Small Business Regulatory Review Board Meeting

Wednesday, March 21, 2018

10:00 a.m.

No. 1 Capitol District Building

250 South Hotel Street, Honolulu, HI

Conference Room 436

SMALL BUSINESS REGULATORY REVIEW BOARD

Department of Business, Economic Development & Tourism (DBEDT)
No. 1 Capitol District Bldg., 250 South Hotel St. 5th Fl., Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804
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AGENDA
Wednesday, March 21, 2018 ★ 10:00 a.m.
No. 1 Capitol District Building
250 South Hotel Street - Conference Room 436

I. Call to Order

II. Approval of January 24, 2018 Meeting Minutes

III. Old Business

A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to Hawaii Administrative Rules (HAR) Title 15 Chapter 37, **Solar Water Heater Variance**, promulgated by Department of Business, Economic Development and Tourism (DBEDT) Discussion Leader – Mark Ritchie

B. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12 Chapter 22, **Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes**, promulgated by Department of Labor and Industrial Relations (DLIR) – Discussion Leader – Kyoko Kimura

C. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12, Chapter 44.1, **Testing, Certifying, and Credentialing Individuals Who Perform Maintenance and Testing of Portable Fire Extinguishers, Fire Protection Systems, and Fire Alarm Systems**, promulgated by Hawaii State Fire Council / DLIR – Discussion Leader - Kyoko Kimura

D. Discussion and Action on the Small Business Statement After Public Hearing on HAR Title 18, Chapter 237, **General Excise Tax Law**, as follows, promulgated by Department of Taxation:
   1. Amendments to Section 8.6, **County Surcharge**
   2. Proposed New Section 29.53, **Exported Services**

IV. New Business

A. Discussion and Action on Proposed Amendments to HAR Title 13 Chapter 104, **Rules Regulating Activities Within Forest Reserves**, promulgated by Department of Land and Natural Resources – Discussion Leader – Mark Ritchie

B. Discussion and Action on Proposed New HAR Title 4 Chapter 162, **Food Safety Certification Costs Grant Program**, promulgated by Department of Agriculture - Discussion Leader – Rob Cundiff

C. Discussion and Action on Proposed Repeal of HAR Title 11, Chapter 200, and Proposed New Chapter 200.1, **Environmental Impact Statement Rules**, promulgated by Department of Health – Discussion Leader – Harris Nakamoto

D. Discussion and Action on Proposed Amendments to HAR Title 15 Chapter 15, **Land Use Commission Rules**, promulgated by DBEDT / Land Use Commission – Discussion Leader - Mark Ritchie

V. Legislative Matters

A. Update on House Bill 2235, Senate Bill 2753 and Senate Bill 2885, "Relating to the Small Business Regulatory Review Board" – Clarifies the Intent of the Small Business Regulatory Review Board's Powers when Reviewing State and County Administrative Rules that Impact Small Business

B. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration of the Gubernatorial Nomination of Mary Albitz to the Small Business Regulatory Review Board for a term to expire June 30, 2021

C. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration of the Gubernatorial Nomination of Will Lydgate to the Small Business Regulatory Review Board for a term to expire June 30, 2021

D. Update on Governor's Messages 513 and 514, Submitting for Consideration the Gubernatorial Nomination of Reg Baker to the Small Business Regulatory Review Board for a term to expire June 30, 2018 and June 30, 2022, respectively

E. Discussion and Action on Senate Bill 2059 "Relating to Public Accountancy" Specifies who may be granted a temporary permit to practice public accountancy. Specifies the requirements that must be met prior to obtaining a temporary permit to practice. Requires a person to obtain a temporary permit to practice from the board of public accountancy prior to commencing public accountancy services in Hawaii. Specifies a time frame for the temporary permit to practice. Requires persons granted a temporary permit to practice to consent to and certify various obligations, including being under the authority of the board of public accountancy and paying all applicable taxes to the State. Makes conforming amendments to the laws relating to public accountancy; takes effect on 1/1/2019

VI. Administrative Matters

A. Discussion and Action on the Board's Investigative Taskforce's Recommendation for the proceeding with Redesign of the existing Website

