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Department of Urban and Regional Planning

DEPT. COMM. NO. 51

January 6, 2010

To: Honorable Members of 2010 Legislature

From: Karl Kim, Ph.D.

Subject: Transmittal of Report to Legislature on Hawaii's Environmental Review System

Please find enclosed our Report to the Legislature on Hawaii's Environmental Review System. This report was prepared pursuant to Act 1, Session Laws of Hawaii 2008, which requested the University of Hawaii to conduct this study of the environmental review system and to develop legislative recommendations for modernizing Hawaii's system of environmental review.

Following an introductory section and a chapter on the background and context for environmental review in Hawaii, the report focuses on five kinds of problems with the system: 1) applicability; 2) governance; 3) participation; 4) content; and 5) process. Specific recommendations are proposed for addressing these problem areas.

The report also contains a draft bill proposing the recommended changes to HRS Chapter 341 and 343. The study team will also be preparing a final, post-session report in June 2010 with further recommendations.

We look forward to working with you to improve Hawaii's environmental review system. Please feel free to contact us about the study through the project blog at http://hawaiiEISstudy.blogspot.com, via email at EISstudy@hawaii.edu or contact Nicole Lowen at (808) 956-3974.

Cc: Governor Linda Lingle
Chiyome Fukino, Director, Department of Health
Lawrence Lau, Deputy Director for Environmental Health, Department of Health
Katherine Kealoha, Director, Office of Environmental Quality Control
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DEPT. COMM. NO. 51

REPORT TO THE LEGISLATURE ON HAWAII'S ENVIRONMENTAL REVIEW SYSTEM

Prepared Pursuant To Act 1, Session Laws of Hawaii 2008
For the Legislative Reference Bureau

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January 1, 2010

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EXECUTIVE SUMMARY

This report, prepared for the Legislature pursuant to Act 1, Session Laws of Hawaii 2008, examines the changes in Hawaii's environmental review system since 1991, when the last comprehensive review was conducted by the University of Hawaii. The report includes a proposed "omnibus" bill that suggests comprehensive substantial changes to HRS Chapters 341 and 343.

For nearly forty years, Hawaii's environmental review system has served the state well by ensuring public disclosure of environmental impacts before agencies make decisions to approve programs and projects. However, in recent years, Hawaii's system for environmental review has drifted from the original goal – to better inform agency decision-making about potential impacts. The system has become inefficient, focusing too much on small projects, exemptions, and litigation, rather than on large projects, the quality of analysis, and early public participation.

Hawaii's "trigger" and "exempt" approach is now archaic compared to the more efficient "discretionary approval" approach used in many other states and the focus on "major" actions under well-accepted federal law. The diverse group of stakeholders of the current system, of whom over 100 participated in this study, has different views about the specific problem and solutions, yet there is a shared sense that the system is in need of change.

The report proposes that Hawaii update, refocus, and streamline its environmental review system by replacing the current "project trigger" screen, which encourages late review and 11th hour public participation, with a new "earliest discretionary approval" screen to encourage early review and public participation. Under the proposal, environmental review would apply to government and private actions tied to an agency discretionary approval process (for example, permits) with a narrowed focus only on those that have a "probable, significant, and adverse environmental effect." To increase predictability, agencies would maintain public lists of discretionary actions that require review and those ministerial actions that do not.

The major recommendations for Chapter 343 include:

> Require an environmental review for actions that require a discretionary approval; excludes actions solely for utility or right-of-way connections from environmental assessment requirement; prescribe what types of activities have a significant effect on the environment; requires agencies to prepare a record of decision and monitor mitigation measures; allow agencies to extend notice and comment periods.
>
> Ensure the Environmental Council adopt rules for: (1) Determining significant effects; (2) Responding to repetitious comments; (3) preparing programmatic and tiered reviews; (4) Prescribing conditions under which supplemental assessments and statements must be prepared and "shelf life"; and (5) Establishing procedures

for state and county agencies to maintain guidance lists of approvals that are a) discretionary and require review, (b) ministerial and do not require review, and (c) those actions to be determined on a case-by-case basis.

The major changes to Chapter 341 include:

Transfer of the office of environmental quality control and the environmental council from the department of health to the department of land and natural resources; reduce the membership of the environmental council from 15 to 7; delegate all rulemaking authority to the environmental council; requires the environmental council to serve in advisory capacity to the governor.

Require the director of the office of environmental quality control to seek advice from and assist the council on environmental quality matters and to perform environmental outreach and education; to maintain an electronic communication system; to prepare an annual report assessing system effectiveness; creates the environmental review special fund; directs the director of the office of environmental quality control to establish reasonable administrative fees for the environmental review process.

A final project report will be provided to the Legislature following the 2010 session including adjustments to specific recommendations. More detailed work pertaining to administrative rules, Chapter 344, and other policies will be included. For project documents or to contact the study team, go to: http://hawaiieisstudy.blogspot.com/.

The University of Hawaii study team looks forward to continuing to work with the Legislature and all stakeholders in ensuring that Hawaii's environmental review system is the best possible approach for our unique island state.

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1. Introduction

Nearly four decades ago, the Legislature created the framework of Hawaii's[1] state environmental review system. In 1970, the Legislature enacted Act 132 (codified as Chapter 341, Hawaii Revised Statutes (HRS)), which established the Office of Environmental Quality Control (OEQC), the Environmental Council, and the University of Hawaii Environmental Center and, in 1974, it enacted Act 246 (codified as Chapter 343), which established the environmental impact statement process. Hawaii was among the first states to adopt an environmental review law modeled on the National Environmental Policy Act (NEPA) of 1969. The Legislature intended "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations" (HRS § 343-1).

Like NEPA, Hawaii's law requires initial review through "environmental assessments" (EAs) and then, if warranted, full "environmental impact statements" (EISs) for actions that may have significant environmental impacts. Unlike NEPA, Chapter 343 uses a broader initial screen, through a list of "triggers," such as the "use of state or county lands or funds" as well as other specific state and private actions. After many years of experience with Hawaii's environmental review system, the stakeholders in the system – agencies, consultants, project proponents, community groups, legislators, and ordinary citizens – generally express support for the system as a whole and its goals. However, the system is viewed by many as now "behind the times" compared to the evolution of NEPA practice and the laws of other states, and its scope, fairness, and effectiveness have increasingly been criticized from a variety of sometimes conflicting perspectives.

The University of Hawaii conducted comprehensive reviews of the system and made recommendations for updating it in 1978 (Cox, Rappa, & Miller, 1978) and in 1991 (Rappa, Miller, & Cook, 1991). This report is the third review, focusing on the past nineteen years of changes in environmental review practice and the evolution of the law. During the 2008 session, the Legislature added Section 10 to the legislative appropriations bill, HB 2688 (Act 1), setting aside funds for the Legislature Reference Bureau to contract with the University of Hawaii to conduct this review of the State's environmental review system (Chapters 341, 343, and 344, the state environmental policy law). In requesting this study, the Legislature found that "in recent years, concerns have arisen about the ability of this system to adapt to the modern demands for achieving sustainability in Hawaii in a way that appropriately balances the state economy, environment, and social conditions over the long term" (HB2510 2008). It further found that "it is vital to ensure that Hawaii has an environmental review system appropriate for the state in the 21st century, which is fully integrated with the state and county permitting system which examines impacts early in the planning process and which is effective, efficient, and equitable."

[1] Hawaiian diacritical marks are not included in accordance with Legislative Reference Bureau drafting guidelines.

To facilitate appropriate reform of Hawaii's cornerstone environmental review law, this report recommends amendments to Chapters 341 and 343 that seek to modernize the State's environmental review process. This report focuses primarily on statutory amendments to these chapters and includes an omnibus proposed bill for consideration during the 2010 Legislative Session as well as a parallel "full text" version of the amendments to Chapters 341 and 343 with explanatory notes.

For Chapter 343, the study proposes a new "discretionary approval" screen,[2] an approach adopted in several other states, which seeks to streamline the system by focusing the assessment process on environmental reviews for discretionary agency decisions (typically, permits) that are most likely to involve significant adverse environmental effects, thereby reducing the resources spent on reviewing minor actions. This proposal represents a fundamental change in Hawaii's approach to environmental review by replacing the existing system of specific "triggers." The study also presents recommendations for increasing the efficiency of the system, for enhancing public participation, and for strengthening and clarifying content requirements. Additional recommendations are made for changes to the administrative rules.

For Chapter 341, the "governance" of the system, the study proposes to reduce the size but elevate the advisory role of the Environmental Council, similar to other state environmental regulatory commissions (such as the Land Use Commission); to strengthen the staff support, increase the budget, and reinforce the important duties of OEQC; and to move the Environmental Council and OEQC from the Department of Health to the Department of Land and Natural Resources. Administrative rule recommendations are also presented.

With regard to Chapter 344, which expresses "state environmental policy," the study recommends that it be updated to include major changes to state environmental policy enacted by the Legislature since 1993, the last time the law was amended, particularly in the areas of cultural practices, energy security, and climate change. The study also considered alternative approaches to reforming applicability (i.e. revising the existing trigger system) and governance (i.e. reducing the role of the Environmental Council and shifting its responsibilities to OEQC). Draft amendments based on these alternatives are not included in this report but are available as part of the study's background documents.[3]

1.1. Purpose of the Study

The Legislature commissioned this study to:

[2] A "screen" refers to criteria to determine the initial need or applicability, and level, of environmental review. Presently, Hawaii's environmental review screen is the "triggers" list.

[3] Background documents for this report, such as these two alternative proposals in draft bill format, may be found on the website for the study at: http://hawaiieisstudy.blogspot.com. Additional information regarding the study will be posted periodically on this website through the completion of the final report in mid-2010.

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

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

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

(4) Develop a strategy, including legislative recommendations, for modernizing Hawaii's environmental review system so that it meets international and national best-practice standards (Appendix 1).

Under the auspices of the Legislative Reference Bureau, the two-year study was initiated in 2008 by an interdisciplinary team of faculty, researchers, and students from the University of Hawaii's Department of Urban and Regional Planning (DURP), the Environmental Center, and the Environmental Law Program of the William S. Richardson School of Law. This report to the Legislature is due twenty days prior to the convening of the 2010 session of the Legislature. The study will continue through the summer of 2010, when the study team will prepare a final report to the Legislature discussing the results of the 2010 session regarding the statutory recommendations in this report, outlining additional proposed changes to the statutes, specifying further recommended changes to the administrative rules, suggesting agency guidance documents, and reviewing in more detail changes to Chapter 344.

1.2. Study Procedures

The study used several procedures to gather information about the State's environmental review system. These include statewide stakeholder interviews, a stakeholder workshop and smaller focus group meetings, a review of the trends in environmental assessment and statement determinations since 1979, analysis of relevant court decisions, a comparative analysis of federal and selected state environmental review systems, and research on international and national "best practices." The study focused on the process required by the State's review system. By interviewing those individuals, agencies, and organizations who are most involved in the daily function of the review system, and by observation of certain outcomes of the system, a broader and deeper understanding of problems and potential solution was developed in a way that could not have been obtained through quantitative analysis. As explained further below, the study team maintained an open, participatory, and transparent process that included allowing stakeholders to review and comment on preliminary findings. The extensive participation and comments of stakeholders over many months has both challenged and strengthened the study.

1.2.1. Stakeholder Interviews

The major study method was in-depth interviews with stakeholders from across the state including: government (federal, state, and county), consulting firms, public interest groups, landowners and developers, industry representatives, university faculty/administrators, environmental/land use attorneys, legislators, and the leadership and staff of OEQC, the Environmental Council, and the Environmental Center. In all, the study team interviewed 170 people in 101 interview sessions (Appendix 2). The interviews were taped, transcribed, and analyzed using a qualitative research and data analysis software called NVivo 8. Close to 100 stakeholders attended a follow-up full-day workshop held at the University in June 2009. The study team received approximately 50 comment letters from stakeholders on the study's recommendations circulated for review in October 2009. In addition, to ensure full consideration of business concerns, the team held additional meetings with the Land Use Research Foundation, the Hawaii Development Council, the Building Industry Association, and the American Planning Association-Hawaii Chapter. Because of the breadth and experience of many stakeholders in Hawaii who participate in the review process, the interviews, workshop, and comments provided a rich set of perspectives and useful data about how the state review system is, or is not, achieving its goals.

1.2.2. Review of Relevant Court Decisions

The Hawaii courts have played a major role in interpreting the State's environmental review law. The study identified and analyzed the key legal decisions to determine the actual and perceived effects that these decisions have had on the law and practice of environmental review. The study also reviewed a variety of other legal resources, such as attorney general opinions and environmental review laws from other jurisdictions as part of a comparative analysis. Many of the background legal materials, including a comprehensive "case bank," will be included in the final study report and made available to the public through the website for the study.

1.2.3. Comparative Review of Other Jurisdictions

The study examined environmental review systems in other jurisdictions and through the stakeholder interview process. The federal government and at least sixteen other states, the District of Columbia, and the territories of Guam and Puerto Rico have comprehensive environmental review processes. The study focused on the National Environmental Policy Act (NEPA), especially NEPA's Council on Environmental Quality (CEQ) regulations and guidance, and the laws of four states: California, Washington, New York, and Massachusetts. These states have exemplary laws or contain innovative features in their environmental review systems. This comparative review aided the formulation of many of the statutory recommendations in this report.

1.2.4. Best Practices Methodology

The study focused on "best practices" as a means to identify the best "lessons learned" from relevant literature and other review systems to bring forward appropriate ideas for modernizing Hawaii's four-decade-old law. "Best practices" were identified from the literature, from stakeholder interviews, from professional organizations such as the International Association of Impact Assessment, and by examining the systems of selected other states.

1.3. The Study Team

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

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

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

Hawthorne, contributed to the analysis of legal issues and the comparative review of other jurisdictions' environmental review laws.

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

2. Background and Context

2.1. Environmental Review System in Hawaii

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

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

In 1973, the Legislature created the Temporary Commission on Statewide Environmental Planning (TCEP), which proposed recommendations passed by the Legislature in 1974, that established the current environmental impact statement system (Chapter 343) and created the state environmental policy act (Chapter 344) (Temporary Commission on Statewide Planning, 1973).

Pursuant to these statutes, there are two sets of administrative rules that regulate the environmental review system, Hawaii Administrative Rules Title 11, Chapter 200, and Chapter 201. Together, these three statutes and two sets of rules, along with the policy guidance documents published by the OEQC and judicial decisions, form the legal foundation for Hawaii's environmental review system.

2.2. Summary of Legislative History – Changes Since 1991

The Legislature has amended Chapter 343 many times since 1974. A description of the original law and amendments from 1979 to 1991 is contained in the two previous reviews of the state system (Cox, et al., 1978; Rappa, et al., 1991) and is not discussed in this report. One major change in the law worth noting, however, was the abolition of the Environmental Quality Commission in 1983 and the transfer of its rulemaking, exemption list, and limited appeal duties to the Environmental Council established under Chapter 341. The final study report will contain a list of changes made to Chapter 343 HRS and Chapter 341 HRS since 1991 to supplement the brief summary below.

Several of the amendments addressed issues of public notification, such as the requirement to inform the public of an "application for the registration of land by accretion for land accreted along the ocean" (Act 73 2003). Another, Act 61 (1996), changed the term "negative declaration" to "finding of no significant impact" (as used under NEPA) for actions that will not have a significant impact on the environment and will not require an EIS. These changes were not considered major.

There have been, however, several amendments that changed the law significantly. Act 241 (1992) required that, for environmental assessments for which a finding of no significant impact is anticipated, that the draft environmental assessment be made available for public review for a thirty-day period. Act 50 (2000) added the requirement to include cultural impact assessments within the EIS. Act 55 (2004) added several triggers and required the preparation of an EA for proposed wastewater facilities, except individual wastewater systems, and for waste-to-energy facilities, landfills, oil refineries, and power-generating facilities. Act 110 (2008) provided that, when there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment, the OEQC is to determine which agency shall prepare the assessment. Act 207 (2008) amended provisions relating to environmental impact statements by defining renewable energy facility and required that a draft environmental impact statement be prepared at the earliest practicable time for an action that proposes the establishment of a renewable energy facility. If adopted, the numerous reforms proposed by this study would be the largest set of changes to the environmental review law since its enactment nearly forty years ago.

2.3. Intent of the Law and Goals of the EIS Process

Historically, the goal of Hawaii's environmental review system can be 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" (Rappa, et al., 1991). Two objectives of environmental review systems are to: (1) provide physical and social environmental information to decision makers necessary to improve their decisions; and (2) improve the public's participation in environmental decision-making (Rosen, 1976; Orloff, 1978).

The logic in establishing a process by which actions can be systematically evaluated for environmental impacts was to assure that the ramifications of agency and applicant actions would be fully known to the degree possible prior to making decisions to proceed with those actions, which would lead to better decisions and environmental protection. Allowing the public to participate in the review process encourages honest data gathering and open 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 also promotes transparency and democratic participation in government by allowing the public to scrutinize agencies' decision-making processes and to insure agencies adhere to federal and state environmental policies. It requires agencies to consider public opinion as a source of information.

It is important to place the role of the environmental review system within the larger context of environmental management and land use planning. Environmental management includes the preservation of important plant and animal species, and ecosystems, for the benefit of the environment and people. Federal, state and county agencies, private landowners, and a number of private non-profit institutions participate in the management of the environment. Environmental management encompasses techniques such as land use zoning, permitting, and land banking.

An important tool for planning and environmental management is the environmental review system. The review system is a formal legal process for systematically gathering information so that managers can make better, informed decisions and advise decision makers of the consequences of their choices. The information gathered by the environmental review process can be used to satisfy information requirements of federal, state, and county mandated permits. Environmental review is a disclosure process that complements existing permits and their procedures.

There is a common misconception that the environmental review process is regulatory in nature and that the final decision on whether to permit a proposed action is based on the final EA/EIS. This is not the purpose of the process. The determination of whether an action is permitted rests with the agency having discretionary authority over that action. Hawaii's environmental review process, like NEPA and other states, gathers information to aid the quality of an agency's decision-making and to keep the public informed of that important process. Another goal of the environmental review process is to better protect the natural, cultural, and social environment of Hawaii so that benefits derived from them can be shared by generations of the state's people.

These three fundamental goals are as important today as they were forty years ago. For the purposes of this study and modernizing our state review system to fit Hawaii's unique needs, two additional goals were identified. The five goals or principles that guided this study are: to protect the environment, to improve the quality of information and decision-making, to improve public participation, to integrate environmental review with planning, and to increase the efficiency, clarity, and predictability of the process. Each of these principles, except for the last one, is explicitly stated in HRS § 343-1,[4] while efficiency, clarity, and predictability are

[4] HRS § 343-1 states: "The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole. It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations."

implied desired features for any complex governmental process that imposes costs and burdens on a wide range of participants. The following is a brief description of each principle:

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

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

(3) Enhance public participation. To better hold decision makers accountable and ensure sufficient and comprehensive consideration of the environment, the environmental review process should strive to be transparent by incorporating public participation. Those affected by proposed projects should have the opportunity to ensure agency awareness of the impacts and the opportunity to provide input in determining appropriate mitigation solutions or alternatives.

(4) Integrate environmental review with the planning process. The environmental review system exists within a planning framework involving discretionary and ministerial permits, plans (e.g. land use, regional, master, development, project, and community plans), and other governmental activities (e.g. economic development, social programs). The strengths and limitations of environment review should be kept in mind. Not every issue is best addressed through this process. However, an important reform would be to change parts of Hawaii's system from an "11th hour" to a "1st hour" approach, to frontload the environmental review process to the earliest practical stage of the planning process rather than to the later stages when key decisions have already been made.

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

The principles address diverse needs and interests in our community. At times, it is necessary to trade-off one principle against another. A balanced approach is necessary. These five principles help clarify the issues and areas of concern and directions for reform.

2.4. Trends in Hawaii's Environmental Review System

Trends in Hawaii's environmental review system can be discerned through OEQC's records of published environmental review documents. Since 1979, when the Environmental Center first began tracking the publication of environmental assessment and environmental impact statements, a total of over 6,200 final EAs have been prepared by agencies and applicants (Table 1). Of these, a total of 639, about 10%, proceeded to the full EIS stage (that is, published an EIS "preparation notice"). The remaining 5,463, about 88%, stopped at the EA stage with a Finding of No Significant Impact (FONSI) (formerly called a Negative Declaration). A few reviews were withdrawn or not completed. Overall, for this 30-year period surveyed, the ratios of EAs to EISs was approximately 10 to 1.

The data indicate a substantial and steady drop in the number of environmental review documents prepared over the past three decades (Figure 1). After 1979, the number of EAs and EISs (306 and 39, respectively) decreased until 1983, when the numbers rose again until the peak in 1990 (311 and 34, respectively). This peak in 1990 is likely the result of the state's increased economic activity. After 1990, the data show a continuous drop (except for a slight increase in 1993) in environmental documents produced through 2008 (with another slight increase in 2004-2006).

Although conclusions are limited without more in-depth examination of each document, three general observations can be derived from this analysis. First, the overall trend in Hawaii's environmental review system is toward fewer documents being prepared, which is contrary to the perception by some stakeholders that the number of reviews has been expanding.

Second, the ratio of EISs prepared compared to EAs, which is an indication of how agencies have determined the "significance" of project impacts, has also declined (although not consistently) over 30 years, with the relative number of EISs decreasing. The overall mean was about .10, including highs of .136 (in 1987), .153 (in 2005), and then a bump to .216 (in 2007, a historical high); with lows of .066 (in 1984), .070 (in 2003), and .057 (in 2008). This trend also appears to contradict the view held by some stakeholders that agencies have become more demanding over time in requiring full EISs. The spike in 2007 was twice the historical mean but in actual numbers involved only six more PNs than required in 2006 and stood out more because there was also a large decrease in the number of EAs prepared that year to 111, a historical low. In 2008, the numbers reverted to the trend, with only 7 PNs out of 122 EAs, a ratio of .057.

