

JAN 25 2023

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# A BILL FOR AN ACT

RELATING TO DEVELOPMENT PROJECTS.

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

1           SECTION 1. The legislature finds that Hawaii is facing a  
2 housing crisis. Residents of all income levels are increasingly  
3 unable to buy homes due to a lack of adequate supply, which also  
4 contributes to elevated housing prices. The solution to a  
5 housing shortage is to build more housing generally, but current  
6 environmental review laws make it inordinately burdensome to  
7 obtain approvals for new development.

8           The legislature further finds that projects across the  
9 State have been stifled by an expansive interpretation of the  
10 Hawaii Environmental Policy Act (HEPA). In 2019, the  
11 environmental advisory council amended the implementing rules of  
12 HEPA under section 11-200.1, Hawaii Administrative Rules, to  
13 address, among other things, the problem of project  
14 segmentation, where a developer divides up a project  
15 incrementally in order to avoid having to prepare an  
16 environmental review. Under the 2019 rule, projects built  
17 solely to serve another project (e.g., drainage infrastructure



1 needed for a residential project) or a project that will clearly  
2 be developed in multiple phases (e.g., a multi-stage highway or  
3 housing project) must be analyzed in a single environmental  
4 review as part of a "program." Thus, while this rule was  
5 intended to ensure that the impact of broad proposals or  
6 planning-level decisions are fully and properly evaluated,  
7 courts have interpreted the provision overbroadly and required  
8 developers to include, within their own environmental review,  
9 other tangential projects that developers have limited  
10 information on or no control over, projects that are speculative  
11 and not reasonably foreseeable, past actions for which HEPA's  
12 statute of limitations period has run, legislative actions, and  
13 other zoning or land use classifications that would not  
14 otherwise be statutorily triggered under HEPA. This trend will  
15 increasingly jeopardize the construction of new housing  
16 throughout the State. Amendments to HEPA are necessary to  
17 address ambiguities in the law, provide greater certainty for  
18 developers, and accelerate the delivery and supply of housing.

19 Accordingly, the purpose of this Act is to:

- 20 (1) Exempt affordable housing and certain qualifying  
21 housing development projects from HEPA;



- 1           (2) Establish a definition of "program" and "project" to  
2           preempt the existing definitions under section 11-  
3           200.1-2, Hawaii Administrative Rules, and narrow the  
4           existing interpretation that requires analysis of  
5           tangentially related projects;
- 6           (3) Amends the applicability and requirements section of  
7           HEPA to clarify when multiple actions must be  
8           considered in the same environmental review document  
9           for the purposes of project segmentation;
- 10          (4) Require that project opponents exhaust their  
11          administrative remedies as a prerequisite to  
12          litigation for environmental assessments and  
13          environmental impact statements; and
- 14          (5) Retroactively apply the new amendments under this Act  
15          to projects that received approval for their  
16          environmental assessment or environmental impact  
17          statement on or after August 9, 2019.

18           SECTION 2. Chapter 343, Hawaii Revised Statutes, is  
19           amended by adding a new section to be appropriately designated  
20           and to read as follows:



1           "§343-    Housing development projects consistent with  
2 environmental policies or long-term environmental goals  
3 established by law; exemption. (a) New construction housing  
4 development projects shall be exempt from the requirements of  
5 this chapter if:

6           (1) The use of state or county lands or funds or the  
7 project's location within the Waikiki area of Oahu  
8 pursuant to section 343-5, is the sole statutory  
9 trigger for compliance with this chapter;

10          (2) The project is consistent with the existing county  
11 general plan or development plan classification that  
12 allows housing;

13          (3) The project is consistent with the existing zoning  
14 code; and

15          (4) The project does not require a variance for shoreline  
16 setbacks or siting in an environmentally sensitive  
17 area, including but not limited to a flood plain,  
18 tsunami zone, sea level rise exposure area, beach,  
19 erosion-prone area, geologically hazardous land,  
20 estuary, fresh water, or coastal waters.



1        (b) For the purposes of this section, "housing development  
2 project" means a use consisting of:

3        (1) Residential units only; or

4        (2) Mixed-use developments consisting of residential and  
5 nonresidential uses with at least two-thirds of the  
6 square footage designated for residential use."