B. Discussion on Governor's Administrative Directive No. 18-02, dated January 1, 2018, updating the policy and procedure by which departments or agencies request executive approval of any proposed adoption, amendment, or repeal of administrative rules

C. Discussion and Action on the Board's Proposed Letter to Governor Ige regarding the current Pilot Project that allows Uber and Lyft Drivers to Operate at the Honolulu International Airport

D. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, Hawaii Revised Statutes:

   1. Discussion and Action on Hawaii Small Business Conference held at Maui Arts & Cultural Center on May 2 – 3, 2018

VII. Next Meeting: Scheduled for Wednesday, April 18, 2018, at 10:00 a.m., Capitol District Building, Conference Room 436, Honolulu, Hawaii

VIII. Adjournment

If you require special assistance or auxiliary aid and/or services to participate in the public hearing process (i.e., sign language, interpreter, wheelchair accessibility, or parking designated for the disabled), please call (808) 586-2399 at least three (3) business days prior to the meeting so arrangements can be made.

II. Approval of January 24, 2018 Meeting Minutes

Approved: _____

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING - Draft
January 24, 2018
Conference Room 436 - No. 1 Capitol District Building, Honolulu, Hawaii

I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:01 p.m., with a quorum present. Mr. Art Mori, this Board's newly-hired temporary assistant, was welcomed.

MEMBERS PRESENT:
- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Garth Yamanaka, 2nd Vice Chair
- Kyoko Kimura
- Reg Baker
- Mark Ritchie

ABSENT MEMBERS:
- Harris Nakamoto
- Nancy Atmospera-Walch

STAFF: DBEDT
Dori Palcovich
Arthur Mori

Office of the Attorney General
Jennifer Waihee-Polk

II. APPROVAL OF DECEMBER 13, 2017 MINUTES

Vice Chair Cundiff made a motion to accept the December 13, 2017 minutes, as presented. Mr. Baker seconded the motion, and the Board members unanimously agreed.

III. OLD BUSINESS

A. Discussion and Action on the Small Business Statement After Public Hearing and proposed Amendments to HAR Title 13, Subtitle 7, Water Resources, promulgated by Department of Land and Natural Resources (DLNR), as follows:

1. Chapter 167, Rules of Practice and Procedure for the Commission on Water Resource Management
2. Chapter 168, Water, Use Wells, and Stream Diversion Works
3. Chapter 169, Protection of Instream Uses of Water

Discussion leader, Mr. Ritchie explained that the proposed rules, reflecting updated statutes, were in front of this Board before the public hearing. At the hearing, all testimonies were in support of the amendments; some testifiers wanted more enforcement of the State Water Code.

Mr. Ritchie made a motion to pass the rules onto the Governor for adoption. Second Vice Chair Yamanaka seconded the motion, and the Board members unanimously agreed.

B. Re-discussion and Action on Proposed Amendments to HAR Title 12, Subtitle 8, Hawaii Occupational Safety and Health Division, promulgated by Department of Labor and Industrial Relations (DLIR), as follows:

i. Part 1, General Legal and Administrative Provisions for Occupational Safety and Health
   a. Chapter 50, General Provisions and Definitions
   b. Chapter 52.1, Recording and Reporting Occupational Injuries and Illnesses
   c. Chapter 56, Program Fees and Library Policies, General Safety and Health Requirements

ii. Part 2, General Legal and Administrative Provisions for Occupational Safety and Health
   a. Chapter 60, General Safety and Health Requirements

iii. Part 3, Construction Standards
   a. Chapter 110, General Safety and Health Requirements

iv. Part 5, Occupational Safety and Health Standards for Shipyard Employment
   a. Chapter 170, Shipyards

v. Part 6, Marine Terminals
   a. Chapter 180, Marine Terminals

vi. Part 7, Safety and Health Regulations for Longshoring
   a. Chapter 190, Longshoring

vii. Part 8, Other Safety and Health Standards
   a. Chapter 208, Other Safety and Health Standards

Mr. Norman Ahu, DLIR's HIOSH Administrator, explained that since he was in front of this Board last month, two stakeholder meetings were held; meeting notes were provided to the members. Most of the stakeholders' concerns related to silica regulations; it was noted that adoption of many of the changes is mandatory.