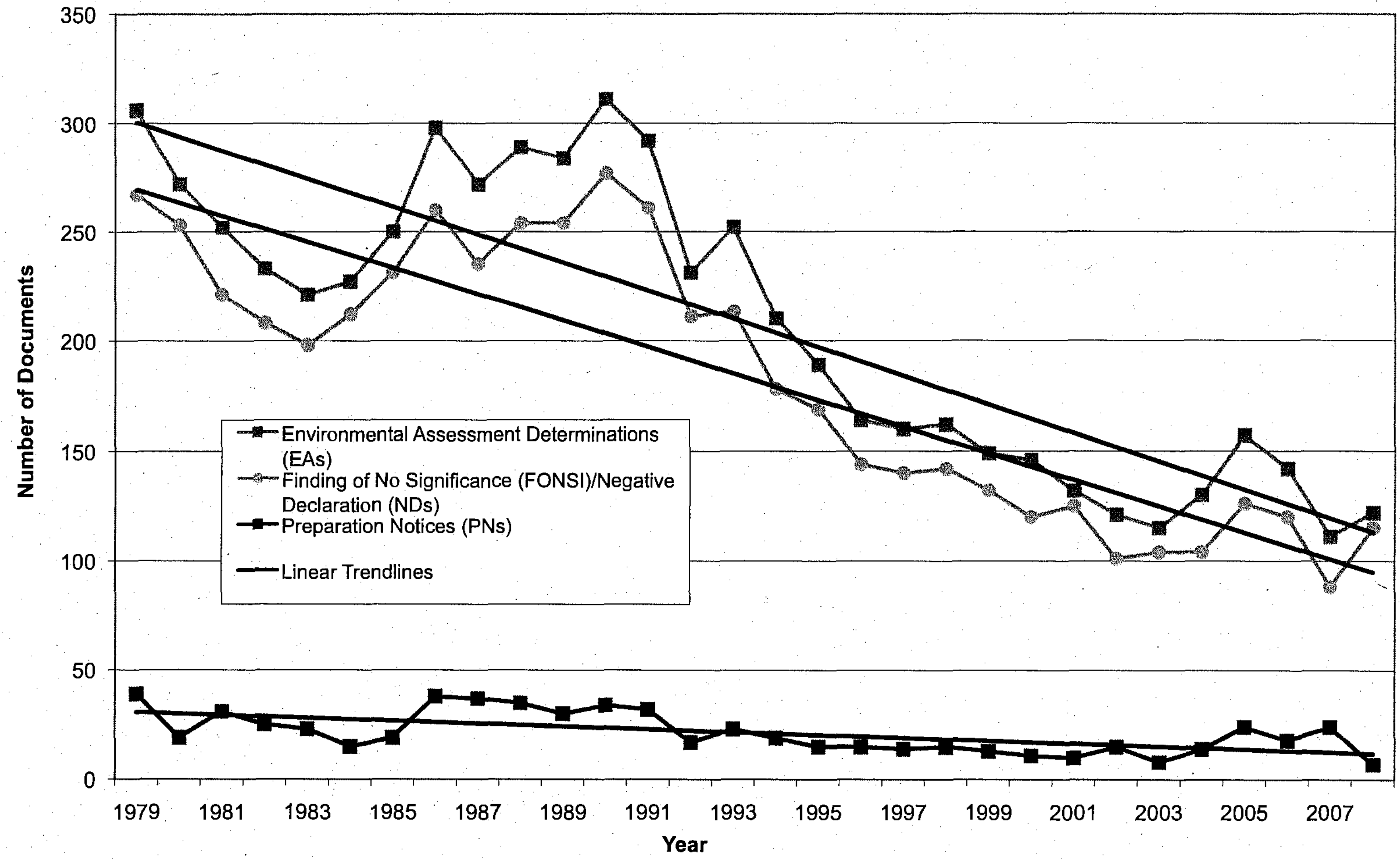
Table 1. Environmental Assessment Determinations from 1979 through 2008: The Ratio of EIS Preparation Notices to Environmental Assessment Determinations

Year	Environmental Assessment Determinations (EAs)[1]	Finding of No Significance (FONSI)/Negative Declaration (NDs)[2]	Preparation Notices (PNs)[3]	DEA[4]	Ratio PN/EA[5]	Supplemental Documents[6]	Discrepancies in Counting EA Determinations[7]
1979	306	267	39	ND[8]	0.127	ND	
1980	272	253	19	ND	0.070	ND	
1981	252	221	31	ND	0.123	ND	
1982	233	208	25	ND	0.107	ND	
1983	221	198	23	ND	0.104	ND	
1984	227	212	15	ND	0.066	ND	
1985	250	231	19	ND	0.076	ND	
1986	298	260	38	ND	0.128	ND	
1987	272	235	37	ND	0.136	ND	
1988	289	254	35	ND	0.121	ND	
1989	284	254	30	ND	0.106	ND	
1990	311	277	34	ND	0.109	ND	
1991	292	261	32	0	0.110	2	1
1992	231	211	17	2	0.074	2	3
1993	252	213	23	6	0.091	0	16
1994	210	178	19	6	0.090	1	13
1995	189	169	15	7	0.079	0	5
1996	164	144	15	5	0.091	1	5
1997	160	140	14	3	0.088	0	6
1998	162	142	15	1	0.093	0	5
1999	149	132	13	4	0.087	0	4
2000	146	120	11	6	0.075	4	15
2001	132	125	10	4	0.076	0	-3
2002	121	101	15	4	0.124	3	5
2003	115	104	8	1	0.070	5	3
2004	130	104	14	1	0.108	0	12
2005	157	126	24	1	0.153	0	7
2006	142	120	18	0	0.127	0	4
2007	111	88	24	0	0.216	0	-1
2008	122	115	7	0	0.057	2	0
TOTAL	6200	5463	639	51	0.103 AVERAGE	20	100

Source: OEQC Bulletin

[1]Only environmental assessments (EAs)
[2]All negative declarations/ finding of no significance projects
[3]All preparation notices for draft environmental impact assessments
[4]All draft environmental assessments withdrawn
[5]Ratio of preparation notices to environmental assessments
[6]All environmental impact statement supplemental documents
[7]Discrepancies can be due to documents informally leaving the process or errors in the publication records. This was calculated by subtracting the number of FONSI/Negative Declarations and Prepration Notices from the number of EA determinations
[8]No data collected for these years for these categories

Figure 1
Environmental Assessment Determinations from 1979-2008
EA Determinations, FONSI/Negative Declarations, and Preparation Notices for EISs



Third, the number of documents prepared in the environmental review system, at least since 1990, appears to track overall economic activity in the State of Hawaii. This relationship between environmental reviews and the economy is not surprising given that the system is triggered by agency and applicant actions that typically are development projects. These data provide an additional dimension to understanding how the state's environmental review system has evolved over time.

2.5. Summary of Judicial Decisions

Since the enactment of Chapter 343 and Chapter 341 in the early 1970s, the Hawaii state courts have played an important role in the environmental review process by interpreting various parts of the statutes and administrative rules in the context of lawsuits brought by citizens challenging a variety of state and county agency determinations.[5] In the nearly four decades of Chapter 343 litigation in Hawaii, the Hawaii Supreme Court has issued approximately fifteen important decisions that have directly addressed substantive legal issues, and the Hawaii Intermediate Court of Appeals (ICA) has issued four important decisions. The Hawaii Supreme Court and ICA have repeatedly referred to, and grounded their decisions in, the key principles of Chapter 343 that have guided this study, including: the broad purpose and intent of Chapter 343 to protect environmental quality, the "informational role" of the environmental review process, the value of public participation, and the role of environmental review in improving the quality of agency decision-making.

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

The range of issues discussed by the Hawaii Supreme Court and the ICA over the past four decades can be categorized into nine areas: (1) the judicial review process, including timing (statute of limitations) and standing; (2) the applicability of the law, triggers, and exemptions, both for agency- and applicant-initiated projects; (3) the issue of when to prepare the review ("earliest practicable time"); (4) the scope of review (secondary impacts, segmentation); (5) content and sufficiency, including

[5] Legal citations for this section are included in the version posted on the study website.

the concept of functional equivalence, (6) the decision to require supplemental EISs (or "shelf life"), (7) the range of cumulative effects required, (8) the role of mitigation measures, and (9) the relatively new cultural impact analysis requirement. Each of these will be discussed in detail in the final report. The third area is, however, particularly salient to current debate over Chapter 343 and this report.

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

In the first case, decided in 1981 by the Hawaii Supreme Court, McGlone v. Inaba, the Court upheld the Board of Land and Natural Resources' decision not to require an EA for an underground utility easement through conservation district land (the Paiko Lagoon Wildlife Sanctuary) or for an adjacent single-family residence. The Court reasoned that neither the utilities nor the house would have impacts that rose to the level of significance contemplated by Chapter 343 and were therefore properly exempted by BLNR.

In the second case, Kahana Sunset Owner's Association v. County of Maui, decided in 1997, the Court agreed with the citizen-plaintiff that the Maui County Planning Commission had erred in not requiring an EA for a proposal to build 312 multi-family units when a 36" drainage culvert would be tunneled under a street and then connect to a culvert under a public highway. The Court found that the agency's decision was not consistent with the larger intent and purpose of Chapter 343 to "exempt only very minor projects from the ambit of HEPA" and the "letter and intent of the administrative regulations." In the 2008 Nuuanu case, the Court looked back at Kahana Sunset, noting that the "use of state lands" by the developer in Kahana had been "undisputed" and emphasizing that the scope of review under 343 "must address the environmental effects of the entire proposed development, not just the drainage system."

In 1999, two years after the Kahana Sunset decision, the Supreme Court addressed a similar situation involving USCLF in Citizens for the Protection of the North Kohala Coastline v. County of Hawaii ("North Kohala"). The Court held that (1) the citizens group had standing, and (2) the private applicant's application to the county for a Special Management Area (SMA) permit for its 387-acre Chalon development triggered Chapter 343 review because the Mahukona Lodge project proposed an easement for golf carts and maintenance vehicles that would be built under a state roadway. Based on Kahana Sunset, the Court reaffirmed that the proposed underpasses constituted "use of state lands," were "integral" parts of the larger development project, and therefore that the county had to initiate Chapter 343 review "at the earliest practicable time." The Court rejected, however, the plaintiffs' arguments that potential "impact" on shoreline or conservation land constituted "use." The use, according to the Court, had to be "*within*" the area.

In 2006, the Court issued another prominent decision in a case commonly referred to as "Koa Ridge." In Sierra Club v. State Office of Planning, the Court upheld the circuit court's decision finding that the reclassification by the Land Use Commission (LUC) from agriculture to urban of the 1,274-acre "Koa Ridge" development proposed by Castle & Cooke in Central Oahu, which required tunneling underneath four state highways for its 36" sewage line and water lines, constituted USCLF. The case did not involve a proposed exemption and the developer admitted that the EA was required. The dispute focused only on whether the LUC stage was "too early" for application of Chapter 343. The Court held that reclassification was the right point to apply Chapter 343: "reclassification is the initial step of a project that proposes the use of state lands; it is the proposed use of state land that triggers the EA requirement, and the request for approval of the reclassification petition that provides . . . the earliest practicable time at which to prepare the EA."

In 2008, the Court issued an opinion in Nuuanu Valley Association v. City and County of Honolulu, which expressly took a restrictive view of the USCLF issue. The Court held that a proposed utility connection by the 45-acre Laumaka subdivision for nine residential lots on land zoned "residential" did not constitute the use of county lands. The Court rejected the plaintiffs' position that Chapter 343 applied "[s]o long as there is a 'use' of city or state lands," without regard to "the size of the 'use' and comparisons to the scope and size of the overall project." Referring to, and limiting, the reasoning in Kahana Sunset, North Kohala, and Koa Ridge, the Court held that these cases did not reach as far as the plaintiffs suggested. Kahana Sunset and North Kohala involved *actual* not just "potential" use of state lands, and Koa Ridge focused on the fact that the project would require tunneling beneath state highways. The Court clarified that: "This court has *not* held that *merely connecting* privately-owned drainage and sewage lines to a state or county-owned drainage and sewage system is sufficient to satisfy HEPA's requirement of 'use of state or county lands.'" Absent "tunneling or construction," the Court concluded, there was no "use."

The most recent Supreme Court decision on the issue of triggers and exemptions is the well-known Superferry I decision, issued in August 2007. The Court held that the State Department of Transportation (DOT) erroneously applied its agency exemption list to declare exempt from Chapter 343 the state-financed harbor improvements that facilitated the Superferry project. Although the Court rejected the plaintiffs' claims that the project involved "connected actions," the Court found that the secondary impact must be considered: "in addition to the direct site of impact the agency must also consider other impacts that are 'incident to and a consequence of the primary impact.'" Finally, the Court found that DOT's exemption review process violated Chapter 343.

The most recent case on the USCLF comes from the Intermediate Court of Appeals, `Ohana Pale Ke Eo v. Hawaii Department of Agriculture (DOA), decided in 2008. The ICA held that Chapter 343 review was required for DOA's granting of a permit to Mera Pharmaceuticals to import eight strains of genetically engineered algae for a project at the state Natural Energy Laboratory of Hawaii (NELH) in Kona because the importation proposal constituted "use" of state lands, focusing on the fact that NELH is a state facility. The court also rejected DOA's argument that the Chapter 150A import permit process was sufficient to satisfy the Chapter 343 process, finding that even though the laws may "overlap in their application and purpose, they do not conflict and both can be given effect." The court also held that the two prior EISs for NELH had been "conceptual" in nature when NELH was at its "infancy" and that "further review" was contemplated for future specific projects at the research park.

In conclusion, a close reading of these seven USCLF cases does not support the perception among some stakeholders that the Court has interpreted Chapter 343 beyond its letter or intent. In two cases, the agency prevailed (McGlone, Nuuanu); in four of the cases, the courts deliberately circumscribed the scope of their rulings (Kahana Sunset, North Kohala, Koa Ridge, Nuuanu). Superferry I, a truly exceptional case, did cause agencies to become more cautious about using exemptions. Ohana Pale has also generated a broad range of concerns among agency and private applicants, particularly regarding research permits at state facilities. Popular perception of judicial decisions can also sometimes become more important than the precise legal rulings and can generate what is called a "shadow" impact by causing agencies or applicants, or even the legislature, to over-react or react "defensively" to various rulings.

There are (at least) two sides to the perception of the importance of this series of rulings. On the one hand, some private applicants, agencies, legislators, consultants, and others feel that the courts have "gone too far" in interpreting the scope of Chapter 343. On the other hand, some citizens, environmental groups, consultants, legislators, and others feel that the courts have "only enforced the law" and that such lawsuits would be unnecessary if agencies would do a better job being proactive and fulfilling the letter and intent of Chapter 343 instead of trying to avoid the review process.

This study is unlikely to change either of the two perspectives. However, it does recommend that those interested in this debate engage in a closer reading of the judicial decisions so that any policy changes are based on actual rather than perceived rulings by the courts. Judicial review is a necessary check on agency decision making under Chapter 343. Even stakeholders who were critical of the judicial decision were unable to suggest a better alternative to the current system of appeals. Only a few stakeholders suggested the creation of an administrative appeal process to the Environmental Council and many rejected that idea as duplicative and unworkable. Therefore, this study proposes only minor "update" changes to judicial review in HRS § 343-7. As further explained below, expanding and frontloading public participation in the review process, and stronger OEQC training, education, and guidance are probably the best way of minimizing the likelihood of agency or applicant errors and sparking citizen concerns that lead to judicial intervention in the review process.

2.6. Comparative Analysis of Other Jurisdictions

To determine how environmental review has evolved since the 1991 study, a comparative review of laws, rules, guidance, and practice in other states and countries as well as in the National Environmental Policy Act (NEPA) was conducted. Examining other jurisdictions for innovations can indicate what might be successful in Hawaii. Although much can be learned from abroad, it is challenging to incorporate practices from other countries into the American legal system; thus, research has been particularly focused on NEPA and other U.S. states. The study examined states that have a reputation for being leaders in environmental assessment, including California, Washington, New York, and Massachusetts.

2.6.1. Applicability

Comparative study of screening processes in other U.S. states, NEPA, and other countries has revealed common elements in determining the applicability of environmental review laws. Based on this review, the following objectives should be considered in any changes proposed to Hawaii's system: (1) a rational approach to inclusion (in the "screen"), (2) broad coverage (rather than specific "triggers") paired with clear exemptions, (3) consideration of how to address borderline cases, (4) a system that incorporates two levels of review in which if a project clearly warrants a more thorough level of review, it can bypass the short review process (EA) and proceed directly to the full review process (EIS), and (5) direct treatment of the issue of segmentation[6] either in the statute or rules.

In New York, California, and Washington, the applicability of environmental review laws is tied to the definition of "action." This definition includes not only projects, but plans and programs. The law applies to all government action and to private actions requiring discretionary agency approval that are likely to have an effect on the environment. Private projects are brought into

[6] "Segmentation" is the common term that refers to when a project is divided into parts, or segments, and each is studied individually so that its impacts appear negligible, such that comprehensive review of all segments appears unnecessary despite potential significant impacts. HRS § 343-6 requires the Environmental Council to prescribe procedures for treating groups of proposed actions and HAR § 11-200-7 uses the term "multiple or phased agency or applicant actions" to refer to segmentation and prescribes which proposals shall be treated as a single action.

the system at the discretionary approval level. This is beneficial both because it ensures that the law is applied at the earlier stages of the planning process and because it includes all projects with potential impacts without enumerating specific types of projects. NEPA, similarly, has a system of applicability that is based on the definition of "action" and applies to "proposals for legislation and other major federal actions significantly affecting the quality of the human environment." This focus on clearly defining "action" is a precautionary approach to inclusion, while the exemption system is a rational screen for determining where the law shall not apply.

To complement this screen, these systems also include robust exemption processes. Exemptions are usually addressed in the rules or regulations, but in some instances, in the statute. Massachusetts uses a set of thresholds in its regulations to exempt actions of a nature, size, or location unlikely to have significant impacts. Thresholds have been determined for wetlands (e.g. alteration of one or more acres of salt marsh or ten or more acres of any other wetland), wastewater (e.g. construction of a new wastewater treatment and/or disposal facility with a capacity of 2,500,000 or more gallons per day), and land use (e.g. direct alteration of 50 or more acres of land, unless the project is consistent with an approved conservation farm plan or forest cutting plan or other similar generally accepted agricultural or forestry practices or the creation of ten or more acres of impervious area), among others (Massachusetts, 2009). New York, in its regulations, uses a list of actions and projects determined to not have a significant impact on the environment. This list includes facility rehabilitation, rights-of-ways, maintenance of existing landscapes, and collective bargaining, among others (New York, 2009).

In Washington, essential public facilities are exempted in the statute, while the rules exempt proposals that do not have probable, significant, and adverse impacts, that include thresholds. For example, the rules exempt minor new construction, such as residential structures of four dwelling units, the construction of a parking lot designed for twenty automobiles, while also setting out maximum threshold levels that cities, towns, or counties may use that suit local conditions (Washington, 2009). California has exemptions in both the statute for actions begun before a certain time, and in the rules such as for actions that have the potential to cause significant effects but based on agency experience is certain to not have significant effects (California, 2009).

2.6.2. Governance

Environmental review systems and their associated laws, regulations, and guidance should be designed to promote a self-driven and transparent process that does not require excessive oversight, regulation, or pose an undue administrative burden. Governance should be structured so that a clear hierarchy of authority exists, and so that the same standards are applied uniformly for how the process is implemented. When decisions are required of a governing entity, the decisions should be made in a timely manner. Washington and NEPA support these goals by imposing timelines or deadlines at decision-making junctures (Council on Environmental Quality, 1981; Washington, 2009). Finally, in order for governance to function well, the responsible agencies must have adequate staff and funding to fulfill their duties.

2.6.3. Participation

Participation refers to processes for notification, review, comment and response, scoping for agency and public concerns and appropriate level of review, and outreach, education, and training. This includes both outside agency and public involvement in the environmental review process. Practices promoted in other states for public and agency participation include early scoping, robust notification, and regular training and education about the process. Other key components include user-friendly access to information and documents.

Several states and NEPA address participation through laws, regulations, and guidance with specific examples on how to fulfill participation requirements. This reduces uncertainty about how to meet these goals. For example, the federal Council on Environmental Quality (CEQ) regulations provide a clear statement about the importance of early and thorough scoping in NEPA and specific guidelines to accomplish this process (Council on Environmental Quality, 1978). Washington has similar requirements (Washington, 2009). Similarly, both NEPA and Washington address the importance of early and effective public and agency notification in regulations, and provide specific examples of reasonable methods for accomplishing notification (Council on Environmental Quality, 1978; Washington, 2009). For Washington, these issues are addressed further in their handbook. To promote relevant guidance and adequate outreach, Washington has a statutory requirement for annual workshops and annual updating of the guidance handbook (Washington, 2009).

2.6.4. Content

Comparative study of environmental review content requirements in other U.S. states, NEPA, and other countries has revealed common elements of systems that are known to function well. While specific content requirements vary, the laws, rules, and guidance should: (1) include clear guidance for content requirements, including specific examples when possible, (2) address length requirements to ensure that documents are focused, relevant, and concise, including allowing incorporation by reference of existing documents and tiering[7] to programmatic documents, (3) address the need for disclosure of uncertainty[8], and (4) encourage objectivity.

CEQ (1997) provides effective guidance on cumulative effects assessment in "Considering Cumulative Effects under the National Environmental Policy Act." For most applicants and agencies, it is difficult to adequately assess cumulative impacts in project-level review documents due to the complexity and broad scope of cumulative impacts and the limitations of project-level review documents. Cumulative effects on environmental resources are best addressed and managed "upstream" in states and localities that have strong planning programs and other effective environmental policies, resource management plans, and regulations in place. The CEQ guidelines demonstrate how to address cumulative effects within the limitations of a project-level environmental review document by including discussion of: (1) the identification of the range of resources, (2) the spatial boundaries of each resource to be examined, (3) the temporal boundaries of each resource to be examined, (4) resource and impact interactions, and (5) models, methods, and tools for effective evaluation.