7        SECTION 3. Section 343-2, Hawaii Revised Statutes, is  
8 amended by adding two new definitions to be appropriately  
9 inserted and to read as follows:

10        "Program" means a series of one or more projects to be  
11 carried out concurrently or in phases within a general timeline,  
12 that may include multiple sites or geographic areas, and is  
13 undertaken for the same shared goal or purpose. Projects  
14 proposing similar uses do not create a presumption of having the  
15 same shared goal or purpose where the projects can be  
16 independently implemented and one project is not a critical  
17 functioning element of the other projects. A program may  
18 include:

19        (1) A number of separate projects in a given geographic  
20 area which, if considered singly, may have minor



- 1           impacts, but if considered together, may have
- 2           significant impacts;
- 3           (2) Separate projects having generic or common impacts;
- 4           (3) The implementation of multiple projects over a long
- 5           timeframe by the same person or persons acting in
- 6           concert; or
- 7           (4) The implementation of a single project over a large
- 8           geographic area.

9 Common use, development, or funding of shared infrastructure  
10 does not create a presumption of a program. Shared  
11 responsibility among one or more projects for compliance with  
12 conditions of regulatory approval imposed by the State or a  
13 local agency does not create a presumption of a program.

14           "Project" means a discrete, planned undertaking that is  
15 site and time specific, has a specific goal or purpose, and has  
16 potential impact to the environment."

17           SECTION 4. Section 343-5, Hawaii Revised Statutes, is  
18 amended to read as follows:

19           "**§343-5 Applicability and requirements.** (a) Except as  
20 otherwise provided, an environmental assessment shall be  
21 required for actions that:



- 1           (1) Propose the use of state or county lands or the use of  
2           state or county funds, other than funds to be used for  
3           feasibility or planning studies for possible future  
4           programs or projects that the agency has not approved,  
5           adopted, or funded, or funds to be used for the  
6           acquisition of unimproved real property; provided that  
7           the agency shall consider environmental factors and  
8           available alternatives in its feasibility or planning  
9           studies; provided further that an environmental  
10          assessment for proposed uses under section 205-  
11          2(d)(11) or 205-4.5(a)(13) shall only be required  
12          pursuant to section 205-5(b);
- 13          (2) Propose any use within any land classified as a  
14          conservation district by the state land use commission  
15          under chapter 205;
- 16          (3) Propose any use within a shoreline area as defined in  
17          section 205A-41;
- 18          (4) Propose any use within any historic site as designated  
19          in the National Register or Hawaii Register, as  
20          provided for in the Historic Preservation Act of 1966,  
21          Public Law 89-665, or chapter 6E;



- 1           (5) Propose any use within the Waikiki area of Oahu, the  
2           boundaries of which are delineated in the land use  
3           ordinance as amended, establishing the "Waikiki  
4           Special District";
- 5           (6) Propose any amendments to existing county general  
6           plans where the amendment would result in designations  
7           other than agriculture, conservation, or preservation,  
8           except actions proposing any new county general plan  
9           or amendments to any existing county general plan  
10          initiated by a county;
- 11          (7) Propose any reclassification of any land classified as  
12          a conservation district by the state land use  
13          commission under chapter 205;
- 14          (8) Propose the construction of new or the expansion or  
15          modification of existing helicopter facilities within  
16          the State, that by way of their activities, may  
17          affect:
- 18                (A) Any land classified as a conservation district by  
19                the state land use commission under chapter 205;
- 20                (B) A shoreline area as defined in section 205A-41;
- 21                or





1 (C) Any historic site as designated in the National  
2 Register or Hawaii Register, as provided for in  
3 the Historic Preservation Act of 1966, Public Law  
4 89-665, or chapter 6E; or until the statewide  
5 historic places inventory is completed, any  
6 historic site that is found by a field  
7 reconnaissance of the area affected by the  
8 helicopter facility and is under consideration  
9 for placement on the National Register or the  
10 Hawaii Register of Historic Places; and

11 (9) Propose any:

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

16 (B) Waste-to-energy facility;

17 (C) Landfill;

18 (D) Oil refinery; or

19 (E) Power-generating facility.

20 (b) Whenever an agency proposes an action in subsection  
21 (a), other than feasibility or planning studies for possible



1 future programs or projects that the agency has not approved,  
2 adopted, or funded, or other than the use of state or county  
3 funds for the acquisition of unimproved real property that is  
4 not a specific type of action declared exempt under section 343-  
5 6, the agency shall prepare an environmental assessment for the  
6 action at the earliest practicable time to determine whether an  
7 environmental impact statement shall be required; provided that  
8 if the agency determines, through its judgment and experience,  
9 that an environmental impact statement is likely to be required,  
10 the agency may choose not to prepare an environmental assessment  
11 and instead shall prepare an environmental impact statement that  
12 begins with the preparation of an environmental impact statement  
13 preparation notice as provided by rules.