2.6.5. Process

Environmental review processes function most effectively when the process is clear and efficient while allowing for adequate transparency and participation. Process issues focus on the day-to-day activity of applicants and agencies in conducting the stages of environmental review. Washington rules direct agencies to "promote certainty regarding the requirements of the act, reduce paperwork" and to "prepare documents that are precise, clear and to the point" (Washington, 2009). Other approaches to making the process more efficient are to assess process regulations and requirements to ensure reviews are not being duplicated, or to coordinate related processes when possible. For example, if both a state and a federal environmental review are required for an action, combining public notification and comment periods can streamline the process without sacrificing quality. In some cases, it can be desirable to expedite the process for specific types of projects that are deemed necessary and beneficial to the state or the environment. Several states have established page limits for documents, thus encouraging them to focus on the relevant issues.

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[7] Tiering is a common feature of federal EAs and EISs. It is the incorporation by reference in a project-specific EA or EIS to a previously conducted programmatic (larger-scale) EA or EIS for the purposes of showing the connections between the project-specific document and the earlier programmatic review. It avoids unnecessary duplication and concentrates the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level. Adding this definition is proposed in § 343-2.

[8] Impact assessment for EISs requires not only discussion of impacts, but also the degree of certainty associated with the assessment of each impact. HAR § 200-11-17, Content Requirements for Draft EISs, requires analysis to be "sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative."

Another issue is the criteria for requiring supplemental EISs. In NEPA, Massachusetts, and Washington, the validity of a document is based on the circumstances of the action. If substantial changes in the project design or location, alternatives, or the environment occur, a supplemental document is warranted (Council on Environmental Quality, 1978; Massachusetts, 2009; Washington, 2009). NEPA does not impose specific time limits, but advises that EISs older than five years should be carefully reexamined to determine whether the criteria for a supplemental document are met (Council on Environmental Quality, 1981).

2.7. Best Practices

Within the environmental review profession, best practices commonly refer to specific tools, methods, and models used to identify, assess, and mitigate impacts. This report, which examines the environmental review system in Hawaii and proposes changes to the statutes, does not focus on these specific tools. Instead, best practices as used here mean sound public policy *principles* such as being purposive, transparent, rigorous, objective, incorporating public participation, and being adaptive, interdisciplinary and cost effective.

To determine best practice principles in the context of an environmental review system, three leading institutions in environmental assessment were examined: the International Association of Impact Assessment (IAIA), a worldwide organization of impact assessment professionals; the World Bank, which aids development primarily in developing countries; and the Equator Principles, applicable to major international investments and development. All three conduct or affect impact assessment throughout the world and frequently self-assess the effectiveness of their practices.

The IAIA is composed of thousands of members from nearly every country. The environmental impact assessment (EIA) principles adopted by the organization represent an international consensus on the objective, purpose, and features of EIA. The IAIA considers the following best practices for environmental impact assessment:

- To ensure that environmental considerations are explicitly addressed and incorporated into the development decision-making process;

- To anticipate and then avoid, minimize, or offset the adverse significant biophysical, social, and other relevant effects of development proposals;

- To protect the productivity and capacity of natural systems and ecological processes that maintain their functions; and

- To promote development that is sustainable and optimizes resource use and management opportunities (IAIA, 1999).

The World Bank (the Bank) requires environmental review for proposed projects seeking World Bank financing. This is to ensure projects are environmentally sustainable and decision-making is sound. The Bank regards environmental review to be a process that evaluates a proposal's potential impacts on its environment, examines project alternatives, identifies measures to improve the project design and implementation, and manages adverse impacts throughout the life of the project (The World Bank, 2007).

Other institutions that engage in project financing have an important role in development throughout the world. To ensure financed projects are environmentally sound and socially responsible, financial institutions developed the Equator Principles. The principles serve as a set of baselines for implementing social and environmental policies, procedures, and standards for a project (Equator Principles, 2006).

Each of these organizations emphasizes the following principles:

- Objectively documenting potential impacts,
- Ensuring the process is transparent,
- Placing the burden of proof and documentation on the proposer,
- Ensuring rigorous review to support objectivity and transparency,
- Adapting the level of review to the level of anticipated impacts to keep the process practical, relevant and efficient,
- Considering alternative means to achieve the proposal's objective,
- Proposing mitigation measures for unavoidable adverse impacts,
- Incorporating public consultation in a manner accessible to interested publics,
- Reviewing documentation adequacy by interested publics and the accepting authority,
- Reporting on compliance to agreed mitigation measures,
- Monitoring mitigation measures by interested publics and the accepting authority, and
- Incorporating lessons learned from mitigation measures into future proposals.

These best practices can be related to the identified goals of the EIS process discussed previously. A more transparent and participative process that is simultaneously practical, relevant, and cost-effective will better serve the goals of environmental protection, information disclosure for decision-makers, public participation, integration with planning, and increasing the clarity, certainty, and predictability of the process. Many of the recommendations discussed in the following sections seek to bring Hawaii's process more in line with these goals, as well as to bring the focus back to the importance of the substantive information contained in documents rather than focusing largely on the process, which has been the trend in recent years.

3. Problem Identification

3.1. Applicability

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

3.1.1. The existing trigger system does not directly link discretionary decision-making with potentially significant environmental impacts, is not comprehensive, and leads to inconsistent and costly application of the environmental review statute.

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

Similarly, the omission of some major projects has promoted a sense that the environmental review system is broken. These projects were omitted because their type of action was not defined in the statute clearly. An example raised by stakeholders of a major project that did not require environmental review, but "should have," was the Wal-Mart super block project near Ala Moana shopping center in urban Honolulu. This project greatly increased traffic in an area that is already prone to heavy traffic, a public road was closed and put into the superblock property, and burials were discovered on the property once construction began. However, because this did not go through the environmental review process, the opportunity for identification of these impacts, exploration of alternatives, public review of the proposal, and development of impact mitigations to inform agency decision-making regarding the project did not occur. There are many examples of small projects that have required more scrutiny than the Wal-Mart project, creating a sense of unfairness and inequity among projects.

The interpretation of the "use of state or county lands or funds" is also a problem. Stakeholders disagree on what constitutes "use of state or county land or funds." As discussed above, several court cases have addressed this issue and it has been interpreted by state and county agencies to expand the coverage of the process. For example, the North Kohala case was initially found to not require environmental review based on the project-based triggers. Opponents of the project sued based on the partial connection of the project to state lands, and therefore were able to apply the "use of state or county lands or funds" trigger to the project. Some stakeholders found this to be an abuse of the environmental review process; others felt the decision appropriately interpreted the law and resulted in a needed environmental review process; some regarded the technical language of "use of state or county lands or funds" to encompass everything government does, including ministerial actions.

Over time, triggers have been added or proposed to Chapter 343 in response to projects not being included. The trigger list invites band-aid solutions to topical problems. The purpose of environmental review is to ensure agency decision-making sufficiently considers environmental issues. Having triggers that mainly focus on a predetermined set of actions disconnects the trigger from discretionary decision-making about actions that may have significant environmental effects.

3.1.2. The environmental review process occurs too late in the project planning cycle, unduly delaying projects and adding unnecessary costs.

The existing trigger system, focusing largely on projects, often applies too late in the project planning process. Applicants and agencies, after receiving discretionary approval for actions such as rezoning, Special Management Area permits, special use permits, or subdivision permits, may be required to prepare an EA for "11th" hour discretionary approval or because of connections to state or county lands. Such projects may be captured late, which was the case in the proposed North Kohala development, because of the partial or secondary use of state lands, and not in the earliest stages of planning review.

This makes environmental review difficult to integrate into the overall planning process. Late review for projects found to have significant impacts creates uncertainty, increases costs to the project proponent, and makes mitigation more expensive than early review, when the design process can accommodate needed changes to mitigate significant impacts.

3.1.3. Ministerial actions such as rights-of-way and utility connections are required to undergo environmental review.

Recent court cases have generated confusion about the scope of Chapter 343 regarding the use of state or county lands or funds. Agencies have interpreted court decisions about the "use of state or county lands or funds" trigger to include actions that have been exempted in the past. Rights-of-way connections and utility hook ups have been considered as "use of state or county land" and therefore triggering environmental review. This has resulted in undue cost and burden for small projects and businesses, a waste of government resources on projects with no likely significant impacts, and frustration with the environmental review process. Seeking exemptions solely for connecting utility hook ups or rights-of-way can be as difficult as preparing an EA. Stakeholders affected by this issue include private for-profit businesses, not-for-profit organizations, educational institutions, and households.

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

Stakeholders report that EAs are approaching the size, complexity, and cost of EISs. Applicants and agencies are including more content in EAs to forestall lawsuits and avoid preparing an EIS. This is also due to the two-step requirement of conducting an EA to determine whether an EIS is needed and to the fear of litigation. Applicants also report that agencies are requiring studies in EAs that are more appropriate for EISs, which increases project costs and causes project delays.

3.1.5. Exemption lists are outdated, difficult to update, and inconsistent between private applicants and agencies, between state and counties, and among state or county agencies.

Exemptions lists have not been updated for many years for some agencies and counties. Agencies report that exemptions lists are difficult to update because of issues with the current rules process and the inability of the Environmental Council to perform its duties. Lists are inconsistent and unevenly applied. The same action can be on different agency lists or an action exempted for one agency may require an EA for another agency. This is because exemptions can be specific to an agency's duties with statewide application, but is not the case for all actions. Actions may have different thresholds for exemption, depending on the agency. Also, agencies are perceived to have different standards for exempting agency projects versus applicant projects. For example, a county-proposed comfort station in the SMA is exempted, while an applicant-proposed comfort station is not. Agency exemptions are not transparent, making access to such actions difficult for agency and non-agency stakeholders.

3.2. Governance

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

OEQC (referred to in the statute as the "office") is headed by a director, appointed by the Governor and confirmed by the Senate, and placed within the Department of Health "for administrative purposes." The duties under Chapter 341 include serving the governor in an advisory capacity "on all matters relating to environmental quality control." The director is also tasked with adopting rules for implementing Chapter 341.

The Environmental Council is a citizen-advisory body, broadly representative of educational, business, and environmental professions, of up to fifteen members, appointed by the Governor, who serve four-year terms, without compensation except for reimbursement of expenses. The Council is attached to the Department of Health "for administrative purposes." The functions of the Council include: serving as a liaison between the Director and the general public, making recommendations to the director, monitoring "the progress of state, county, and federal agencies in achieving the State's environmental goals and policies," and working with the director to publish an annual report. The Council also has broad rule-making authority for implementing Chapter 343, and is by statute directed to prescribe rules in several areas. The only explicit quasi-judicial "appeal" authority given to the Council is in the event of the "non-acceptance" of an environmental impact statement for applicant actions.

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

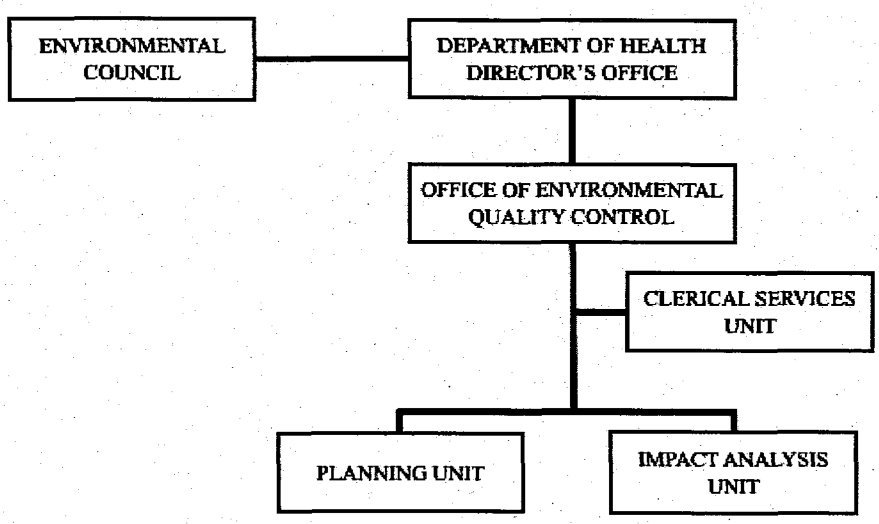
For nearly forty years, OEQC, the Environmental Council, and the Center have been effective because of their many dedicated and experienced administrators, professional staff, stakeholder support, and citizen involvement. With regard to OEQC in particular, stakeholders indicate a consensus about the actual and potential value of the office's services for the statewide review system.

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

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

The OEQC has the primary broad advisory role to the Governor on matters of environmental quality. HRS §341-3(a). The Council's more limited advisory role to the Governor is through advising the Director of OEQC and the annual report on environmental quality. §341-6. Both entities are placed "for administrative purposes" within the State Department of Health (DOH). § 341-3(a) & (c). According to a DOH organizational chart dated June 2007, OEQC and the Environmental Council both *independently* report to the Department of Health Director's office, with no organizational connection between the two entities (Figure 2).

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



The lack of organizational connection in the DOH hierarchy has confused both OEQC and the Council given the historically close relationship between the two entities and is creating a myriad of governance problems.

a. OEQC faces challenges due to increasing stresses and lack of staff and funding

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

OEQC is positively viewed as an essential keystone of the environmental review system, because of its role in maintaining an effective advisory function for stakeholders, a system for publication and legally required notice of the various documents required under Chapter 343, and a widely used website. Despite its critical role and the goodwill toward OEQC from stakeholders, OEQC is under-staffed and under-funded.

b. The Environmental Council is unable to fulfill its duties and obligations

Even though many citizens have dedicated substantial time and energy to service on the Environmental Council, it has become dysfunctional and, since July 2009, has suspended all meetings. The disconnection of a historically supportive relationship between OEQC and the Council (both budget and staffing) has resulted in a number of problems, including that the OEQC Director was informed that she could no longer provide any staff support for the Council. The Council has experienced innumerable problems with holding meetings, either in person, due to lack of a budget for flying in neighbor island members, or electronically, due to unreliable video-conference facilities.

Moreover, a package of proposed HAR amendments, passed by the Council in April 2006 (the first such amendments since the Council revised the rules in 1985), has stalled for the past four years. The approval of the Council's 2008 Annual Report, focused on the theme of food security, was also stalled without explanation until it was approved in 2009, without notice to the Council. New Council members have not been appointed to fill the vacancies of three

Council members who resigned in 2009, undermining the ability of the Council to make quorum.

The Council has become isolated without sufficient staff support for the conduct of its business, including rulemaking and exemption list review. The Council's attempts to obtain support directly from DOH and the Governor's office for its rulemaking package, its annual reports, and daily functioning (particularly for its meetings, either in person or by video-conference) have not been successful.

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

The need for better electronic and communications technology to improve Hawaii's review system was one of the areas of highest agreement among stakeholders in the study. The information and communications aspects of Hawaii's environmental review system have not kept up with modern best practices. Although OEQC has made improvements to the system over the years, despite a limited budget -- such as an expanded and all-electronic Notice, use of PDF versions of documents, and archiving historical environmental review documents – the system does not appear to be operating efficiently due to the lack of a systematic and modern communication system. For example, many stakeholders complained about the "clunky" nature of the OEQC website. Stakeholders expressed a need for more easily searchable archives of review documents to allow them access to similar reviews, which could expedite their own processing of documents and make the system more iterative. Many stakeholders asked for an ability to follow, via an electronic system, project proposals for a particular geographic or substantive topic (similar to the RSS feed and hearing notice system utilized now on the Legislature's website). The potential for greater efficiencies in the exemption system, in particular, are significant. With better technology, exemption lists could be more efficiently cross-checked and declarations could be routinely and simply archived with a form template. A review of websites for environmental review offices in other states indicates a wealth of models to follow for a more efficient system.

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

The Environmental Council suffers from a lack of stakeholder awareness about its functions. Most stakeholders have periodic contact with OEQC, even if only through the Notice, but few have been in direct contact with the Council. Few stakeholders attend Council meetings, which are open and subject to the state's "Sunshine law," except for the infrequent meetings where the Council has addressed a controversial issue such as Superferry. Each year, a few state and county agency staff members interact with the Council with regard to updating agency exemption lists. These can typically take several months of interaction to complete. Some stakeholders who personally knew members of the Council expressed strong support for their credibility and commitment. Overall, however, almost all stakeholders expressed a lack of knowledge about the Council's functions and membership.

The Environmental Center is even less well known than the Council. A unit of the Water Resources Research Center of the University of Hawaii at Manoa, the Center does not receive any direct support from OEQC, the Council, DOH, or the Governor. Due to the decline in support from the University of Hawaii and changes in staffing, the Environmental Center has become less active in the state environmental review system. The majority of stakeholders interviewed were unaware of the role of the Center. The stakeholders who did have experience with the Center through contributing to, or receiving, the Center's written comments on environmental review documents had mixed impressions of the quality and neutrality of the Center's reviews. While stakeholders recognized the importance of the Center as a consolidator of University expertise and a valuable voice in the review process, the waning participation of University faculty in reviews and the lack of consistency or neutrality perceived by stakeholders undermine the "outside expert" role of the Center.

3.3. Participation

Participation refers to processes for notification, review, comment and response, scoping, and outreach. This includes agency and public involvement in the environmental review process. During the stakeholder interview process, questions were asked about the adequacy of public notification and how it might be improved; the adequacy of agency participation in the review process and how it might be improved; and how the current system for comment and response might be improved, both for agency and public comments.

3.3.1. The current system does not encourage broad, early, and sufficient public participation.

The results of the stakeholder interviews and workshop indicated that many felt the system for public notice can be improved. Some felt the system for public notice is adequate as is; while there is always more that can be done, the public should be somewhat proactive, and there should not be an expectation that project proponents will "spoon-feed" information. Others expressed strong concerns that the public is not adequately notified, that they often learn of opportunities to participate late in the process and are then "scrambling to keep up" or must resort to a judicial challenge. Stakeholders also reported a need for increased public education about the environmental review process, as there are misconceptions, and in some cases a complete lack of awareness that the process exists. Stakeholders suggested that the system allow for more flexibility to extend comment periods when warranted.

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

A problem identified with the current system's comment and response process is the issue of repetitious and voluminous comments. This occurs when interest groups opposed to a project organize a campaign to submit large numbers of similar, or identical, comments. Because of the existing requirement to respond to each individual comment in writing and to reproduce each individual comment and response in the final document, this can add significant cost and time to a project. Furthermore, voluminous commenting, even if does not happen often, is perceived as a deliberate attempt to impede projects through the environmental review process, which is viewed as an abuse of the system. Many stakeholders suggested adopting a NEPA approach, which allows for "clumping" of similar comments together and not requiring a response to each one individually.

3.3.3. *Interagency review is often cursory and may not focus on concerns within agency expertise.*

The quality of interagency review was also examined by this study. The interviews indicate that the quality of agency review can vary by agency. In many cases, comments are cursory or boilerplate and do not provide useful feedback. Agencies may also comment outside of their particular jurisdiction, or, in some cases, request additional studies that are perceived to be unreasonable if they are only marginally related to the project. The issue of agencies being under-staffed and under-funded and lacking the time to properly review documents was frequently mentioned. Strengthening the quality of review is essential, as this is a way to ensure that document preparers are held accountable to the information in these documents and that studies are presented in an unbiased and objective manner.

3.4. Content

Content requirements examined in this study include cumulative impacts, mitigation measures, cultural impacts, climate change, and disaster management. Other factors that support good content, such as clear guidance, thorough scoping and review, and requirements for concise documents written in plain language, were also considered. Many issues regarding content involve recommendations to the rules or guidance. For some topics, such as disaster management, no changes are recommended to the current system. The following discussion focuses on identified major problems and recommendations for changes to the statute.

3.4.1. *Mitigation measures lack transparency and follow up.*

Mitigation measures, in the current system, are usually incorporated into the permitting process. This works in most cases, but not all mitigation measures are captured in permitting. Stakeholder interviews also identified a concern that, because environmental review documents are unenforceable, this leads to mitigation measure not being given thoughtful and realistic consideration. Additionally, there is no readily accessible follow-up built into the environmental review or, often, in the permitting process.

3.4.2. *Climate change is a significant policy issue and stakeholders have requested guidance for how to address climate change impacts in environmental review.*

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

3.4.3. *Cumulative impact assessment is neither well understood nor implemented and is not integrated with the planning process.*

This study has identified that cumulative impact assessment in Hawaii is lacking. Stakeholders reported difficulty addressing cumulative impacts due to a lack of data, lack of clear guidance, and lack of policy goals against which to determine thresholds for these impacts. Addressing cumulative impacts at the project-level can be "too little, too late" because it requires a big picture approach.

3.4.4. Documents are too long, repetitive, and contain too much boilerplate language to support effective decision-making.

EA and EIS documents can be too long and put unnecessary focus on impacts that are already understood or well-regulated. For example, discussion of temporary impacts associated with the construction phase of projects might not merit inclusion in the document other than a brief mention that impacts are present and Department of Health requirements will be met. Standard, boilerplate language does not enhance decision-making or provide information about project specifics. At the same time, overly long documents make the process more cumbersome for both preparers and reviewers, and less accessible to the general public.

3.4.5. Applicants and agencies report a lack of guidance and training on the environmental review process.

Clear guidance and a high level of involvement in the review process are both essential for supporting the quality of information contained in documents. The environmental review process in Hawaii lacks clear comprehensive guidance and specific examples for some content requirements, particularly in developing areas of impact assessment, such as climate change and cultural impacts. New guidance would help to provide stakeholders more certainty about the scope and depth of certain aspects of the review process.

3.5. Process

Specific process questions examined in this study are significance determination and document preparation, acceptability, and longevity. Three primary problems were identified: requiring an EA for likely EIS projects, determining how long a document is considered valid, and the perception of bias in document preparation and acceptance. The following discussion focuses on the identified major problems and recommendations for changes to the statute. Other process problems identified through the stakeholder process are to be addressed in rules and guidance recommendations not discussed in detail in this report.

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

The two-step requirement of the EA screen to determine if an EIS is needed can be burdensome and costly for applicants and agencies with projects likely to have significant impacts. Applicants and agencies are frustrated with the rigidity of the two-step approach because it does not allow agencies to exercise discretion for determining the appropriate level of review based on agency experience with similar actions. Often agencies circumvent the need to produce a separate EA by designating a Preparation Notice (PN) as the EA. Developing a way to move directly to the preparation of an EIS would increase system efficiency without loss of useful public participation and clarify the legality of a practice that is already in effect.

3.5.2. The shelf life of environmental review documents is unclear.

Chapter 343 does not discuss supplemental EISs, causing confusion about their role in the environmental review process. The administrative rules provide for supplemental EISs, but the criteria are in dispute as indicated in the pending "Turtle Bay" case. Stakeholders dispute whether: 1) supplemental EISs should even be required, 2) after a given time supplemental EISs should be required only for changes in project conditions, and 3) after a given time supplemental EISs should be required for changes in project conditions or the surrounding environment. Many stakeholders referred to the NEPA regulations and guidance as a better and familiar alternative approach.

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

The purpose of environmental review is to provide objective information about significant impacts to the environment. However, many stakeholders perceive a bias or conflict of interest when applicants or agencies prepare or contract the preparation of an environmental review document. It is perceived to be in the interest of applicants to "downplay" impacts to avoid agency denial, while agencies may have a hard time being objective about impacts if they are also proposing the project.

In light of these identified problems with Hawaii's environmental review system, the following section recommends a comprehensive and integrated set of statutory and regulatory reforms.

4. Recommendations

This section focuses on the major statutory recommendations of the study, which are contained in the proposed "omnibus" bill (Appendix 3) and explained in more detail in the "full text" version of the statutes (Appendix 4). These recommendations should be considered as an integrated package and have many inter-locking considerations. They are based on the five principles identified in Section 2.3, the problems described in Section 3, the recommendations of many stakeholders, the comparative jurisdictional review, best practices considerations, and the judgment of the study team. All recommendations are for statutory changes unless stated otherwise in the recommendation. Rule recommendations are included here to provide context to the statutory recommendations and are not comprehensive. The complete rule and guidance recommendations will be included in the final report.

4.1. Applicability

4.1.1. Adopt an "earliest discretionary approval" screen.

a. Adopt an "earliest discretionary approval" screen

An "earliest discretionary approval" screen should be adopted and substituted for the existing triggers in HRS § 343-5. The purpose of Chapter 343 is to: "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations." Or, to paraphrase one stakeholder, "to ensure government looks at the environment before it leaps." Government discretionary decision-making requires objective information and judgment to make an informed action. Ministerial actions are those where the government is constrained to make a decision based on established criteria or standards without an exercise of judgment. Because the fundamental purpose of Chapter 343 is to inform government decision-making, the study finds that the basis for considering the applicability of Chapter 343 should be the requirement for discretionary government decision-making and that the screen should be narrowed to apply only when the impacts are "probable, significant, and adverse."

This recommendation represents a fundamental change to Hawaii's approach. It streamlines the system up front by focusing the assessment process on environmental review for the most important agency approval decisions and reduces the resources spent on reviewing smaller, later actions. Drawing on language in other states, the definition of action should be amended to clarify which government action might be considered eligible for environmental review. The proposed definition of action for HRS § 343-2 returns the focus of environmental review to government action and includes private applicant action in so far as it requires government involvement through the granting of contracts, issuance of leases, permits, licenses, certificates, or other entitlements for use or permission to act by one or more agencies. Similar language is already present as explanatory text in HAR § 200-11-5(C) for agency actions regarding the use of state or county lands or funds. The proposed definition also specifically excludes ministerial actions that involve no exercise of government discretion. For actions that do not require discretionary government consent, environmental review does not apply. Thus, the proposed definition narrows the applicability of Chapter 343 compared to the existing trigger-based screen.

The discretionary approval screen is a direct means to determine applicability. Particularly if, as in the New York system and as recommended by this study, agencies maintain clear lists of discretionary v. ministerial approvals, applicants and agencies will be more certain than under the current system about when review is required. One of the principles of good EIA practice is institutional adaptability, which a discretionary screen achieves because it is systematic, transparent, and occurs early in the planning process. A discretionary approval screen integrates environmental review with planning by linking Chapter 343 to agency decision-making rather than to a predetermined list of projects that indirectly links decision-making to environmental effects. Agencies can use forty years of experience with environmental review to gauge the correlation between a proposed action and its probable environmental effects to determine which discretionary actions are likely to rise to the threshold of "probable, significant, and adverse," and therefore needing environmental review. The discretionary approval screen also clarifies the uncertainty regarding the use of state or county lands or funds and the limits of a proposed project by clarifying the distinction between discretionary versus ministerial approvals. It allows flexibility for addressing unanticipated future projects by focusing on the nature of the agency review of the proposal rather than the nature of the project.

While some stakeholders are comfortable with the existing system, analysis of the interviews revealed structural flaws. Stakeholders who favor the existing system do so because it has developed over a forty-year period and they are comfortable with it. An industry focused on navigating this complex system has emerged. Firms engaged in these activities resist significant change to the system. Also stakeholders and the public are experienced with the existing system and what should undergo environmental review. Many stakeholders believe the existing system to be adequate at capturing the majority of actions, with adjustments needed to exempt ministerial or minor actions. However, stakeholders identified a litany of project types to be added or deleted from the existing list, underscoring the limitations of the present approach for linking agency decision-making to potentially significant environmental impacts.

The proposal for an earliest discretionary approval approach arose after the initial round of stakeholder interviews. Stakeholders in business, research, and law support focusing Chapter 343 review only on discretionary agency decisions and advocate a more planning-based approach to environmental decision-making, such as through zoning or county general or development plan processes. Feedback from draft recommendations, however, highlighted concerns about the scope of applicability based on discretionary permitting. Many questioned whether this would include actions not traditionally subject to environmental review in Hawaii. Objectors did not want to capture minor permitting issues such as off-site parking. Others noted that differences exist between state and county and among state or county agencies on what is considered a discretionary permit (e.g., subdivisions).

In response to these concerns about the potential overreach of a discretionary permit trigger, the study team has introduced a qualifier to "narrow the funnel" by restricting Chapter 343 applicability only to those discretionary actions that have a "probable, significant, and adverse" environmental effect. This language avoids the ambiguity of the federal language in NEPA ("major actions") and eliminates minor or unrelated discretionary permits from environmental review. This language excludes, by definition, ministerial permits and such minor permits as "off-site" parking or granting of operator licenses, even if technically discretionary. As noted above, the study recommends that agencies maintain public lists of their discretionary and ministerial permits, which will provide certainty to the system.

Moving from a trigger system to an "earliest discretionary approval" and "probable, significant, and adverse environmental effects" approach includes a set of integrated changes:

(1) adding a new section (temporarily designated § 343-B) called "Applicability" that states "an environmental assessment shall be required for actions that require discretionary approval from an agency and that may have a probable, significant, and adverse environmental effect";

(2) clarifying that two categories of actions from the existing trigger list will continue to be covered by the discretionary action definition: new or amendments to county general plans or (new) "development plans," § 343-B(1); and reclassification of any land classified as conservation district or (new) important agricultural lands, § 343-B(2);

(3) excluding from the discretionary approval screen "the use of land solely for connection to utilities or rights-of-way," § 343-B(b); and

(4) "clarifying § 343-5(a) to require an agency to prepare an EA when it proposes an action in § 343-B.

b. Add and clarify statutory definitions

Add and clarify existing definitions in § 343-2:

(1) "action" (to add "a discretionary approval, such as a permit" but excluding "acts of a ministerial nature that involve no exercise of discretion"),

(2) "approval" (changing "consent" to "approval" for consistency),

(3) "discretionary approval" (changing "consent" to "approval" for consistency),

(4) "ministerial approval" (adding a definition of "a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements"),

(5) "permit" (adding a definition of "a determination, order, or other documentation of approval, including the issuance of a lease, license, certificate, variance, approval, or other entitlement for use or permission to act, granted to any person by an agency for an action"), and

(6) "project" (adding a definition of "an activity that may cause either a direct or indirect physical effect on the environment, such as construction or management activities located in a defined geographic area").

c. Delete the existing triggers

Transitioning from a trigger system to an "earliest discretionary approval" and "probable, significant, and adverse environmental effects" approach no longer requires the existing statutory triggers. Amend § 343-5(a) to delete all of the existing triggers, § 343-5(a)(1)-(9), except the two categories noted above. Also delete definitions in § 343-2 that were inserted into the statute because of triggers that are to be deleted: "helicopter facility," "power generating facility," "renewable energy facility," and "wastewater treatment unit."

d. Develop agency guidance for ministerial versus discretionary approvals

Require by statute that agencies develop guidance lists on which approvals may have probable, significant, and adverse environmental effects, which ministerial actions do not require environmental review, and which actions likely to require case-by-base determinations. Amend § 343-6(a)(15) to "provide guidance to agencies and applicants about the applicability of the environmental review system, establish procedures whereby each state and county agency shall maintain lists of (a) specific types of discretionary approvals that may have probable, significant, and adverse environmental effects, (b) ministerial actions that do not require environmental review, and (c) those actions that require a case-by-case determination of applicability."

4.1.2. Encourage programmatic environmental review for large-scale programs and plans by agencies and tiering of later, site-specific projects.

Encourage programmatic environmental review for large-scale programs and plans by agencies and a complementary "tiering" process to promote early consideration of environmental effects and greater efficiency in the later project-specific environmental review documents. Programmatic and tiered documents are commonly used by federal agencies under NEPA. To introduce the concepts of programmatic and tiered documents to Hawaii, programmatic documents should be prepared <u>at the discretion</u> of the agency, as follows:

(1) add the term "program" or "programmatic" to the existing and new definitions in § 343-2 of:

- "environmental review,"
- "program" (defined as "a systemic, connected, or concerted applicant or discretionary agency action to implement a specific policy, plan, or master plan"),
- "programmatic" (defined as "a comprehensive review of a program, policy, plan, or master plan"), and
- "tiering" (defined as "the incorporation by reference in a project-specific [EA or EIS] to a previously conducted programmatic [EA or EIS] for the purposes of showing the connections between the project-specific document and the earlier programmatic review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level").

(2) add references to "programmatic" EAs or EISs in amended § 343-5(a) (the agency shall prepare an EA, "or, based on its discretion, may choose to prepare for a program, a programmatic [EA]" for the action at the earliest practicable time to determine whether an [EIS] is required); and the same discretionary provision in § 343-5(b) (for applicant actions);

(3) add to the Council's rulemaking duties, § 343-6, the duty to promulgate rules that "prescribe procedures and guidance for the preparation of

programmatic [EAs or EISs] and the tiering of project-specific [EAs or EISs]"; and

(4) encourage incorporation by reference to prior review documents. § 343-5(d).

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

In the new proposed section on "Applicability," § 343-B, which creates the "earliest discretionary approval" screen, expressly <u>exclude</u> "the use of land solely for connection to utilities or rights-of-way" from environmental review (EA or EIS). This clarifies and reinforces the distinction between environmental review as linked to agencies' discretionary processes, and that situations involving only connections to utilities or rights-of-way are considered ministerial. This specific exclusion is reinforced by the clarified definition of "discretionary approval" and the new definition of "ministerial" in § 343-2, which together ensure that ministerial actions are excluded from the environmental review system, eliminating the need for these kinds of exemptions.

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

To clarify the distinction between EAs and EISs, move and slightly modify the "significance criteria" from the administrative rules, HAR § 11-200-12, to the statute, in a new section temporarily designated § 343-A. This hardens the criteria based on well-understood rules (largely in place since 1985, amended in 1996) and provides predictability about circumstances under which an EA should proceed to an EIS. The study proposes two major modifications to the significance criteria:

- adding to existing subsection (13) the phrase "or emits substantial quantities of greenhouse gases" to require consideration of large project emissions as a reason for moving from an EA to an EIS," and

- adding a new subsection (14) regarding climate change hazards, as a significance consideration ("increases the scope or intensity of hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the life-time of the project").

Other proposed changes to the criteria include:

- adding the term "adverse" before "effect," § 343-A(a),

- consolidating references to what an agency "shall consider" (every phase, primary and secondary effects, overall and cumulative effects, short-term and long-term effects), § 343-A(a)(1)-(3),

- adding the term "adverse" before "affects" or "effect" in § 343-A(b)(4), (5), (6), (8), (9), and (12), to narrow the scope and clarify that the environmental review process is focused on adverse not beneficial environmental impacts, and

- adding subsection (c) requiring the director to "provide guidance to agencies on the application of this section."

- Require the Council to develop guidance for the interpretation and application of the significance criteria. § 343-6(a)(12).

4.1.5. *Amend the rules to streamline the exemption process, increase transparency, consolidate exemptions lists where possible, and allow agencies to cross-reference their lists.*

Adopting an earliest discretionary approval screen and requiring agencies to create new guidance lists of "discretionary, "ministerial," and "case-by-case" actions for applicability (see 4.1.1. above) will reduce the need to include many actions on agency exemption lists because many actions will not meet the initial criteria of "probable, significant, and adverse environmental effects."

Amend the rules to require consolidation of agency exemptions into one integrated list per agency at the state level and one per county, where possible. Require counties to appoint one office to coordinate the exemption list update for all county offices, such as is done by Maui County. Require state agencies to similarly coordinate their division lists. Where actions are similar among agencies but only one agency has an applicable exemption, permit agencies to share or cross-reference exemptions, with public notice.

Require regular updates to exemption lists through periodic review by the Environmental Council and public notice in the Notice; specify a sunset date for the lists after which an update is required. Revise the exemption lists in light of the proposed earliest discretionary approval screen. Consider adding to the rules new classes of exemptions for actions that meet zoning and county general or development plans, and certain types of University research.

Amend § 343-6(a)(2) to add to the exemption rules a requirement that an electronic system be developed for agencies to use in simultaneously submitting to the office and maintaining as a public record a searchable archive of exemption declarations.

Encourage OEQC to expand training and education about the exemption process for stakeholders to reduce uncertainty and fear of litigation.

4.2. Governance

4.2.1. *Clarify the authority, organizational structure, responsibilities, and roles of the OEQC, Environmental Council, Department of Health, and the Governor with respect to environmental review.*

a. Elevate and streamline the Environmental Council

Elevate the Environmental Council to be equivalent to other boards and commissions with OEQC serving as staff to the Council. Explicitly attach the Environmental Council to OEQC for administrative purposes. § 341-3(c). Adjust the Director's powers and duties toward supporting the Council's authority by adding "through the Council" in several subsections, § 341-4(b)(1), (3), (4), (5) & (8). Require that OEQC ensure adequate budgeting and staff support for the Council. § 341-4(b)(9). Separate OEQC and the Council by removing the Director as an ex officio member of the Council. § 341-3(c). One model for this arrangement is the Land Use Commission.

Make the Environmental Council advisory to the Governor, similar to the federal Council on Environmental Quality (CEQ). Make the Council, instead of the Director, the primary advisor to the Governor on environmental quality, § 341-6(a)(1); strengthen the role of the Council as the liaison between the Governor and the public, § 341-6(a)(2), (3), & (b); and give the Council authority for rulemaking for Chapter 341 as well as 343. § 341-6(e).

Streamline the membership of the Environmental Council from 15 to 7 members with 4 members nominated by the Legislature. This will reduce the administrative burden and cost of maintaining a large council. § 341-3(c). The BLNR has seven members, HRS §171-4; the LUC consists of nine members, HRS § 205-1; the Water Commission has seven members, HRS §174C-7. To ensure diversity and independence, require that a total of four of the seven members be selected from lists prepared by the House and Senate (two each). § 341-3(c).

b. Move OEQC and the Environmental Council to DLNR from DOH

Move OEQC and the Council to DLNR from DOH for administrative purposes. § 341-3(a); also §§ 2, 3, 4. The mission of DLNR is more consistent with the environmental quality mission of OEQC and the Council; see HRS §171C-3: "The department shall manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein and . . . manage and administer the state parks, historical sites, forests, forest reserves, aquatic life, aquatic life sanctuaries, public fishing areas, boating, ocean recreation, coastal programs, wildlife, wildlife sanctuaries, game management areas, public hunting areas, natural area reserves . . . ."

c. Create a pay-as-you go process

Create a pay-as-you go process to ensure adequate funding for the administration of the environmental review process through reasonable filing fees. Establish an environmental review special fund to be funded through filing fees and other administrative fees collected by OEQC, to be used to provide *additional* funds to OEQC and the Council, and to support outreach, training, education, and research programs pursuant to § 341-4. § 341-B. Require the Director to adopt rules for reasonable fees for filing, publication, and other administrative services of the office or council. § 341-C. This special fund is intended to supplement, not supplant, the current budget for OEQC. § 341-B(b).

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

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

a. Require OEQC to conduct regular outreach and training

Expressly add to OEQC's duties the requirement to conduct regular outreach and training for state and county agencies, § 341-4(b)(6); to offer advice to non-governmental organizations, state residents, private industry, agencies, and others, § 341-4(b)(7); in cooperation with stakeholders, to conduct annual statewide workshops and publish an annual state environmental review guidebook to include: assistance for preparing, processing, and reviewing documents; review of judicial decisions, administrative rules, and other relevant changes to the law; and other information that would improve efficient implementation of the system. § 341-4(b)(10). Requires OEQC to prepare a new kind of annual report that analyzes the effectiveness of the state's environmental review system, including an assessment of a sample of EAs and EISs for completed projects. § 341-4.A. Allows the Council to combine its annual report with OEQC's new annual report. § 341-6(c).

b. Require OEQC to create and maintain an electronic communication system

Require OEQC to create and maintain an electronic communication system, such as a website, to meet best practices for environmental review. § 341-4(c). Encourage the office to make primary access to environmental review documents via the electronic communication system and allow the office to minimize use of hard copies. § 343(a). Support and approve the office's use of an electronic notice. § 343(d). Set up a system for electronic transmission and storage of exemption declarations. § 343-6(a)(2). Encourage use of an electronic system for the comment and response process. § 343-6(a)(10). OEQC is already moving in the direction of better use of electronic technology in these areas; these amendments are intended to support and encourage more rapid development in these areas and promote efficiency for all stakeholders.

c. The legislature should provide greater staff and funding support to the OEQC.

The primary non-statutory recommendations are that the legislature: (1) add at least three additional staff members to OEQC, and (2) pass a supplemental budget for OEQC (until the special fund is established) to ensure adequate functioning and support for OEQC and the Council and continued improvements to the electronic communication and archiving system.

4.2.3. While respecting the autonomy of the University of Hawaii, encourage it to support the functioning of the Environmental Center.

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

4.3. Participation

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

a. Encourage broad, early, and sufficient public participation

To address concerns that public participation is not sufficient, add an explicit requirement to reinforce the important principle that applicants and agencies provide notice to the public of actions under review and encourage and facilitate public involvement throughout the environmental review process. § 343-3(e). Add to judicial review a limitation on standing for challenging EAs similar to that for draft EISs to those who provided written comment and limiting review to the scope of the comments provided, § 343-7(b), making (b) parallel to (c) for standing on EISs.

b. Permit agencies to extend the period for public comment

To address concerns that, in cases where projects are controversial or public involvement occurs late in the process, allow agencies flexibility to extend the period for public comment prescribed by § 343-5 by 15 days, once, for good cause, at their discretion, if a timely request is made. § 343-5(f). Many different stakeholders offered this suggestion as a solution for the problem of the public not having enough time to comment. Concerns also exist that extension requests might delay projects, and that allowing open-endedness leads to uncertainty and risk that may discourage economic activity. To address both sides of this issue, the amendment allows a "one time only" extension of no more than 15 days. The request for the extension must additionally be submitted within the time frame of the original comment period and show good cause.

c. Adopt in the rules examples of "reasonable methods" to inform the public

Furthermore, add rules that improve public notice and provide specific examples of "reasonable methods" to inform the public. Similar regulations are included in both NEPA and Washington's statute and can provide a model for these rule changes. While this will not add any new legal requirement, it will encourage a diligent effort to provide adequate notice, as well as provide transparency for project proponents regarding what constitutes "reasonable methods" and "adequate notice."

4.3.2. Require the Environmental Council to develop rules based on NEPA that address repetitious and voluminous comments.

Amend § 343-6(a)(10) to require the Environmental Council to issue rules to address the problem of repetitious and voluminous comments through "procedures, including use of electronic technology, for responding to public comments, including procedures for issuing one comprehensive response to multiple or repetitious comments that are substantially similar in content." This is similar to how NEPA addresses repetitious and voluminous comments and the growing trend toward electronic systems for handling comment. Broad support for a "NEPA-like" approach was expressed through the interviews and comments received on the Draft Recommendations.

4.3.3. Amend the rules, improve interagency review and focus comments on agency expertise by clarifying rules and designating an EIS coordinator for each agency.

a. Amend the rules to clarify agency duty to comment

   To strengthen the quality of review, amend the rules to clarify agency duty to comment. This will increase the quality and relevance of comments by including rules relating to specificity of comments and specificity of responses.

b. Designate in the rules an EIS coordinator within each agency to coordinate and streamline EIS-related responsibilities.

   Recommendations for rule amendments will also include requiring each agency to designate an environmental review coordinator to coordinate and streamline EIS related responsibilities within that agency. This will help to support the interagency review process. See 4.1.5. above for related recommendations.

4.4. Content

4.4.1. Adopt NEPA's Record of Decision (ROD) requirement for mitigation measures in EISs.

To improve the consideration and implementation of mitigation measures, adopt a Record of Decision (ROD) process similar to NEPA. § 343-C(a). The ROD will be a short document (typically only a few pages under NEPA practice) that includes a clear summary of impacts, mitigation measures, and the associated permitting agencies when applicable. RODs facilitate follow-up on mitigation measures but do not turn the environmental review process (which should analyze a range of possible mitigation measures) into a binding mitigation document. Require agencies to ensure follow-up on mitigation measures that are imposed during their permitting process, to assess the effectiveness of mitigation measures, and to provide feedback for the environmental review process. § 343-C(b) & (c). Require the Council to prescribe procedures for implementing the ROD requirement, monitoring, and mitigation. § 343-6(a)(11).