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

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

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



- 1           (3) The agency shall respond in writing to comments  
2           received during the review and prepare a final  
3           environmental assessment to determine whether an  
4           environmental impact statement shall be required;
- 5           (4) A statement shall be required if the agency finds that  
6           the proposed action may have a significant effect on  
7           the environment; and
- 8           (5) The agency shall file notice of the determination with  
9           the office. When a conflict of interest may exist  
10          because the proposing agency and the agency making the  
11          determination are the same, the office may review the  
12          agency's determination, consult the agency, and advise  
13          the agency of potential conflicts, to comply with this  
14          section. The office shall publish the final  
15          determination for the public's information pursuant to  
16          section 343-3.

17           The draft and final statements, if required, shall be  
18 prepared by the agency and submitted to the office. The draft  
19 statement shall be made available for public review and comment  
20 through the office for a period of forty-five days. The office  
21 shall inform the public of the availability of the draft



1 statement for public review and comment pursuant to section 343-  
2 3. The agency shall respond in writing to comments received  
3 during the review and prepare a final statement.

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

6 (d) The final authority to accept a final statement shall  
7 rest with:

8 (1) The governor, or the governor's authorized  
9 representative, whenever an action proposes the use of  
10 state lands or the use of state funds, or whenever a  
11 state agency proposes an action within the categories  
12 in subsection (a); or

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

16 Acceptance of a required final statement shall be a  
17 condition precedent to implementation of the proposed action.

18 Upon acceptance or nonacceptance of the final statement, the  
19 governor or mayor, or the governor's or mayor's authorized  
20 representative, shall file notice of such determination with the



1 office. The office, in turn, shall publish the determination of  
2 acceptance or nonacceptance pursuant to section 343-3.

3 (e) Whenever an applicant proposes an action specified by  
4 subsection (a) that requires approval of an agency and that is  
5 not a specific type of action declared exempt under section 343-  
6 6, the agency initially receiving and agreeing to process the  
7 request for approval shall require the applicant to prepare an  
8 environmental assessment of the proposed action at the earliest  
9 practicable time to determine whether an environmental impact  
10 statement shall be required; provided that if the agency  
11 determines, through its judgment and experience, that an  
12 environmental impact statement is likely to be required, the  
13 agency may authorize the applicant to choose not to prepare an  
14 environmental assessment and instead prepare an environmental  
15 impact statement that begins with the preparation of an  
16 environmental impact statement preparation notice as provided by  
17 rules. The final approving agency for the request for approval  
18 is not required to be the accepting authority.

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



- 1           (1) A draft environmental assessment shall be made  
2           available for public review and comment for a period  
3           of thirty days;
- 4           (2) The office shall inform the public of the availability  
5           of the draft environmental assessment for public  
6           review and comment pursuant to section 343-3; and
- 7           (3) The applicant shall respond in writing to comments  
8           received during the review and the applicant shall  
9           prepare a final environmental assessment to determine  
10          whether an environmental impact statement shall be  
11          required. A statement shall be required if the agency  
12          finds that the proposed action may have a significant  
13          effect on the environment. The agency shall file  
14          notice of the agency's determination with the office,  
15          which, in turn, shall publish the agency's  
16          determination for the public's information pursuant to  
17          section 343-3.

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



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

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

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

17          Acceptance of a required final statement shall be a  
18 condition precedent to approval of the request and commencement  
19 of the proposed action. Upon acceptance or nonacceptance of the  
20 final statement, the agency shall file notice of the  
21 determination with the office. The office, in turn, shall



1 publish the determination of acceptance or nonacceptance of the  
2 final statement pursuant to section 343-3.

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

12       In any acceptance or nonacceptance, the agency shall  
13 provide the applicant with the specific findings and reasons for  
14 its determination.

15       (f) Whenever an applicant requests approval for a proposed  
16 action and there is a question as to which of two or more state  
17 or county agencies with jurisdiction has the responsibility of  
18 determining whether an environmental assessment is required, the  
19 office, after consultation with and assistance from the affected  
20 state or county agencies, shall determine which agency has the  
21 responsibility for determining whether an environmental





1 assessment by the applicant is required, except in situations  
2 involving secondary actions under section 343-5.5; provided that  
3 in no case shall the office be considered the approving agency.

4 (g) In preparing an environmental assessment, an agency  
5 may consider and, where applicable and appropriate, incorporate  
6 by reference, in whole or in part, previous determinations of  
7 whether a statement is required and previously accepted  
8 statements. The council, by rule, shall establish criteria and  
9 procedures for the use of previous determinations and  
10 statements.