4.4.2. Amend significance criteria to address climate change mitigation and adaptation.

Including specific references to climate change hazards and greenhouse gas emissions in the significance criteria will make clear that these impacts are considered significant and thus should be addressed in environmental review documents. § 343-A(b)(13) & (14). Require the Council to develop guidance for the interpretation and application of the significance criteria, including these new criteria. § 343-6(a)(12).

4.4.3. *Add a statutory definition of "cumulative effects" and require in the rules for OEQC to establish a database for cumulative impact assessment.*

Add a statutory definition of "cumulative effects" that is based on NEPA. § 343-2 ("cumulative effects"). Add a definition of "secondary effects" and "indirect effects" to clarify the difference between these effects and cumulative effects. § 343-2 ("secondary effects" and "indirect effects").

Require through the rules that OEQC establish a database to track environmental data over time, providing guidance to promote uniformity in reporting data so that cross-study comparisons and assessments can be done, and establishing a set of key environmental indicators to be assessed for cumulative impacts. The study further recommends that government take a more active role in this arena, by supporting cumulative impact assessment in planning documents and mandating planning agencies to establish baselines and thresholds for cumulative impacts. This will place cumulative impact assessment in a more meaningful context and give the project-level assessment more value.

4.4.4. *Require maximum page limits for environmental review documents.*

Establish page limits for environmental review documents, to be determined through the Council rulemaking process, to encourage concise discussion of relevant impacts and focus on significant impacts. § 343-6(a)(4) (EAs) & (6) (EISs). For projects determined to be of a substantial size or scope, this limit could be longer. The rules could also, for example, provide flexibility through archiving appendices electronically. This will make the process more efficient for document preparers, ease the review process, and make documents more accessible to the public.

4.4.5. *Require OEQC to create guidance and conduct training on the environmental review process for applicants and agencies.*

Applicants and agencies can receive training through an enhanced OEQC. This issue is addressed through recommendations included in the "governance" section that will require OEQC to conduct annual workshops and to annually update or supplement the guidebook (see 4.2.2.a & 4.2.2.b).

4.5. Process

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

Allow agencies to determine, based on their judgment and experience, that an EIS is likely to be required and therefore choose not to prepare an EA, proceeding directly to the EIS, with adequate notice to the public and interested parties, § 343-5(a) (agency actions) & -5(b) (applicant actions). Agencies have had experience with environmental review in Hawaii and know which projects are likely to require full environmental review and should proceed directly to the preparation of an EIS. While this omits one layer of public participation through the EA, public participation remains robust in the preparation notice, scoping, and review phases of the EIS.

4.5.2. Require the Environmental Council to make certain rules regarding supplemental environmental review documents and "shelf life."

Require the Environmental Council to make rules regarding supplemental EAs and EISs, § 343-6(a)(14)(a), and address the long-standing "shelf life" issue with a seven-year limit on the validity of environmental documents until discretionary approvals are completed. § 343-6(a)(14)(b). Allow agencies and applicants to seek a timely determination from the Council that a prior EA or EIS need not be supplemented despite the passage of the prescribed time period. § 343-6(a)(14)(c). The criteria for when an EIS needs supplementation should be clarified in the rules, but currently the statute does not explicitly address supplemental EISs. Include references to supplemental EISs in the statute, § 343-2 (included in definition of "environmental review"), § 343-5(g) (adding "other than a supplement"), § 343-7(a) (judicial review), to provide greater clarity for stakeholders and the courts on the intention and criteria for requiring supplemental EISs. The statute should adopt a hybrid of the existing HAR and the NEPA approaches, which assumes EISs become "stale" after a set period of time; the rules should require a supplemental document when there is significant new information that relates to environmental effects or a change in the project or surrounding environment.

4.5.3. Enhance public and interagency review through guidance and training to reduce perceptions of bias and to strengthen the role of the OEQC and Environmental Council.

The study does not recommend any changes to the current unregulated preparation process despite frequently raised concerns about bias. The study agrees that the perception of bias is problematic but the solution recommended by many stakeholders is not feasible for Hawaii's situation. A preparation process using third-party preparers requires a large consultancy market that currently does not exist in Hawaii and would involve a complicated administrative mechanism for contracting with independent preparers. Instead, encourage greater public and interagency review to ensure greater objectivity in documents where the preparer is also the approving authority or financial beneficiary of the approval.

4.6. Effective Date

The study proposes that the effective date for the recommended amendments be 2012, to allow for a phase-in of the new requirements, duties, and functions. Proposed reporting requirements would not be required until after rules have been developed. Environmental review documents for which a draft has been prepared and for which notice has been published by the effective date would not be subject to the new requirements.

5. Conclusions

This section highlights the key findings of the study and discusses legislative and other recommendations.

5.1. Environmental review is broadly supported and has been beneficial to Hawaii.

The study found broad support for Hawaii's environmental review system across different stakeholder groups as well as in agencies and communities across the state. The benefits of environmental review and balancing environmental, economic, cultural, and social goals are perceived as necessary and important to maintaining Hawaii's quality of life.

5.2. Applicant and agency decision-making is improved by early and robust public and interagency review.

Early and robust review of environmental impacts supports sound applicant and agency decision-making. The importance of good information that is widely disseminated is recognized by all stakeholder groups. Hawaii should do more to effectuate the core values of its present system of environmental review, which emphasizes disclosure and review by agencies and the public.

5.3. The environmental review system has significant problems that need to be addressed.

5.3.1. The governance system is broken. Evidence comes not just from the interviews but also from recent events and correspondence involving the Environmental Council. Key activities such as updating exemption lists and amending rules have not been carried out because of the structural and financial problems associated with the entities responsible for oversight of the environmental review system. This is a key area of concern involving not just fiscal matters but also realignment of environmental governance as a key priority for the state.

5.3.2. Too much time and resources are spent on "small" projects and not enough on the "big" projects. Many stakeholders reported that time and money is wasted on projects that should be exempted from environmental review while more significant projects have evaded review. Unnecessary studies and reports have been generated because of the "fear of lawsuits" rather than because the action or project is likely to have significant impacts.

5.3.3. The system of environmental review in Hawaii has not kept pace with developments in other states. Hawaii has been outpaced by other places in terms of how best to address cumulative impacts, mitigations, and the use of technology and modern communication tools in the environmental review process.

5.3.4. Environmental review in Hawaii has become too costly, unpredictable, and inefficient. The system is in need of reform. Estimated costs for an environmental assessment now often exceed $50,000. Many EAs have grown in size and complexity so that they appear to be as voluminous and detailed as EISs. While preparers and consulting firms have expressed resistance to change, many landowners, developers, and other applicants have expressed concerns about the costs and the lack of clarity as to what actions are subject to the law, what constitutes a significant impact, and appropriate strategies for mitigation of likely significant impacts.

5.3.5. The environmental review system is sometimes used as means of delaying and stopping projects. This is not the intent of the law, which is the disclosure of significant impacts and mitigation actions for informing agency decision-making. More emphasis on early participation as well as education and training should be directed towards supporting understanding of the role of the environmental review system.

5.3.6. A key concern expressed by many is that the current system allows for projects with significant impacts to evade necessary review. Large subdivision projects occurring on agricultural lands were cited as examples of potentially ministerial actions that may be exempted from review. Public projects covered by Planned Review Use (PRU) regulations have also been exempted from the review process. Because some stakeholders confuse environmental review with the entitlement process, the broader goals of balancing environmental, economic, cultural, and social goals that guide environmental review have been ignored.

5.3.7. There is a significant disconnect between environmental review and planning. Environmental review needs to be part of an overall program of neighborhood, community, regional, and state planning. Without clearly articulated planning goals and visions for the community, the process of balancing diverse environmental, economic, social, cultural, and community goals will be impeded. Environmental review cannot substitute for planning processes, which need to be continuing, coordinated, and community-based. When environmental review is disconnected from planning processes and when it occurs too late in the planning process, it becomes more adversarial than cooperative, making it difficult to balance environmental, economic, social, cultural, and community goals.

5.3.8. There is need for better integration between Hawaii's system of environmental review and NEPA. Stakeholders support principles and practices contained in NEPA. NEPA is regarded by many as a touchstone for best practices. Efforts to better align Hawaii's system of environmental review with federal policies have broad support.

5.4. Major reform is challenging because of the complexity of the system, diversity of values held by stakeholders, and vested interests in perpetuating the existing system.

Over the last forty years, Hawaii's environmental review system has become increasingly complex, even while the number of documents processed by the system has steadily declined. Not only has the science of environmental assessment evolved, but increasingly challenging concerns such as climate change, sea level rise, carbon sequestration, and other environmental considerations have emerged. CEQ and other states are considering changes to environmental review laws to address climate change; the fact that the U.S. EPA will begin regulating greenhouse gases suggests that the system of environmental review will change. Environmental assessment is also complicated because of the diversity of values held in the community.

While some strongly support preservation of the natural environment, others are more concerned with jobs and economic development. The need to encourage new technologies, energy self-sufficiency, and more sustainable systems has also complicated the business of environmental review. Finding balance between environmental, economic, cultural, and social goals has become increasingly difficult. There are, moreover, vested interests in our community who support perpetuation of the existing system. Those who understand and can navigate the complex rules and relationships associated with a dysfunctional and arcane system have a special role to play in terms of advising applicants through the labyrinth of triggers, exemptions, determinations of significance, and implementation of mitigations. Coupled with bureaucratic inertia and fiscal problems focusing attention on short-term considerations, the implementation of significant reform to Hawaii's system of environmental review faces an uphill climb.

5.5. In the past, Hawaii had a reputation for being a leader in environmental policy. A modernization of the environmental review system can restore Hawaii's reputation in planning and environmental management.

Historically, Hawaii was a leader in terms of planning and environmental policy. The legacy of its state land use law as well as exemplary programs in state planning, coastal zone management, and its system of environmental review is still widely recognized. Yet this study has found that Hawaii has not kept pace with other states such as California, Washington, New York, and Massachusetts in terms of environmental review and management. Environmental assessment is a cornerstone for not just achieving and monitoring progress towards sustainability, but also for maintaining and improving the quality of life in Hawaii.

5.6. Conclusion

This report contains a summary of the key findings of the study conducted for the Legislature. The report identifies major problems and concerns with Hawaii's system of environmental review. It also contains comprehensive draft legislation for statutory amendments to address the most significant problems raised through the interviews with stakeholders and the research conducted over the past year and a half.

At the end of the contract, in summer 2010, a final project report will be developed and delivered to the Legislature containing more details of the study as well as adjustments to specific recommendations. Some of the non-statutory recommendations have been outlined in this report but more detailed work pertaining to administrative rules and other policies is forthcoming. Based upon the outcome of the 2010 legislative session, there may be further recommendations and approaches detailed in the final report.

In conclusion, the authors express appreciation to the hundreds of individuals who participated in this study. Many people were interviewed. Many gave generously of their time and ideas. Many participated in our Town-Gown event held at the University. Others reviewed and commented on earlier drafts of problem statements and recommendations. All input, even the criticism, was valued by the study team. In particular, the support of the Legislative Reference Bureau in advising on the study process and drafting the proposed bill was greatly appreciated. The study team looks forward to continuing to work with the Legislature and all stakeholders in ensuring that Hawaii's environmental review system is the best possible approach for our unique island state.

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Appendix 1. Authorizing Legislation: Act 1 2008 Section 10

during fiscal year 2008-2009, including equipment relating to computer systems programming and operations.

The sum appropriated in this section shall be expended by the legislative reference bureau.

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

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

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

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

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

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

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

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

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

SECTION 11. There is appropriated out of the general revenues of the State of Hawaii the sum of $1,060,728 or so much thereof as may be necessary to the office of the ombudsman for defraying the expenses of the office during fiscal year 2008-2009.

The sum appropriated in this section shall be expended by the ombudsman.

Appendix 2. List of Stakeholders

Federal Agencies

Federal Aviation Administration
Steve Wong

Federal Highway Administration
Jodi Chew

Natural Resources Conservation Service
Michael Robotham

State of Hawaii Agencies

Department of Health
Larry Lau
Kelvin Sunada

Department of Land and Natural Resources
Christen Mitchell
Nelson Ayers
DLNR – Office of Conservation and Coastal Lands
Sam Lemmo
DLNR – State Historic Preservation Division
Pua Aiu
DLNR – Land Division
Morris Atta

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

Department of Agriculture
Brian Kau
Robert Boesch

Department of Business, Economic Development and Tourism
DBEDT - Office of Planning
Scott Derrickson
DBEDT - Strategic Industries Office
Joshua Strickler
DBEDT – Coastal Zone Management
Douglas Tom
John Nakagawa
Ann Ogata-Deal
DBEDT – Land Use Commission
Orlando Davidson

Hawaii Department of Transportation
Brennon Morioka
HDOT - Harbors Division
Fred Nunes
Fred Pascua
Marshall Ando
Dean Watase
HDOT – Highways Division
Jiro Sumada
Scot Urada
Ken Tatsuguchi
Doug Meller
Darell Young
Robert Miyasaki
HDOT – Support Services
Glenn Soma
Mike Murphy
David Shimokawa
Susan Papuga

Department of Hawaiian Homelands
Darrell Yagodich

Office of Hawaiian Affairs
Jonathan Scheuer
Heidi Guth

Hawaii Community Development Authority
Anthony Ching, Executive Director

Office of Environmental Quality Control
Katherine Kealoha

Hawaii Public Housing Authority
Marcel Audant
Edmund Morimoto

Hawaii Housing and Finance Development Corporation
Janice Takahashi

Department of the Attorney General
Bill Wynhoff

<u>City and County of Honolulu</u>

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

Department of Transportation Services
Wayne Yoshioka
Faith Miyamoto
Brian Suzuki

Department of Design and Construction
Terry Hildebrand
Dennis Kodama
Russell Takara

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

<u>Maui County</u>

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

Department of Environmental Management
Cheryl Okuma
Dave Taylor
Gregg Kresge

Department of Public Works
Milton Arakawa
Joe Krueger
Wendy Kobashigawa

<u>Hawaii County</u>

Department of Planning
Daryn Arai
Chris Yuen (Former Director)

Department of Environmental Management
Bobby Jean Leithead-Todd

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

Kauai County

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

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

Nadine Nakamura

Barbara Robeson

Consultants

Belt Collins Hawaii, Ltd.
Sue Sakai
Lee Sichter

PBR Hawaii and Associates, Inc.
Tom Schnell

Group 70 International, Inc
Jeff Overton

R.M. Towill Corporation
Chester Koga

Aecos Incorporated
Eric Guither

Wilson Okamoto Corporation
Earl Matsukawa

Tetra Tech
George Redpath

Helber, Hastert and Fee
Gail Renard
Scott Ezer

Plan Pacific, Inc.
John Whalen

Oceanit
Joanne Hiramatsu

Wil Chee Planning
Richard Stook

Townscape, Inc.
Bruce Tsuchida
Sherri Hiraoka

Parsons Brinkerhoff
James Hayes

Chris Hart and Partners
Chris Hart
Michael Summers
Jason Medema

Munekiyo and Hiraga, Inc.
Michael Munekiyo
Mich Hirano

Marine and Coastal Solutions International, Inc
David Tarnas

Geometrician Associates
Ron Terry

Public Interest Groups

Hawaii's Thousand Friends
Carl Christensen

Sierra Club Hawaii Chapter
Robert Harris

Conservation Council of Hawaii
Marjorie Ziegler

KAHEA: The Hawaiian-Environmental Alliance
Marti Townsend
Miwa Tamanaha

Hawaii Audobon Society
John Harrison

The Nature Conservancy
Mark Fox
Stephanie Liu
Jason Sumiye

Maui Tomorrow
Irene Bowie

Earthjustice
Isaac Moriwake

Native Hawaiian Legal Corporation
David Frankel

The Outdoor Circle
Mary Steiner
Bob Loy

Blue Planet Foundation
Jeff Mikulina

Sierra Club, Maui Group
Lucienne de Naie

Kohala Center
Maralyn Herkes

Industry Groups

Chamber of Commerce of Hawaii
Dean Uchida
Sherry Menor

National Association of Industrial and Office Properties, Hawaii
Serge Krivatsy

Land Use Research Foundation
David Arakawa

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

Hawaii Leeward Planning Conference
Jacqui Hoover

University of Hawaii Faculty

Kem Lowry, Department of Urban and Regional Planning

Brian Szuster, Department of Geography

Jackie Miller, Environmental Center (retired)

Casey Jarman, William S. Richardson School of Law

David Callies, William S. Richardson School of Law

Jon Van Dyke, William S. Richardson School of Law

Carlos Andrade, Kamakakuokalani Center for Hawaiian Studies

Luciano Minerbi, Department of Urban and Regional Planning

Jon Matsuoka, School of Social Work

Davianna McGregor, Ethnic Studies Department

Panos Prevadouros, Department of Civil and Environmental Engineering

Frank Perkins, Chancellor's Office

Kevin Kelly, Center for Marine Microbial Ecology and Diversity

State Legislature

Senate President Colleen Hanabusa

Senate Majority Leader Gary Hooser

Senate Majority Policy Leader Les Ihara

Senator Carol Fukunaga

Minority Leader Fred Hemmings

Speaker of the House Calvin Say

House Majority Leader Blake Oshiro

Representative Cynthia Thielen

Representative Mina Morita

Attorneys

Bill Tam, Alston Hunt Floyd & Ing

Elijah Yip, Cades Schutte

Lisa Munger, Goodsill Anderson Quinn & Stifel

Lisa Bail, Goodsill Anderson Quinn & Stifel

Isaac Hall

Lorraine Akiba, McCorriston Miller Mukai MacKinnon LLP

Sharon Lovejoy, Starn O'toole Marcus & Fisher

Tom Pierce

Doug Codiga, Schlack Ito Lockwood Piper & Elkind

Michael Matsukawa

Governance

Environmental Council

Genevieve Salmonson (Former Director, OEQC)

Appendix 3. Omnibus Bill

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

H.B. NO.

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL PROTECTION

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

PART I.

SECTION 1. Chapter 341, Hawaii Revised Statutes, is amended to read as follows:

"[~~[~~]**CHAPTER 341**[~~]~~]

ENVIRONMENTAL QUALITY CONTROL

[~~[~~]**§341-1**[~~]~~] **Findings and purpose.** The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The purpose of this chapter is to stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

§341-2 Definitions. As used in this chapter, unless the context otherwise requires:

"Center" means the University of Hawaii [~~ecology or~~] environmental center established in section [~~+~~]304A-1551[~~+~~].

"Council" means the environmental council established in section 341-3(c).

"Director" means the director of the office of environmental quality control.

"Office" means the office of environmental quality control established in section 341-3(a).

"University" means the University of Hawaii.

§341-3 Office of environmental quality control; environmental center; environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the director of the office of environmental quality control who shall be appointed by the governor as provided in section 26-34. This office shall implement this chapter and shall be placed within the department of [~~health~~] land and natural resources for administrative purposes. The office shall perform [~~its~~] the duties prescribed to it under chapter 343 [~~and shall serve the governor in an advisory capacity on all matters relating to environmental quality control~~].

(b) The environmental center within the University of Hawaii shall be as established under section [+]304A-1551[+].

(c) There is created an environmental council not to exceed [~~fifteen~~] seven members. [~~Except for the director, members~~] The council shall include one member from each county and no more than three at-large members. The director may not serve as a member of the council. Members of the environmental council shall be appointed by the governor as provided in section 26-34, provided that two of the seven members shall be appointed from a list of persons nominated by the speaker of the house of representatives and two members shall be appointed from a list of persons nominated by the senate president. The council shall be attached to the [~~department of health~~] office for administrative purposes. [~~Except for the director, the~~] The term of each member shall be four years; provided that, of the members initially appointed, [~~five~~] three members shall serve for four years, [~~five~~] two members shall serve for three years, and the remaining [~~four~~] two members shall serve for two years.

Vacancies shall be filled for the remainder of any unexpired term in the same manner as original appointments. [~~The director shall be an ex officio voting member of the council.~~] The council chairperson shall be elected by the council from among the [~~appointed~~] members of the council.

Members shall be appointed to [~~assure~~] ensure a broad and balanced representation of educational, business, and environmentally pertinent disciplines and professions[~~, such as the natural and social sciences, the humanities, architecture, engineering, environmental consulting, public health, and planning; educational and research institutions with environmental competence; agriculture, real estate, visitor industry, construction, media, and voluntary community and environmental groups~~]. The members of the council shall serve without compensation but shall be reimbursed for expenses, including travel expenses, incurred in the discharge of their duties.

§341-4 Powers and duties of the director. (a) The director shall have [~~such~~] powers delegated by the governor as are necessary to coordinate and, when requested by the governor, to direct, pursuant to chapter 91, all state governmental agencies in matters concerning environmental quality.

(b) To further the objective of subsection (a), the director shall:

(1) [~~Direct~~] Through the council, direct the attention of [~~the university community~~] state agencies and the residents of the State [~~in general~~] to [~~ecological and~~] environmental problems [~~through~~], in cooperation with the center [~~and the council, respectively, and through public education programs~~];

(2) Conduct research or arrange for [~~the conduct of~~] research through contractual relations with the center, state agencies, or other persons with competence in [~~the field of ecology and~~] environmental quality;

(3) [~~Encourage~~] Through the council, encourage public acceptance of proposed legislative and administrative actions concerning [~~ecology and~~] environmental quality, and receive notice of any private or public complaints concerning [~~ecology and~~] environmental quality [~~through the council~~];

(4) Recommend to the council programs for long-range implementation of environmental quality control;

(5) Submit [~~direct~~] to the council for its review and recommendation to the governor [~~and to the legislature such~~] legislative bills and administrative policies, objectives, and actions, as are necessary to preserve and enhance the environmental quality of the State;

(6) Conduct regular outreach and training for state and county agencies on the environmental review process and conduct other public educational programs; [~~and~~]

(7) Offer advice and assistance to private industry, governmental agencies, non-governmental organizations, state residents, or other persons upon request[~~.~~];

(8) Obtain advice from the environmental council on any matters concerning environmental quality;

(9) Perform budgeting and hiring in a manner that ensures adequate funding and staff support for the council to carry out its duties under this chapter and chapter 343; and

(10) With the cooperation of private industry, governmental agencies, non-governmental organizations, state residents, and other interested persons in fulfilling the requirements of this subsection, conduct annual statewide workshops and publish an annual state

environmental review guidebook or supplement to assist persons in complying with this chapter, chapter 343, and administrative rules adopted thereunder; provided that workshops, guidebooks, and supplements shall include:

(A) Assistance for the preparation, processing, and review of environmental review documents;

(B) Review of relevant court decisions affecting this chapter, chapter 343, and administrative rules adopted thereunder;

(C) Review of amendments to this chapter; chapter 343, other relevant laws, and administrative rules adopted thereunder; and

(D) Any other information that may facilitate the efficient implementation of this chapter, chapter 343, and administrative rules adopted thereunder.

(c) [~~The director shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter.~~] To facilitate agency and public participation in the review process, the office shall create and maintain an electronic communication system, such as a website, to meet best practices of environmental review, as determined by the director.

§341-4.A Annual report. No later than January 31 of each year, at the direction of the council, the director shall prepare a report that analyzes the effectiveness of the State's environmental review system during the prior year. The report shall include an assessment of a sample of environmental assessments and environmental impact statements for completed projects.

At the request of the director or the council, state and county agencies shall provide information to assist in the preparation of the annual report.

§341-6 [~~Functions~~] Duties of the environmental council. (a) The council shall [~~serve~~]:

(1) Serve the governor in an advisory capacity on all matters relating to environmental quality;

(2) Serve as a liaison between the [~~director~~] governor and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning [~~ecology and~~] environmental quality through public hearings or any other means and by publicizing [~~such~~] these matters as requested by the [~~director pursuant to section 341-4(b)(3).~~] governor; and

(3) Meet at the call of the council chairperson or the governor upon notice to the council chairperson.

(b) The council may make recommendations concerning [~~ecology and~~] environmental quality to the [~~director~~] governor [~~and shall meet at the call of the council chairperson or the director upon notifying the council chairperson~~].

(c) The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies [~~and~~]. No later than January 31 of each year, the council, with the assistance of the director, shall make an annual report with recommendations for improvement to the governor, the legislature, and the public [~~no later than January 31 of each year~~]. [~~All~~] At the request of the council, state and county agencies shall [~~cooperate with the council and~~] provide information to assist in the preparation of [~~such a~~] the report [~~by responding to requests for information made by the council~~]. The council may combine its annual report with the annual report prepared by the director pursuant to section 341-A.

(d) The council may delegate to any person [~~such~~] the power or authority vested in the council as it deems reasonable and proper for the effective administration of this section and chapter 343, except the power to make, amend, or repeal rules.

(e) The council shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter and chapter 343.

§341-B Environmental review special fund; use of funds. (a) There is established in the state treasury the environmental review special fund, into which shall be deposited:

(1) All filing fees and other administrative fees collected by the office;

(2) All accrued interest from the special fund; and

(3) Moneys appropriated to the special fund by the legislature.

(b) Moneys in the environmental review special fund shall be supplemental to, and not a replacement for, the office budget base and be used to:

(1) Fund the activities of the office and the council in fulfillment of their duties pursuant to this chapter and chapter 343, including administrative and office expenses; and

(2) Support outreach, training, education, and research programs pursuant to section 341-4.

§341-C Fees. The director shall adopt rules, pursuant to chapter 91, that establish reasonable fees for filing, publication, and other administrative services of the office or council pursuant to this chapter and chapter 343."

SECTION 2. All rules, policies, procedures, orders, guidelines, and other material adopted, issued, or developed by the office of environmental quality control or the environmental council within the department of health to implement provisions of the Hawaii Revised Statutes shall remain in full force and effect until amended or repealed by the office of environmental quality control or the environmental council within the department of land and natural resources.

SECTION 3. All appropriations, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the office of environmental quality control or the environmental council within the department of health relating to the functions transferred to the department of land and natural resources shall be transferred with the functions to which they relate.

SECTION 4. All rights, powers, functions, and duties of the office of environmental quality control or the environmental council within the department of health are transferred to the office of environmental quality control or the environmental council within the department of land and natural resources.

All officers and employees whose functions are transferred by this Act shall be transferred with their functions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act.

No officer or employee of the State having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act, and such officer or employee may be transferred or appointed to a civil service position without the necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed; and provided that subsequent changes in status may be made pursuant to applicable civil service and compensation laws.

An officer or employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefits or privileges and without the necessity of examination; provided that such officer or employee possesses the minimum qualifications for the position to which transferred or appointed.

If an office or position held by an officer or employee having tenure is abolished, the officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the State with the same pay and classification and shall be transferred to some other office or position for which the officer or employee is eligible under the personnel laws of the State as determined by the head of the department or the governor.

PART II.

SECTION 5. Chapter 343, Hawaii Revised Statutes, is amended by adding three new sections to be appropriately designated and to read as follows:

"**§343-A Significance criteria.** (a) In determining whether a proposed action may have a significant adverse effect on the environment, an agency shall consider:

(1) Every phase of the proposed action;

(2) Expected primary and secondary effects of the proposed action; and

(3) The overall and cumulative effects of the proposed action, including short-term and long-term effects.

(b) A proposed action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;

(2) Curtails the range of beneficial uses of the environment;

(3) Conflicts with the State's long-term environmental policies, guidelines, or goals, as expressed in chapter 344, and any revisions thereof and amendments thereto, court decisions, or executive orders;

(4) Substantially adversely affects the economic welfare, social welfare, or cultural practices of the community or State;

(5) Substantially adversely affects public health;

(6) Involves substantial adverse secondary impacts, such as population changes or effects on public facilities;

(7) Involves a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has considerable adverse effect upon the environment or involves a commitment to related or future actions;

(9) Substantially adversely affects a rare, threatened, or endangered species or its habitat;

(10) Detrimentally affects air or water quality or ambient noise levels;

(11) Affects or is likely to suffer present or future damage by being located in an environmentally sensitive area, such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Substantially adversely affects scenic vistas and viewplanes identified in county or state plans or studies;

(13) Requires substantial energy consumption or emits substantial quantities of greenhouse gases, or

(14) Increases the scope or intensity of hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the lifetime of the project.

(c) The director of the office of environmental quality control shall provide guidance to agencies on the application of this section.

§343-B Applicability. Except as otherwise provided, an environmental assessment shall be required for actions that require discretionary approval from an agency and that may have a probable, significant, and adverse environmental effect, including:

(1) Any new county general or development plans or amendments to existing county general or development plans; or

(2) Any reclassification of any land classified as a conservation district or important agricultural lands.

(b) Notwithstanding any other provision, the use of land solely for connection to utilities or rights-of-way shall not require an environmental assessment or an environmental impact statement.

§343-C Record of decision; mitigation. (a) At the time of the acceptance or nonacceptance of a final statement, the accepting authority or agency shall prepare a concise public record of decision that:

(1) States its decision;

(2) Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:

(A) Alternatives that were considered to be environmentally preferable; and

(B) Preferences among those alternatives based upon relevant factors, including economic and technical considerations and agency statutory mission; and

(3) States whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not adopted.

(b) Agencies shall provide for monitoring to ensure that their decisions are carried out and that any other conditions established in the environmental impact statement or during its review and committed to as part of the accepting authority or agency's decision are implemented by the lead agency or other appropriate agency. Where applicable, a lead agency shall:

(1) Include conditions on grants, permits, or other approvals to ensure mitigation;

(2) Condition the funding of actions on mitigation; and

(3) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures that they proposed during the environmental review process and that were adopted by the accepting authority or agency in making its decision.

(c) Results of monitoring pursuant to this section shall be made available periodically to the public through the bulletin."

SECTION 6. Section 183-44, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) For the purposes of this section:

(1) "Emergency repairs" means that work necessary to repair damages to fishponds arising from natural forces or events of human creation not due to the willful neglect of the owner, of such a character that the efficiency, esthetic character or health of the fishpond, neighboring activities of persons, or existing flora or fauna will be endangered in the absence of correction of existing conditions by repair, strengthening, reinforcement, or maintenance.

(2) "Repairs and maintenance" of fishponds means any work performed relative to the walls, floor, or other

traditional natural feature of the fishpond and its appurtenances, the purposes of which are to maintain the fishpond in its natural state and safeguard it from damage from environmental and natural forces.

Repairs, strengthening, reinforcement, and maintenance and emergency repair of fishponds shall not be construed as actions [~~"proposing any use"~~] requiring an environmental assessment or an environmental impact statement within the context of section [~~343-5.~~] 343-B."

SECTION 7. Section 343-2, Hawaii Revised Statutes, is amended to read as follows:

"**§343-2 Definitions.** As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant[~~,~~] that:

(1) Is directly undertaken by any agency;

(2) Is supported in whole or in part by contracts, grants, subsidies, or loans from one or more agencies; or

(3) Involves the issuance to a person of a discretionary approval, such as a permit by one or more agencies.

The term "action" shall not include official acts of a ministerial nature that involve no exercise of discretion.

"Agency" means any department, office, board, or commission of the state or county government that [~~which~~] is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary approval [~~consent~~] required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Cumulative effects" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (county, state, or federal) or person undertakes those actions; cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

"Discretionary approval[~~consent~~]" means an approval, consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial approval [~~consent~~].

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and [~~which~~] that discloses the:

(1) [~~environmental~~] Environmental effects of a proposed action[~~,~~];

(2) [~~effects~~] Effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State[~~,~~];

(3) [~~effects~~] Effects of the economic activities arising out of the proposed action[~~,~~];

(4) [~~measures~~] Measures proposed to minimize adverse effects[~~,~~]; and

(5) [~~alternatives~~] Alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement, which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Environmental review" refers broadly to the entire process prescribed by chapter 341 and this chapter, applicable to applicants, agencies, and the public, of scoping, reviewing, publishing, commenting on, finalizing, accepting, and appealing required documents such as environmental assessments and environmental impact statements; any variations of these documents such as preparation notices, findings of no significant impact, programmatic reviews, and supplemental documents; any exemptions thereto; and any decisions not to prepare these documents.

"Finding of no significant impact" means a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

[~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.~~]

"Ministerial approval" means a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements.

"Office" means the office of environmental quality control.

"Permit" means a determination, order, or other documentation of approval, including the issuance of a lease, license, certificate, variance, approval, or other entitlement for use or permission to act, granted to any person by an agency for an action.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary effect" or "direct effect" means effects that are caused by the action and occur at the same time and place.

[~~"Power-generating facility" means:~~

~~(1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or~~

~~(2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.~~]

"Program" means a systemic, connected, or concerted applicant or discretionary agency action to implement a specific policy, plan, or master plan.

"Programmatic" means a comprehensive environmental review of a program, policy, plan, or master plan.

"Project" means an activity that may cause either a direct or indirect physical effect on the environment, such as construction or management activities located in a defined geographic area.

[~~"Renewable energy facility" has the same meaning as defined in section 201N-1.~~]

"Secondary effects" or "indirect effect" means effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.

"Significant effect" means the sum of effects on the quality of the environment[~~, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State~~].

"Tiering" means the incorporation by reference in a project-specific environmental assessment or environmental impact statement to a previously conducted programmatic environmental assessment or environmental impact statement for the purposes of showing the connections between the project-specific document and the earlier programmatic review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level.

[~~"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.~~]"

SECTION 8. Section 343-3, Hawaii Revised Statutes is amended to read as follows:

"§343-3 **Public participation, records, and notice.** (a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public at minimum through the electronic communication system maintained by the office and, if specifically requested due to lack of electronic access, also through printed copies available through the office ~~during established office hours~~.

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

(1) A public comment process or public hearing if a state or federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or

incidental take license pursuant to the state or federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office, [~~and~~] public libraries, and in electronic format.

(e) At the earliest practicable time, applicants and the relevant agencies shall:

(1) Provide notice to the public and to state and county agencies that an action is subject to review under to this chapter; and

(2) Encourage and facilitate public involvement throughout the environmental review process as provided for in this chapter, chapter 341, and the relevant administrative rules."

SECTION 9. Section 343-5, Hawaii Revised Statutes, is amended to read as follows:

"**§343-5 [~~Applicability and~~] Agency and applicant requirements.** [~~(a) Except as otherwise provided, an environmental assessment shall be required for actions that:~~

~~(1) Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-~~

~~2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);~~

~~(2)~~ ~~Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(3)~~ ~~Propose any use within a shoreline area as defined in section 205A-41;~~

~~(4)~~ ~~Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;~~

~~(5)~~ ~~Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";~~

~~(6)~~ ~~Propose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county;~~

~~(7) Propose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C) Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and~~

~~(9) Propose any:~~

~~(A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;~~

~~(B) Waste-to-energy facility;~~

~~(C) Landfill;~~

~~(D) Oil refinery; or~~

~~(E) Power-generating facility.]~~

[~~(b)~~] (a) Whenever an agency proposes an action in [~~subsection (a), other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6,~~] section 343-B, the agency shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment, for [~~such~~] the action at the earliest practicable time to determine whether an environmental impact statement shall be required[~~.~~]; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.

(1) For environmental assessments for which a finding of no significant impact is anticipated:

(A) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(B) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;

(C) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;

(D) A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment; and

(E) The agency shall file notice of [~~such~~] the determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(2) The final authority to accept a final statement shall rest with:

(A) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds, or whenever a state agency proposes an action within the categories in subsection (a); or

(B) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

[~~(c)~~] <u>(b)</u> Whenever an applicant proposes an action specified by [~~subsection (a)~~] <u>section 343-B</u> that requires approval of an agency and that is not a specific type of action declared exempt under <u>that section or</u> section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment<u>, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment,</u> of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; <u>provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties</u>[~~; provided further that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time~~]. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

(1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and

(3) The applicant shall respond in writing to comments received during the review, and the agency shall

prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

[~~(d)~~] (c) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency shall prepare the assessment.

[~~(e)~~] (d) In preparing an environmental [~~assessment,~~] review document, an agency or applicant may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous [~~determinations of whether a statement is required and previously accepted statements.~~] review documents. The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

[~~(f)~~] (e) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

(f) Upon receipt of a timely written request and good cause shown, a lead agency, approving agency, or accepting authority may extend a public review and comment period required under this section one time only, up to fifteen days. To be considered a timely request, the request for an extension shall be made before the end of the public review and comment period. An extension of a public review and comment period shall be communicated by the lead agency in a timely manner to all interested parties.

(g) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action, other than a supplement to that statement, shall be required."

SECTION 10. Section 343-6, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter. Any such rules may be issued as interim rules by adoption and filing with the lieutenant governor, and by posting the interim rules on the lieutenant governor's website. Interim rules adopted pursuant to this Act shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91 and the requirements of chapter 201M, Hawaii Revised Statutes, and shall take effect upon filing with the lieutenant governor. All interim rules adopted pursuant to this section shall be effective only through June 30, 2014. For any new or expanded programs, services, or benefits that have been implemented under interim rules to continue in effect beyond June 30, 2014, the environmental council shall adopt rules in conformance with all the requirements of chapter 91 and chapter 201M, Hawaii Revised Statutes. Such rules shall include but not be limited to rules that shall [~~in accordance with chapter 91 including, but not limited to, rules that shall~~]:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment, and ensuring that the declaration is simultaneously transmitted electronically to the office and is readily available as a public record in a searchable electronic database;

(3) Prescribe procedures for the preparation of an environmental assessment;

(4) Prescribe the contents of, and page limits for, an environmental assessment;

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of, and page limits for, an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not; [~~and~~]

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council[~~.~~];

(10) Prescribe procedures, including use of electronic technology for the comment and response process,

including procedures for issuing one comprehensive response to multiple or repetitious comments that are substantially similar in content;

(11) Prescribe procedures for implementing the requirement for records of decision, monitoring, and mitigation;

(12) Develop guidance for the application and interpretation of the significance criteria under chapter 343-A;

(13) Prescribe procedures and guidance for the preparation of programmatic environmental assessments or impact statements and the tiering of project-specific environmental assessments or impact statements;

(14) Prescribe:

(A) Procedures for the applicability, preparation, acceptance, and publication of supplemental environmental assessments and supplemental environmental impact statements when there are substantial changes in the proposed action or significant new circumstances or information relevant to environment effects and bearing on the proposed action and its impacts;

(B) Procedures for limiting the duration of the validity of environmental assessments and environmental impact statements, or if an environmental assessment led to the preparation of an environmental impact statement, then of the later-prepared statement, to seven years or less from the date of acceptance of the document until all state and county discretionary approvals are fully completed for the action; and

(C) Procedures for an agency or applicant to seek a timely determination from the council that a prior environmental assessment or environmental impact statement contains sufficiently current information such that a supplemental document is not warranted despite the passage of the prescribed time period; and

(15) To provide guidance to agencies and applicants about the applicability of the environmental review system, establish procedures whereby each state and county agency shall maintain lists of (a) specific types of discretionary approvals that may have probable, significant, and adverse environmental effects, (b)

ministerial actions that do not require environmental review, and (c) those actions that require a case-by-case determination of applicability."

(b) Except for the promulgation of interim rules pursuant to subsection (a) of this section, at least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

SECTION 11. Section 343-7, Hawaii Revised Statutes, is amended to read as follows:

"§343-7 **Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of an environmental assessment required under section 343-B or 343-5, or the lack of a supplemental environmental assessment or supplemental impact statement, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that an assessment, supplement, or statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within sixty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved. Affected agencies and persons who provided written comment to the assessment during the designated review period shall be judged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-B or 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of [~~such~~] the statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to [~~such~~] the statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment."

SECTION 12. Section 353-16.35, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Notwithstanding any other law to the contrary, the governor, with the assistance of the director, may negotiate with any person for the development or expansion of private in-state correctional facilities or public in-state turnkey correctional facilities to reduce prison overcrowding; provided that if an environmental assessment or environmental impact statement is required for a proposed site or for the expansion of an existing correctional facility under section 343-B or 343-5, then notwithstanding the time periods specified for public review and comments under section 343-5, the governor shall accept public comments for a period of sixty days following public notification of either an environmental assessment or an environmental impact statement."

PART III.

SECTION 13. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date, and does not affect the rights and duties related to any environmental assessment or environmental impact statement for which a draft has been prepared and public notice thereof published by the office before the effective date of the act.

SECTION 14. In codifying the new sections added by section 1 and section 5 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 15. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 16. This Act shall take effect on July 1, 2012.

INTRODUCED BY: ____________________________

H.B. NO.

Report Title:

Environmental Protection

Description:

Transfers the office of environmental quality control and the environmental council from the department of health to the department of land and natural resources. Reduces the membership of the environmental council from 15 to 7. Requires the director of the office of environmental quality control to seek advice from and assist the council on environmental quality matters and to perform environmental outreach and education. Requires the office of environmental quality control to maintain an electronic communication system. Delegates all rulemaking authority to the environmental council. Requires the director of the office of environmental quality control to prepare an annual report assessing system effectiveness. Requires the environmental council to serve in advisory capacity to the governor. Creates the environmental review special fund. Directs the director of the office of environmental quality control to establish reasonable administrative fees for the environmental review process.

Requires an environmental review for actions that require a discretionary approval. Excludes actions solely for utility or right-of-way connections from environmental assessment requirement. Prescribes what types of activities have a significant effect on the environment. Requires agencies to prepare a record of decision and monitor mitigation measures. Allows agencies to extend notice and comment periods. Directs the environmental council to adopt rules for: (1) Determining significant effects; (2) Responding to repetitious comments; (3) preparing programmatic and tiered reviews; (4) Prescribing conditions under which supplemental assessments and statements must be prepared; and (5) Establishing procedures for state and county agencies to maintain guidance lists of approvals that are a) discretionary and require review, (b) ministerial and do not require review, and (c) those actions to be determined on a case-by-case basis.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

Appendix 4. Full Statutory Versions of Chapter 341 and Chapter 343 with Footnotes

Chapter 341 - Environmental Quality Control.[9]

HRS § 341-1 - Findings and purpose. The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

The purpose of this chapter is to stimulate, expand and coordinate efforts to determine and maintain the optimum quality of the environment of the State.

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[9] One major type of stylistic amendment not discussed in the report but considered desirable would be to rewrite Sections 343-5(b) and (c) to consolidate the duplicative sections in the applicant and agency action sections, then indicate in another section the distinctive language. For clarity and ease of reference, these sections could also be numbered separately from the trigger section 343-5(a). Currently § 343-5 is long, duplicative, and rambling. This kind of stylistic change may, however, cause some confusion and should be done only after the substantive changes are finalized and after an assessment of whether the reordering would, on balance, aid or hinder clarity for those involved in the environmental review system. Other stylistic amendments are suggested to modernize language or improve the organization of the statute.

HRS § 341-2 - Definitions. As used in this chapter, unless the context otherwise requires:

"Center" means the University of Hawaii [~~ecology or~~][10] environmental center established in section 304A-1551.

"Council" means the environmental council established in section 341-3(C).

"Director" means the director <u>of the office</u>[11] of environmental quality control.

"Office" means the office of environmental quality control established in section 341-3(A).

"University" means the University of Hawaii.

HRS § 341-3 - Office of environmental quality control; environmental center; environmental council. (a) There is created an office of environmental quality control that shall be headed by a single executive to be known as the director of <u>the office of</u>[12] environmental quality control who shall be appointed by the governor as provided in section 26-34. This office shall implement this chapter and shall be placed within the department of [~~health~~] <u>land and</u>

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[10] Deletes "ecology" as duplicative, archaic, and uses actual name of center.

[11] Minor housekeeping change for consistency with other sections of the statute.

[12] Housekeeping change for consistency.

natural resources,[13] for administrative purposes. The office shall perform [~~its~~] the duties prescribed to it under chapter 343 [~~and shall serve the governor in an advisory capacity on all matters relating to environmental quality control~~][14].