11 (h) Whenever an action is subject to both the National  
12 Environmental Policy Act of 1969 (Public Law 91-190) and the  
13 requirements of this chapter, the office and agencies shall  
14 cooperate with federal agencies to the fullest extent possible  
15 to reduce duplication between federal and state requirements.  
16 Such cooperation, to the fullest extent possible, shall include  
17 joint environmental impact statements with concurrent public  
18 review and processing at both levels of government. Where  
19 federal law has environmental impact statement requirements in  
20 addition to but not in conflict with this chapter, the office



1 and agencies shall cooperate in fulfilling these requirements so  
2 that one document shall comply with all applicable laws.

3 (i) A statement that is accepted with respect to a  
4 particular action shall satisfy the requirements of this  
5 chapter, and no other statement for the proposed action shall be  
6 required.

7 (j) A group of actions shall be treated as a single action  
8 when:

9 (1) The component actions are phases or increments of a  
10 larger total program; provided that each component  
11 action depends on and cannot be implemented  
12 independent of the other phases or increments;

13 (2) An individual action is a necessary precedent to a  
14 larger action; provided that the development or  
15 funding of shared infrastructure does not create a  
16 presumption that the actions should be treated as a  
17 single action;

18 (3) An individual action represents a commitment to a  
19 larger action; or

20 (4) The actions in question are essentially identical and  
21 a single environmental assessment or environmental



1           impact statement will adequately address the impacts  
2           of each individual action and those of the group of  
3           actions as a whole."

4           SECTION 5. Section 343-7, Hawaii Revised Statutes, is  
5 amended by amending subsection (b) to read as follows:

6           "(b) Any judicial proceeding, the subject of which is the  
7 determination that a statement is required for a proposed  
8 action, shall be initiated within sixty days after the public  
9 has been informed of such determination pursuant to section 343-

10 3. Any judicial proceeding, the subject of which is the  
11 determination that a statement is not required for a proposed  
12 action, shall be initiated within thirty days after the public  
13 has been informed of such determination pursuant to section 343-

14 3. The applicant shall be adjudged an aggrieved party for the  
15 purposes of bringing judicial action under this subsection[~~-~~

16 ~~Others, by environmental court action, may be adjudged~~

17 ~~aggrieved.]; provided that the contestable issues shall be~~

18 limited to those issues identified by the accepting authority as

19 the basis for requiring a statement. Affected agencies and

20 persons who provided written comments to an accepted statement

21 during the designated review period shall be adjudged aggrieved



1 parties for the purpose of bringing judicial action under this  
2 subsection; provided that for other aggrieved parties, the  
3 contestable issues shall be limited to issues identified and  
4 discussed in the written comments."

5 SECTION 6. (a) The amendments to sections 343-2 and 343-  
6 5, Hawaii Revised Statutes, made by this Act shall in no way  
7 affect the validity of any environmental assessment or  
8 environmental impact statement approved on or after August 9,  
9 2019.

10 (b) Any previous regulations established by the  
11 environmental advisory council, to the extent inconsistent with  
12 these changes, shall be null and void.


13 (c) The Hawaii Environmental Policy Act is a procedural  
14 and informational statute, and any effects of these provisions  
15 shall not be deemed to affect a substantial right of any person.

16 SECTION 7. Statutory material to be repealed is bracketed  
17 and stricken. New statutory material is underscored.

18 SECTION 8. This Act shall take effect upon its approval  
19 and shall apply retroactively to projects that received approval



1 for their environmental assessment or environmental impact  
2 statement on or after August 9, 2019.  
3

INTRODUCED BY:  \_\_\_\_\_



# S.B. NO. 1436

**Report Title:**

Hawaii Environmental Policy Act; Environmental Impact Statements; Environmental Assessments; Affordable Housing; Project Segmentation

**Description:**

Exempts affordable housing and certain qualifying housing development projects from HEPA. Establishes a definition of "program" and "project" to preempt the existing definitions under section 11-200.1-2, Hawaii Administrative Rules, and narrow the existing interpretation that requires analysis of tangentially related projects. Amends the applicability and requirements section of HEPA to clarify when multiple actions must be considered in the same environmental review document for the purposes of project segmentation. Expands the requirement that project opponents must exhaust their administrative remedies as a prerequisite to litigation to apply to environmental assessments and environmental impact statements. Retroactively applies to projects that received approval for their environmental assessment or environmental impact statement on or after August 9, 2019.

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