(b) The environmental center within the University of Hawaii shall be as established under section [~~[~~]304A-1551[~~]~~].[15]

(c) There is created an environmental council not to exceed [~~fifteen~~] seven[16] members. [~~Except for the director, members~~] The council shall include one member from each county and no more than three at-large members. The director may not serve as a member of the council.[17]

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[13] See Rec. 4.2.1.b. Because of the steep decline in financial and staff support for the council and the office over the past several years, OEQC should be moved from the Department of Health to another agency that is more aligned with and supportive of its mission. DLNR is the best option because of its environmental protection mission and expertise in natural resources.

[14] See Rec. 4.2.1.a. Under these amendments, the Council, not the office, is the point of contact for advising the Governor. The office would directly support the Council in its advisory role.

[15] Note that the UH Environmental Center is no longer in Chapter 341 but moved to HRS § 304A-1551 (in 2006) because it is a unit of the University; this was part of a legislative recognition and shift toward autonomy for the University. While recognizing the University's autonomy, the study believes the center plays a valuable role in the environmental review process and urges the University to support the Center.

[16] See Rec. 4.2.1.a.

[17] See Rec. 4.2.1.a.

Members[18] of the environmental council shall be appointed by the governor, as provided in section 26-34, provided that two of the seven members shall be appointed from a list of persons nominated by the speaker of the house of representatives and two members shall be appointed from a list of persons nominated by the senate president[19]. The council shall be attached to the [~~department of health~~] office[20] for administrative purposes[21]. [~~Except for the director, the~~] The term of each member shall be four years; provided that, of the members initially appointed, [~~five~~] three members shall serve for four years, [~~five~~] two members shall serve for three years, and the remaining [~~four~~] two members shall serve for two years. Vacancies shall be filled for the remainder of any unexpired term in the same manner as original appointments. [~~The director~~

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18 See Rec. 4.2.1.a. This change streamlines the Council membership from fifteen to seven, and reduces overall costs, by reducing the number of members while still maintaining statewide representation. Explicitly attaches the Council to OEQC to clarify that it does not report to the Deputy Director of DOH and can receive support from OEQC, which is currently not the case (according to DOH).

19 See Rec. 4.2.1.a. This amendment ensures that the Council is an independent body from the Governor's office and provides input from the House and Senate on four of the seven members. This split nomination process is based on similar procedures in other Hawaii statutes, such as HRS § 6E-44 (Veterans Memorial Commission).

20 See Rec. 4.2.1.a.

21 "For administrative purposes" (in existing law) should mean for line item, fiscal, and staff support, not for control over the substance of the Council's work.

~~shall be an ex officio voting member of the council.~~][22] The council chairperson shall be elected by the council from among the [~~appointed~~][23] members of the council.

Members shall be appointed to [~~assure~~] ensure a broad and balanced representation of educational, business, and environmentally pertinent disciplines and professions[~~, such as the natural and social sciences, the humanities, architecture, engineering, environmental consulting, public health, and planning; educational and research institutions with environmental competence; agriculture, real estate, visitor industry, construction, media, and voluntary community and environmental groups~~].**[24]** The members of the council shall serve without compensation but shall be reimbursed for expenses, including travel expenses,

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[22] See Rec. 4.2.1.a. This amendment recognizes the Council's clarified role as an independent advisor to the Governor, and that OEQC staffs but does not direct the Council; the Director should no longer be a member of the Council (similar to the Land Use Commission, where the Executive Director is not on the LUC).

[23] See Rec. 4.2.1.a. Same purpose as noted above, to ensure independence.

[24] See Rec. 4.2.1.a. Representativeness of Council members is desirable but given the reduced size of the Council, a strict and detailed list of categories does not make sense; the prior sentence already directs representativeness. The Governor's nomination process, the Senate and House nomination lists, and the Senate's confirmation role is an adequate check on the quality and diversity of the Council appointments by the Governor.

incurred in the discharge of their duties.

HRS § 341-4 - Powers and duties of the director[25]

(a) The director shall have [~~such~~] powers delegated by the governor as are necessary to coordinate and, when requested by the governor, to direct, pursuant to chapter 91, all state governmental agencies in matters concerning environmental quality.

(b) To further the objective of subsection (a), the director shall:

(1) [~~Direct~~] Through the council,[26] direct the attention of [~~the university community~~] state agencies and the residents of the State [~~in general~~] to [~~ecological and~~] environmental problems [~~through~~], in cooperation with the center [~~and the council, respectively, and through public education programs~~];

(2) Conduct research or arrange for [~~the conduct of~~] research through contractual relations with the center, state agencies, or other persons with competence in [~~the field of ecology and~~] environmental quality;

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[25] Adopted LRB's proposed language and structure for this section.

[26] See Rec. 4.2.1.a.

(3) [~~Encourage~~] Through the council,[27] encourage public acceptance of proposed legislative and administrative actions concerning [~~ecology and~~] environmental quality, and receive notice of any private or public complaints concerning [~~ecology and~~] environmental quality [~~through the council~~];

(4) Recommend to the council[28] programs for long-range implementation of environmental quality control;

(5) Submit [~~direct~~] to the council[29] for its review and recommendation to the governor [~~and to the legislature such~~] legislative bills and administrative policies, objectives, and actions, as are necessary to preserve and enhance the environmental quality of the State;

(6) Conduct regular outreach and training[30] for state and county agencies on the environmental review process and conduct other public educational programs; [~~and~~]

(7) Offer advice and assistance to private industry, governmental agencies, non-governmental

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[27] See Rec. 4.2.1.a.

[28] See Rec. 4.2.1.a.

[29] See Rec. 4.2.1.a.

[30] See Rec. 4.2.2.a.

organizations, state residents,[31] or other persons upon request[~~.~~];

(8) Obtain advice from the environmental council[32] on any matters concerning environmental quality;

(9) Perform budgeting and hiring in a manner that ensures adequate funding and staff support for the council[33] to carry out its duties under this chapter and chapter 343; and

(10) With the cooperation of private industry, governmental agencies, non-governmental organizations, state residents, and other interested persons in fulfilling the requirements of this subsection, conduct annual statewide workshops and publish an annual state environmental review guidebook or supplement to assist persons in complying with this chapter, chapter 343, and administrative rules adopted thereunder; provided that workshops, guidebooks, and supplements shall include:[34]

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[31] See Rec. 4.2.2.a.

[32] See Rec. 4.2.1.a.

[33] See Rec. 4.2.1.a.

[34] See Rec. 4.2.2.a.

(A) Assistance for the preparation, processing, and review of environmental review documents;

(B) Review of relevant court decisions affecting this chapter, chapter 343, and administrative rules adopted thereunder;

(C) Review of amendments to this chapter, chapter 343, other relevant laws, and administrative rules adopted thereunder; and

(D) Any other information that may facilitate the efficient implementation of this chapter, chapter 343, and administrative rules adopted thereunder.

(c) [~~The director shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter.~~] To facilitate agency and public participation in the review process, the office shall create and maintain an electronic communication system, such as a website, to meet best practices of environmental review, as determined by the director.[35]

§341-4.A Annual report.[36] No later than January 31 of each year, at the direction of the council, the director

[35] See Rec. 4.2.2.b.

[36] See Rec. 4.2.2.a.

shall prepare a report that analyzes the effectiveness of the State's environmental review system during the prior year. The report shall include an assessment of a sample of environmental assessments and environmental impact statements for completed projects.

At the request of the director or the council, state and county agencies shall provide information to assist in the preparation of the annual report.

HRS § 341-5 - Repealed

HRS § 341-6 - [~~Functions~~] Duties of the environmental council[37]

(a) The council shall [~~serve~~]:

(1) Serve the governor in an advisory capacity on all matters relating to environmental quality[38];

(2) Serve as a liaison between the [~~director~~] governor[39] and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning [~~ecology and~~] environmental quality through public hearings or any other means and by publicizing

[37] Adopted LRB's proposed structure and format for revisions to this section.

[38] See Rec. 4.2.1.a.

[39] See Rec. 4.2.1.a.

[~~such~~] these matters as requested by the [~~director pursuant to section 341-4(b)(3).~~] governor[40]; and

(3) Meet at the call of the council chairperson or the governor[41] upon notice to the council chairperson.

(b) The council may make recommendations concerning [~~ecology and~~] environmental quality to the [~~director~~] governor[42] [~~and shall meet at the call of the council chairperson or the director upon notifying the council chairperson~~].

(c) The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies [~~and~~]. No later than January 31 of each year, the council, with the assistance of the director, shall make an annual report[43] with

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[40] See Rec. 4.2.1.a.

[41] See Rec. 4.2.1.a.

[42] See Rec. 4.2.1.a.

[43] See Rec. 4.2.2. The existing annual report responsibility of the council would be in addition to the other annual report proposed above. For both reports, the responsibilities for the annual report are vested in the Council, but the staff and liaison work is provided by the office. The reports could be combined. The study believes that the newer report (on how the system is working) is more valuable than the currently required report (on general state environmental quality). If both can be supported, that would be helpful. If only one is desired, than the newer type of report is preferred as being more useful to the stakeholders of the review system, the Governor, and the Legislature.

recommendations for improvement to the governor, the legislature, and the public [~~no later than January 31 of each year~~]. [~~All~~] At the request of the council, state and county agencies shall [~~cooperate with the council and~~] provide information to assist in the preparation of [~~such a~~] the report [~~by responding to requests for information made by the council~~]. The council may combine its annual report with the annual report prepared by the director pursuant to section 341-A.[44]

(d) The council may delegate to any person [~~such~~] the power or authority vested in the council as it deems reasonable and proper for the effective administration of this section and chapter 343, except the power to make, amend, or repeal rules.

(e) The council shall adopt rules pursuant to chapter 91 necessary for the purposes of implementing this chapter and chapter 343.[45]

§341-B Environmental review special fund; use of funds.[46]

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[44] See Rec. 4.2.2.a.

[45] See Rec. 4.2.1.a.

[46] See Rec. 4.2.1.c.

(a) There is established in the state treasury the environmental review special fund, into which shall be deposited:

(1) All filing fees and other administrative fees collected by the office;

(2) All accrued interest from the special fund; and

(3) Moneys appropriated to the special fund by the legislature.

(b) Moneys in the environmental review special fund shall be supplemental to, and not a replacement for, the office budget base[47] and be used to:

(1) Fund the activities of the office and the council in fulfillment of their duties pursuant to this chapter and chapter 343, including administrative and office expenses; and

(2) Support outreach, training, education, and research programs pursuant to section 341-4.

§341-C Fees. The director shall adopt rules, pursuant to chapter 91, that establish reasonable fees for filing, publication, and other administrative services of the office or council pursuant to this chapter and chapter 343.[48]

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[47] See Rec. 4.2.1.c.

[48] See Rec. 4.2.1.c.

[Note: Additional Provisions in the proposed bill:]

SECTION 2. All rules, policies, procedures, orders, guidelines, and other material adopted, issued, or developed by the office of environmental quality control within the department of health to implement provisions of the Hawaii Revised Statutes shall remain in full force and effect until amended or repealed by the office of environmental quality control or the environmental council within the department of land and natural resources.[49]

SECTION 3. All appropriations, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the office of environmental quality control or the environmental council within the department of health relating to the functions transferred to the department of land and natural resources[50] shall be transferred with the functions to which they relate.

SECTION 4. All rights, powers, functions, and duties of the office of environmental quality control or the environmental council within the department of health are transferred to the office of environmental quality control

[49] See Rec. 4.2.1.b.

[50] See Rec. 4.2.1.b.

or the environmental council within the department of land and natural resources.[51]

All officers and employees whose functions are transferred by this Act shall be transferred with their functions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act.

No officer or employee of the State having tenure shall suffer any loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act, and such officer or employee may be transferred or appointed to a civil service position without the necessity of examination; provided that the officer or employee possesses the minimum qualifications for the position to which transferred or appointed; and provided that subsequent changes in status may be made pursuant to applicable civil service and compensation laws.

An officer or employee of the State who does not have tenure and who may be transferred or appointed to a civil service position as a consequence of this Act shall become a civil service employee without the loss of salary, seniority, prior service credit, vacation, sick leave, or

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[51] See Rec. 4.2.1.b.

other employee benefits or privileges and without the necessity of examination; provided that such officer or employee possesses the minimum qualifications for the position to which transferred or appointed.

If an office or position held by an officer or employee having tenure is abolished, the officer or employee shall not thereby be separated from public employment, but shall remain in the employment of the State with the same pay and classification and shall be transferred to some other office or position for which the officer or employee is eligible under the personnel laws of the State as determined by the head of the department or the governor.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2012.[52]

HRS Chapter 343

§343-1 Findings and purpose. The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have

[52] The effective date of 2012 is to facilitate an appropriate transition time for the changes proposed in the bill and for the transfer of functions, departments, and expanded duties of OEQC and the Council.

broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects that [~~which~~] may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

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

§343-2 Definitions. As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant[~~,~~] that:

(1) Is directly undertaken by any agency;

(2) Is supported in whole or in part by contracts, grants, subsidies, or loans from one or more agencies; or

(3) Involves the issuance to a person of a discretionary approval, such as a permit, by one or more agencies.[53]

The term "action" shall not include official acts of a ministerial nature that involve no exercise of discretion.[54]

"Agency" means any department, office, board, or commission of the state or county government that [~~which~~] is a part of the executive branch of that government.

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[53] See Rec. 4.1.1.a.

[54] See Rec. 4.1.1.a. This definition is derived from New York's State Environmental Quality Review (SEQR) law, 6 NYCRR § 617.2(w) ("Ministerial act means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license."); see also id. § 617.5(c)(19) (exempting from review "official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)").

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary approval [~~consent~~][55] required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Cumulative effects" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (county, state, or federal) takes those actions; cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.[56]

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55 This amendment is not intended to change the meaning, but to update the terminology, the same as the proposed amendment to "Discretionary consent," below.

56 See Rec. 4.1.1.b. & Rec. 4.4.3. This definition is added at the suggestion of LRB because of the amendment moving the "significance criteria" from the rules to the statute. This definition is derived from HAR § 11-200-2 (definition of "cumulative impact"), which is based on NEPA's CEQ Regulations, 40 C.F.R. § 1508.7 "Cumulative Impact." The term "cumulative effects" is used here instead of "cumulative impact," but there is not a distinction in Hawaii and NEPA between the terms "effect" and "impact"; see HAR § 11-200-2 ("effects" or "impacts" have the same meaning); "effect" is preferred here to keep the reference and abbreviation of this term distinct (as "CE" instead of "CI") from Hawaii's cultural impact analysis requirement (sometimes also called by the short hand "CI" or "CIA."

"Discretionary approval"[57] [~~consent~~] means an approval, consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial approval [~~consent~~].[58]

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and [~~which~~] that discloses the:

(1)[59] [~~environmental~~] Environmental effects of a proposed action~~,~~;

(2) [~~effects~~] Effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State~~,~~;

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[57] See Rec. 4.1.1.b. This amendment is not intended to change the meaning of this definition but to update the terminology in light of current environmental review practice; the term "discretionary approval" is more commonly used than "discretionary consent," which seems to be used only in Hawaii. See California's CEQA regulations, 14 Cal. Code Regs. Art. 20 (Definitions), § 15377 ("Private Project") and § 15381 ("Responsible Agency"). The term "consent" is maintained here as part of the definition for continuity with existing law and to indicate no change in the meaning.

[58] See prior note re updating terminology from "consent" to "approval."

[59] No substantive change intended; numbered for clarity at the suggestion of LRB.

(3) [~~effects~~] Effects of the economic activities arising out of the proposed action~~,~~;

(4) [~~measures~~] Measures proposed to minimize adverse effects~~,~~; and

(5) [~~alternatives~~] Alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement, which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Environmental review" refers broadly to the entire process prescribed by chapter 341 and this chapter, applicable to applicants, agencies, and the public, of scoping, reviewing, publishing, commenting on, finalizing, accepting, and appealing required documents such as environmental assessments and environmental impact statements; any variations of these documents such as preparation notices, findings of no significant impact, programmatic reviews,[60] and supplemental[61] documents; any

[60] See Rec. 4.1.2.

[61] See Rec. 4.5.2.

exemptions thereto; and any decisions not to prepare these documents.

"Finding of no significant impact" means a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

[~~"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.~~][62]

"Ministerial approval" means a governmental decision involving little or no personal judgment by the public official and involving only the use of fixed standards or objective measurements.[63]

"Office" means the office of environmental quality control.

"Permit" means a determination, order, or other documentation of approval, including the issuance of a

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[62] This definition is no longer necessary because the heliport trigger is removed from the statute under the discretionary approval approach. See Rec. 4.1.1.c.

[63] See Rec. 4.1.1.b. Defines "ministerial" to distinguish it more clearly from "discretionary." Definition derived from California's CEQA regulations 14 Cal. Code Regs. § 15369 ("Ministerial").

lease, license, permit, certificate, variance, approval, or other entitlement for use, granted to any person by an agency for an action.[64]

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Primary effect" or "direct effect" means effects that are caused by the action and occur at the same time and place.[65]

[~~"Power-generating facility" means:~~

~~(1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or~~

~~(2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.~~][66]

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[64] See Rec. 4.1.1.b. This clarifies the intent of the new discretionary approval approach by adding a definition of "permit," needed for clarity and cross-referencing with the ROD amendment, Rec. 4.4.1. The proposed definition is derived from Massachusetts's statute (MEPA), Mass. Gen. Laws Ch. 30 § 62 (Definitions).

[65] See Rec. 4.1.1.b. This definition is added at the suggestion of LRB, because of the amendment moving the "significance criteria" from the rules to the statute. The definition is derived from existing Council rules, HAR § 11-200-2 ("'Primary impact' or 'primary effect' or 'direct impact' or 'direct effect' means effects which are caused by the action and occur at the same time and place.").

[66] See Rec. 4.1.1.c. This specific trigger is no longer necessary if the discretionary approval approach is adopted.

"Program" means a systematic, connected, or concerted applicant or discretionary agency action to implement a specific policy, plan, or master plan.[67]

"Programmatic" means a comprehensive environmental review of a program, policy, plan or master plan.[68]

"Project" means an activity that may cause either a direct or indirect physical effect on the environment, such as construction or management activities located in a defined geographic area.[69]

[~~"Renewable energy facility" has the same meaning as defined in section 201N-1.~~][70]

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67 See Rec. 4.1.1.b. This definition is derived from the NEPA/CEQ Regulations, 40 C.F.R. § 1508.18(b)(4).

68 See Rec. 4.1.2. This new definition complements the new definition of "program" and seeks to encourage but not require, through an express definition, the practice of preparing programmatic environmental reviews, which are common at the federal level under NEPA, are familiar to Hawaii practitioners who work on NEPA documents, and often used in other states (see, e.g., California's CEQA regulations, 14 Regs. § 15168,"Program EIR"). Some "master plan" reviews are currently conducted in Hawaii, see, e.g., State Department of Transportation Oahu Commercial Harbors 2020 Master Plan EIS (Sept. 1999), but the term "programmatic" is not in common use. Programmatic reviews serve the purpose of "front loading" the review of environmental impacts at the broadest level and at the earliest practicable stage, better integrate environmental review with the planning process and decreasing the scope and burden for the later-tiered project-specific documents. See, e.g., California's CEQA regulations, 14 Cal. Code Regs. § 15168(b) (describing the advantages of a program EIR).

69 See Rec. 4.1.1.b. This definition is derived from California's CEQA regulations, 14 Cal. Code Regs. § 15257 ("Discretionary Project"), § 15369 ("Ministerial"), and § 15378 ("Project") ("'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .").

70 See Rec. 4.1.1.c. This specific trigger definition is no longer necessary if the discretionary approval approach is adopted.

"Secondary effects" or "indirect effect" means effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air, water, and other natural systems, including ecosystems.[71]

"Significant effect" means the sum of effects on the quality of the environment[~~, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State~~].[72]

"Tiering" means the incorporation by reference in a project-specific environmental assessment or environmental

[71] See Rec. 4.4.3. This definition is added at the suggestion of LRB, because of the amendment moving the "significance criteria" from the rules to the statute. The definition is derived from existing Council rules, HAR § 11-200-2 ("Secondary impact" or "secondary effect" or "indirect impact" or "indirect effect" means [definition continues as indicated in the proposed rule].)"

[72] See Rec. 4.1.4. This proposed deletion does *not* signify a change in intent or meaning; rather, *assuming* that the significant criteria, which are currently in the rules, *are added* to the statute (see below), this long definition becomes duplicative here.

impact statement to a previously conducted programmatic environmental assessment or environmental impact statement for the purposes of showing the connections between the project-specific document and the earlier programmatic review, avoiding unnecessary duplication, and concentrating the analysis on the project-specific issues that were not previously reviewed in detail at the programmatic level.[73]

~~["Wastewater treatment unit" means any plant or facility used in the treatment of wastewater.]~~[74]

[73] See Rec. 4.1.2. This definition of "tiering" is a twin to the definition of "programmatic." Tiering a project-specific EA (or EIS) "into" a previously prepared programmatic EA (or EIS) can be very efficient (particularly for private applicants) because it reduces the size and scope of the later-prepared document (typically prepared by agencies). The tiered EA/EIS can be more narrowly focused on the project specific issues and incorporate (that is, refer to) but no duplicate the broader reviews to the earlier document. Definition does not have a specific source. The CEQ definition of "tiering" is: "refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:
(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis or lesser scope or to a site-specific statement or analysis.
(b) From an environmental impact statement on a specific action at an early state (such as need or site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."). 40 C.F.R. § 508.28.

[74] See Rec. 4.1.1.c. This specific trigger definition is no longer necessary if discretionary approval review is adopted.

§343-3 Public participation,[75] records, and notice.

(a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public at minimum through the electronic communication system maintained by the office[76] and, if specifically requested due to lack of electronic access, also through printed copies available through the office ~~during established office hours.~~[77]

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

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[75] See Rec. 4.3.1.a. This amendment emphasizes the importance of "public participation," as opposed to mere "notice." This heading change and the addition of a general policy goal, below, should encourage agencies to facilitate public involvement throughout the environmental review process, which is a stated goal of Chapter 343 (see § 343-1 Findings and purpose: "public participation during the review process benefits all parties involved and society as a whole").

[76] See Rec. 4.2.2.b.

[77] See Rec. 4.2.2.b. This proposed amendment is not a significant change and merely reflects the proposed change to § 341-4 that supports the important existing practice of OEQC to make documents easily available through the electronic means such as the web site. The existing term "office hours" is fairly archaic given modern technology but is not deleted because some access to documents still needs to be in person.

(1) A public comment process or public hearing if a state or[78] federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the state or federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and

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[78] This proposed amendment is housekeeping and does not represent a significant change in the law that added this original provision. It clarifies that similar notice of state hearings is also provided for such actions under the authority of the *state* ESA, which is already expressly noted in H.R.S. Chapter 195D-4(i), which provides that DLNR "shall work cooperatively with federal agencies in concurrently processing habitat conservation plans, safe harbor agreements, and incidental take licenses pursuant to the Endangered Species Act. After notice in the periodic bulletin of the office of environmental quality control and a public hearing on the islands affected, which shall be held jointly with the federal agency, if feasible, whenever a landowner seeks both a federal and a state safe harbor agreement, habitat conservation plan, or incidental take license, the board, by a two-thirds majority vote, may approve the federal agreement, plan, or license without requiring a separate state agreement, plan, or license if the federal agreement, plan, or license satisfies, or is amended to satisfy, all the criteria of this chapter."

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office, [~~and~~] public libraries, and in electronic format.[79]

(e) At the earliest practicable time[80], applicants and the relevant agencies shall:

(1) Provide notice to the public and to state and county agencies that an action is subject to review under this chapter; and

(2) Encourage and facilitate public involvement throughout the environmental review process as provided for in this chapter, chapter 341, and the relevant administrative rules.[81]

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[79] See Rec. 4.2.2.b. This proposed amendment merely reflects the proposed change to § 341-4 that supports and emphasizes the important existing practice of OEQC to make documents easily available through the electronic means such as the web site.

[80] The "earliest practicable time" language is derived from HRS § 343-5(b) and (c), and the Council rules; see, e.g., HAR § 11-200-5.

[81] See Rec. 4.3.1.a. This amendment emphasizes the obligation of agencies and applicants to actively engage the public in the review process.

§343-4 REPEALED. L 1983, c 140, §7.

§343-A[82] **Significance criteria.**[83] (a) In determining whether a proposed action may have a significant adverse[84] effect on the environment, an agency shall consider:

(1) Every phase of the proposed action;

(2) Expected primary and secondary[85] effects of the proposed action; and

(3) The overall and cumulative[86] effects of the proposed action, including short-term and long-term effects.

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82 Temporarily renumbered 343-A in format suggested by LRB for HB.

83 See Rec. 4.1.4. This new section pulls the "significance criteria" from the administrative rules, H.A.R. § 11-200-12, and (with a few modifications) places them directly in the statute for clarity. These criteria have withstood the test of time, are well accepted, and have not been controversial. Putting them in the statute makes chapter 343 more clear and comprehensive. The only aspects of the proposed modifications to this criteria, which may be controversial, are: (1) the addition of the term "adversely" in several places, however this term is already in the statutory definition of "significance" and is meant to narrow the application of the statute and avoid review of environmentally beneficial projects, (2) the addition of greenhouse gas emissions to subsection (13), which now addresses energy consumption; and (3) the addition of subsection (14), which adds language focusing on climate-change hazards that are amplified by a project.

84 See Rec. 4.1.4.. The term "adverse" is added here and in other subsections to narrow the range of actions covered by chapter 343 to those with the most negative impacts. This would reduce review of projects that have a beneficial environmental impact. Some effects, however, will be viewed by some as beneficial and by others as adverse; in such cases, it would be up to the earliest agency review to make the judgment call on this line-drawing, in the overall context of the action.

85 See Rec. 4.4.3.

86 See Rec. 4.4.3.

(b) A proposed action shall be determined to have a significant effect on the environment if it:

(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;

(2) Curtails the range of beneficial uses of the environment;

(3) Conflicts with the State's long-term environmental policies, guidelines, or goals, as expressed in chapter 344, and any revisions thereof and amendments thereto, court decisions, or executive orders;

(4) Substantially adversely[87] affects the economic welfare, social welfare, or cultural practices of the community or State;

(5) Substantially adversely[88] affects public health;

(6) Involves substantial adverse secondary[89] impacts, such as population changes or effects on public facilities;

(7) Involves a substantial degradation of environmental quality;

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[87] See Rec. 4.1.4.

[88] See Rec. 4.1.4.

[89] See Rec. 4.4.3.

(8) Is individually limited but cumulatively[90] has considerable adverse[91] effect upon the environment or involves a commitment to related or future actions;

(9) Substantially adversely affects a rare, threatened, or endangered species or its habitat;

(10) Detrimentally affects air or water quality or ambient noise levels;

(11) Affects or is likely to suffer present or future damage by being located in an environmentally sensitive area, such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Substantially adversely[92] affects scenic vistas and viewplanes identified in county or state plans or studies;

(13) Requires substantial energy consumption or emits substantial quantities of greenhouse gases[93]; or

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[90] See Rec. 4.4.3.

[91] See Rec. 4.1.4.

[92] See Rec. 4.1.4.

[93] See Rec. 4.1.4. & Rec. 4.4.2. This amendment adds greenhouse gas emissions to the significance criteria alongside the existing criteria of "energy consumption." The policy basis for this addition includes Act 234 (2007), which stated a state policy of 1990-level of greenhouse

(14) Increases the scope or intensity of natural hazards to the public, such as increased coastal inundation, flooding, or erosion that may occur as a result of climate change anticipated during the lifetime of the project.[94]

(c) The director of the office of environmental quality control shall provide guidance to agencies on the application of this section.[95]

§343-B[96] Applicability. Except as otherwise provided, an environmental assessment shall be required for actions that require discretionary approval from an agency and that

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gas emissions by 2020. For example, if an agency were reviewing a proposed landfill that emitted methane, the agency would consider the emission of greenhouse gases from the project as among the criteria that would move the review from the EA to the EIS phase. The interpretation of the term "substantial" can be assisted through the development of guidance from OEQC. The threshold will be determined over time from experience with various project reviews.

[94] See Rec. 4.1.4. & Rec. 4.4.2. This amendment adds a new section addressing the potential amplification of project-created public hazards that are related to anticipated climate change impacts during the lifetime of the project. For example, with the prospect of sea-level rise from climate change, areas subject to likely future inundation would be considered potentially significant; a project proposing to locate vital public infrastructure in such an area might be required to move to the EIS phase.

[95] See Rec. 4.1.4.

[96] In the proposed House Bill, this is temporarily numbered section 343-B Applicability.

may have a probable, significant, and adverse[97] environmental effect,[98] including:

(1) Any new county general or development plans or amendments to existing county general or development plans; or

(2) Any reclassification of any land classified as a conservation district or important agricultural lands.[99]

(b) Notwithstanding any other provision, the use of land solely for connection to utilities or rights-of-way shall not require an environmental assessment or an environmental impact statement.[100]

§343-5 [~~Applicability and~~] Agency and applicant requirements. [~~(a) Except as otherwise provided, an environmental assessment shall be required for actions that:~~][101]

[97] See Rec. 4.1.4.

[98] See Rec. 4.1.1.a.

[99] See Rec. 4.1.1.a.

[100] See Rec. 4.1.1.a. & Rec. 4.1.3. This proposed amendment seeks to resolve a major current controversy over small projects getting unfairly "trapped" in the environmental review system by clarifying that use of land solely for utility connections or uses of rights-of-way are not covered by the EA requirement.

[101] See Rec. 4.1.1.c. The long list of triggers is no longer needed under a discretionary approval approach.

~~(1)~~ ~~Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);~~

~~(2)~~ ~~Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(3)~~ ~~Propose any use within a shoreline area as defined in section 205A-41;~~

~~(4)~~ ~~Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;~~

~~(5) Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";~~

~~(6) Propose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county;~~

~~(7) Propose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:~~

~~(A) Any land classified as a conservation district by the state land use commission under chapter 205;~~

~~(B) A shoreline area as defined in section 205A-41; or~~

~~(C)~~ ~~Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and~~

~~(9)~~ ~~Propose any:~~

~~(A)~~ ~~Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;~~

~~(B)~~ ~~Waste-to-energy facility;~~

~~(C)~~ ~~Landfill;~~

~~(D)~~ ~~Oil refinery; or~~

~~(E)~~ ~~Power-generating facility.~~]

[~~(b)~~] <u>(a)</u>[102] Whenever an agency proposes an action in [~~subsection (a), other than feasibility or planning~~

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[102] This amendment breaks § 343-5 into two subsections for clarity.

~~studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6,~~] section 343-B,[103] the agency shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment,[104] for [~~such~~] the action at the earliest practicable time to determine whether an environmental impact statement shall be required[~~.~~]; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties.[105]

(1) For environmental assessments for which a finding of no significant impact is anticipated:

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103 See Rec. 4.1.1.a.

104 See Rec. 4.1.2.

105 See Rec. 4.5.1. To improve efficiency, this amendment allows an agency or applicant to go "straight to the EIS" and avoid the duplicative EA process in situations where the significance of the impacts is evident from the beginning of the review process.

(A) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(B) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;

(C) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;

(D) A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment; and

(E) The agency shall file notice of [~~such~~] the determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(2) The final authority to accept a final statement shall rest with:

(A) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds, or whenever a state agency proposes an action within the categories in subsection (a); or

(B) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

[~~(c)~~] (b) Whenever an applicant proposes an action specified by [~~subsection (a)~~] section 343-B that requires approval of an agency and that is not a specific type of action declared exempt under that section or section 343-6, the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment, or, based on its discretion, may choose to prepare for a program, a programmatic environmental assessment,[106] of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience[107],

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[106] See Rec. 4.1.2. Same as above for agency applicants.

[107] See Rec. 4.5.1.

that an environmental impact statement is likely to be required, then the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement following adequate notice to the public and all interested parties[~~; provided further that, for an action that proposes the establishment of a renewable energy facility, a draft environmental impact statement shall be prepared at the earliest practicable time~~][108]. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

(1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;

(2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and

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[108] Proposed for deletion; while desirable, a general "earliest practicable time" requirement is already in the statute for agency and applicant actions, HRS § 343-5(b) and (c), and in the rules, see HAR § 11-200-5 and § 11-200-9(A)(1) and -9(B)(1); singling out renewable energy facilities does not seem necessary; the goal of allowing these kinds of projects to start with the draft EIS, instead of having to go through a potentially duplicative EA step, would be met by the proposed amendment allowing agencies to use their discretion to "go direct" to the EIS for all types of projects.

(3) The applicant shall respond in writing to comments received during the review, and the agency shall prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

[~~(d)~~] (c) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of preparing the environmental assessment, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency shall prepare the assessment.

[~~(c)~~] (d) In preparing an environmental [~~assessment~~] review document,[109] an agency or applicant may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous [~~determinations of whether a statement is required and previously accepted statements~~] review documents.[110] The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

[~~(f)~~] (e) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

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109 This amendment clarifies that the practice of "incorporation by reference" should apply to both EAs and EISs.

110 See Rec. 4.1.2. (programmatic). Clarifies the intent and streamlines the language.

(f) Upon receipt of a timely written request and good cause shown, a lead agency, approving agency, or accepting authority may extend a public review and comment period required under this section one time only, up to fifteen days. To be considered a timely request, the request for an extension shall be made before the end of the public review and comment period. An extension of a public review and comment period shall be communicated by the lead agency in a timely manner to all interested parties.[111]

(g) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action, other than a supplement to that statement,[112] shall be required.

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111 See Rec. 4.3.1.b.

112 See Rec. 4.5.2. This amendment clarifies that this section does not conflict with the requirement in the existing HAR for "supplemental statements," H.A.R. § 11-200-26 & -27. The meaning of this section as it relates to supplemental EISs is currently a controversial issue before the Hawaii Supreme Court in the Turtle Bay case, argued on Dec. 17, 2009. The proposed amendment should *not* be construed by anyone, including a party or amicus to the Turtle Bay lawsuit or the media or public, to mean that the study believes that the current statute does not support the rules that require supplemental environmental assessments or supplemental impact statements. The position of the study is that, as with NEPA, the statute need not expressly mention supplemental EAs or EISs for such documents to be legally required by the Environmental Council rules. However, this proposed amendment would be a helpful clarification of legislative intent for the future.

§343-C[113] **Record of decision**[114]**; mitigation**[115]**.** (a) At the time of the acceptance or nonacceptance of a final statement, the accepting authority or agency shall prepare a concise public record of decision that:

(1) States its decision;

(2) Identifies all alternatives considered by the accepting authority or agency in reaching its decision, including:

(A) Alternatives that were considered to be environmentally preferable; and

(B) Preferences among those alternatives based on relevant factors, including economic and technical considerations and agency statutory mission; and

(3) States whether all practicable means to avoid or minimize environmental harm from the alternative

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[113] This adopts the temporary numbering proposed by LRB in the HB.

[114] See Rec. 4.4.1. Records of Decision (RODs) are required under the NEPA regulations, 40 C.F.R. § 1505.2. RODs, which are usually only a few pages long, serve to clarify the end-result of the environmental review process and provide a concise summary of the agency's decision, including the selection of the preferred alternative and the proposed mitigation measures. This language is based on CEQ regulations, 40 C.F.R. §§ 1505.2 and 1505.3.

[115] See Rec. 4.4.1. Concerns about the lack of specificity of mitigation and the lack of post-review enforceability were frequently raised by stakeholders in the study review. The ROD requirement largely enforces what agencies already do, that is, incorporate mitigation measures into the substantive permitting process, but makes this a clearer requirement and transparent process.

selected have been adopted and, if not, why they were not adopted.

(b) Agencies shall provide for monitoring to ensure that their decisions are carried out and that any other conditions established in the environmental impact statement or during its review and committed as part of the accepting authority or agency's decision are implemented by the lead agency or other appropriate agency. Where applicable, a lead agency shall:

(1) Include conditions on grants, permits, or other approvals to ensure mitigation;

(2) Condition the funding of actions on mitigation; and

(3) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures that they proposed during the environmental review process and that were adopted by the accepting authority or agency in making its decision.

(c) Results of monitoring pursuant to this section shall be made available periodically to the public through the bulletin.[116]

[116] Added language "periodically through the bulletin" so agencies will pro-actively provide the information to the public, as opposed to only provide the information when asked; the frequency ("periodically") is

§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. Any such rules may be issued as interim rules by adoption and filing with the lieutenant governor, and by posting the interim rules on the lieutenant governor's website. Interim rules adopted pursuant to this Act shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91 and the requirements of chapter 201M, Hawaii Revised Statutes, and shall take effect upon filing with the lieutenant governor. All interim rules adopted pursuant to this section shall be effective only through June 30, 2014. For any new or expanded programs, services, or benefits that have been implemented under interim rules to continue in effect beyond June 30, 2014, the environmental council shall adopt rules in conformance with all the requirements of chapter 91 and chapter 201M, Hawaii Revised Statutes. Such rules shall include but not be limited to rules that shall[117] [~~in~~

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up the agency's sound discretion and will depend greatly on the nature of the project and mitigation required.

[117] Expedite interim rulemaking authority is authorized to ensure that appropriate temporary rules are in place to effectuate legislative intent without unnecessary delay.

~~accordance with chapter 91 including, but not limited to, rules that shall~~]:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment, and ensuring that the declaration is simultaneously transmitted electronically to the office and is readily available as a public record in a searchable electronic database[118];

(3) Prescribe procedures for the preparation of an environmental assessment;

(4) Prescribe the contents of, and page limits for,[119] an environmental assessment;

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118 See Rec. 4.1.5 & Rec. 4.2.2.b. This amendment addresses a major gap in the existing system of declarations by agencies, which is their timely transmission to OEQC and timely (and searchable) accessibility to the public, other agencies, and all stakeholders. This amendment requires the Council to create an efficient system for addressing this problem. An electronic database of declarations would substantially improve the long-term efficiency of the exemptions list and declaration process.

119 See Rec. 4.4.4.

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of, and page limits for,[120] an environmental impact statement;

(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;

(8) Establish criteria to determine whether an environmental impact statement is acceptable or not;

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council[~~.~~];

(10) Prescribe procedures, including use of electronic technology for the comment and response process,

[120] See Rec. 4.4.4.

including procedures for issuing one comprehensive response to multiple or repetitious comments that are substantially similar in content;[121]

(11) Prescribe procedures for implementing the requirement for records of decision, monitoring, and mitigation[122];

(12) Develop guidance for the application and interpretation of the significance criteria under chapter 343-A[123];

(13) Prescribe procedures and guidance for the preparation of programmatic environmental assessments or impact statements and the tiering

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[121] See Rec. 4.2.2.b. & Rec. 4.3.2. This amendment addresses the issue of repetitious, voluminous comments by making clear the legislative intent to allow a consolidated response by leaving the details to the council to make rules.

[122] This section is recommended by the LRB and requires the Council to write supporting rules for the proposed ROD, monitoring, and mitigation requirements (see proposed § 343-C in HB), which are new concepts for Hawaii law but familiar to stakeholders of the federal NEPA process and some other states. See, e.g., California's CEQA statute, Cal. Pub. Res. Code § 21081 (requiring "findings" that minimize impacts).

[123] See Rec. 4.4.2. The interviews indicated significant concern that the criteria for significance are vague and that this requires more guidance from OEQC; OEQC has experience with these issues but there is not sufficient useful guidance; this amendment will require the preparation of the necessary guidance that will help all stakeholders.

of project-specific environmental assessments or impact statements[124];

(14) Prescribe:

(A) Procedures for the applicability, preparation, acceptance, and publication of supplemental environmental assessments and supplemental environmental impact statements when there are substantial changes in the proposed action or significant new circumstances or information relevant to environment effects and bearing on the proposed action and its impacts;[125]

(B) Procedures for limiting the duration of the validity of environmental assessments and environmental impact statements, or if an environmental assessment led to the preparation of an environmental impact statement, then of the later-prepared statement, to seven years or less from the date of acceptance of the document until all

[124] See Rec. 4.1.2. This amendment requires the Council to provide support through the rules for the practice of programmatic and tiered EAs and EISs.

[125] See Rec. 4.5.2.

state and county discretionary approvals are fully completed for the action;[126] and

(C) Procedures for an agency or applicant to seek a timely determination from the council that a prior environmental assessment or environmental impact statement contains sufficiently current information such that a supplemental document is not warranted despite the passage of the prescribed time period;[127] and

(15) To provide guidance to agencies and applicants about the applicability of the environmental review system, establish procedures whereby each state and county agency shall maintain lists of (a) specific types of discretionary approvals that may have probable, significant, and adverse[128] environmental effects, (b) ministerial actions that do not require environmental review,

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126 See Rec. 4.5.2.

127 See Rec. 4.5.2. This amendment clarifies that the Council has authority for its rules regarding "supplemental statements," clarifying that this applies to EAs as well as EISs. (See H.A.R. § 11-200-26 & -27.) See explanation, supra note 108. Part of the proposed language (from "when there are" on) is derived from the CEQ regulations, 40 C.F.R. § 1502.9 ("Draft, final, and supplemental statements"), subsection (c)(1)(i) and (ii).

128 See Rec. 4.1.1.d.

and (c) those actions that require a case-by-case determination of applicability.[129]

(b) Except for the promulgation of interim rules pursuant to subsection (a) of this section, a[~~A~~]t least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

[§343-6.5] Waiahole water system; exemption. The purchase of the assets of the Waiahole water system shall be specifically exempt from the requirements of chapter 343.

§343-7 Limitation of actions. (a) Any judicial proceeding, the subject of which is the lack of an environmental[130] assessment required under section 343-B or 343-5, or the lack of a supplemental environmental assessment or supplemental impact statement[131], shall be initiated within one hundred twenty days of the agency's

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[129] See Rec. 4.1.1.d. Guidance will provide clarity and certainty as agencies transition from the trigger system to the discretionary approval screen. This screening by list approach is similar to that used in New York.

[130] This is a technical amendment for clarification to make phrasing consistent with the rest of the chapter.

[131] See Rec. 4.5.2. This would clarify an ambiguity raised in the Turtle Bay case; that is, the appropriate statute of limitations for a failure to prepare a supplemental EA or EIS. The proposed amendment should *not* be construed by anyone, including a party or amicus to the Turtle Bay lawsuit or the media or public, to mean that the study believes that the current statute does not support the application of the 120-day provision to challenges to agency failure to require supplemental environmental assessments or supplemental impact statements.

decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that an assessment, supplement, or[132] statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within sixty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of [~~such~~] the determination pursuant to section 343-3. The council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged

[132] This continues to clarify the prior amendments proposed for this section.

aggrieved. Affected agencies and persons who provided written comment to such assessment during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.[133]

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-B or 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of [~~such~~] the statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to [~~such~~] the statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment.

§343-8 Severability. If any provision of this chapter or the application thereof to any person or

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[133] See Rec. 4.3.1.a. Inserts the same language for standing derived from comment on EAs as for EISs.

circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable.

Other Comments on Proposed Statutory Amendments Related to Chapter 343:

(1) The House Bill includes an effective date of July, 2012 to allow affected agencies and stakeholders time to prepare for changes in the review system.

(2) The HB draft contains cross-referenced amendments to HRS § 183-44 (fishpond EA exemption) and § 353-16.35 (correctional facilities) to change the cross references to reflect the amendments to Ch. 343. (HRS § 353-16.35 provides: "a) Notwithstanding any other law to the contrary, the governor, with the assistance of the director, may negotiate with any person for the development or expansion of private in-state correctional facilities or public in-state turnkey correctional facilities to reduce prison overcrowding; provided that if an environmental assessment or environmental impact statement is required for a proposed site or for the expansion of an existing

correctional facility under <u>section 343-5</u>, then notwithstanding the time periods specified for public review and comments under <u>section 343-5</u>, the governor shall accept public comments for a period of sixty days following public notification of either an environmental assessment or an environmental impact statement.")