Mr. Ahu re-emphasized that "Table 1" benefits the employer. HIOSH is committed to continue holding stakeholder meetings going forward. One suggestion regarding exemptions is currently being discussed; and if possible, HIOSH will accommodate the suggestion and place it in the rules.

Testifier Mr. Walter Chun, PhD., a safety and health professional and State of Hawaii consultant, has forty-five years of experience in the occupational safety and health profession. He explained how the rule amendments apply to the stakeholders and distributed his written testimony which entailed: 1) HIOSH citation penalties,2) measures used by OSHA, and 3) industrial safety and health news.

Mr. Chun noted that the average HIOSH penalty of a homeowner in the past two years has been over $2,000. He attended HIOSH's stakeholders' meeting, which he believed went well, but there were open questions as to how changes are going to be made and what assistance HIOSH will be giving. He would like to have all the stakeholders (businesses and homeowners) able to understand exactly what the rule changes and processes entail.

Testifier Mr. Tim Lyons, representing the subcontractor's association, explained that although he was unable to attend last month's Board meeting, his written testimony has not changed. He thanked this Board for being instrumental in encouraging HIOSH to hold the stakeholders' meetings. He added that while some progress has been made, there is not much that HIOSH can do about the silica regulations as the federal government is forcing its hands on this issue. However, the silica standard is very difficult to understand and HOISH could be more helpful in assisting the business community by providing samplings of silica and/or descriptions in certain situations.

Testifier Mr. Blake Parson, Executive Director of SMCA (Sheet Metal Contractors Association of Hawaii) stated that because there are still underlying unknowns to the ramifications of the rules, it would be impractical, for example, for his members to purchase $10,000 worth of equipment when it turns out to be unnecessary, which is occurring now with the regulations as presented.

Chair Borge stated that because there are so many variables and issues involved with operating a small business along with understanding and following the proposed rule amendments, guidance from HIOSH is essential; without such guidance, small businesses run the risk of being cited. In response, Mr. Ahu expressed that HIOSH is willing to continue with the stakeholder meetings for training. Because HIOSH is fully cognizant of the small business' concerns, it is available to do (silica) "sampling" at no expense; he added that the proposed rules are a benefit to businesses.

Vice Chair Cundiff thanked the HIOSH representatives for reaching out to the stakeholders. Based on the discussion today, he questioned what can be done to provide the businesses with correct information so they are able to comply with the set guidelines so small businesses are able to comply with the rules. Mr. Ahu responded that the businesses must take advantage of HIOSH's ongoing consultation, in-house training, and guidelines.

Mr. Ritchie made a motion to recommend that HIOSH continue with ongoing discussions with the small business stakeholders' concerns, and to move the proposed rule amendments to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

IV. LEGISLATIVE MATTERS

A. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration the Gubernatorial Nomination of Reg Baker to the Small Business Regulatory Review Board for a term to expire June 30, 2018 and June 30, 2022

Ms. Kimura made a motion for this Board to testify in support of the Gubernatorial Nomination of Mr. Baker to the Small Business Regulatory Review Board. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Senate and House Bills, Relating to the Small Business Regulatory Review Board – "Clarifies the Intent of the Small Business Regulatory Review Board's Powers when Reviewing State and County Administrative Rules that Impact Small Business"

Chair Borge explained that these bills, which clarify the Board's powers, were currently introduced in the legislature. All four bills, House Bill 2235, House Bill 2326, Senate Bill 2753, and Senate Bill 2885, are the same.

Vice Chair Cundiff made a motion to provide testimony in support of all four measures, House Bill 2235, House Bill 2326, Senate Bill 2753, and Senate Bill 2885, "Relating to the Small Business Regulatory Review Board." Mr. Baker seconded the motion, and the Board members unanimously agreed.

V. ADMINISTRATIVE MATTERS

A. Deliberation, Decision Making, and Action on the Board's Investigative Taskforce Findings and Recommendations regarding the Development and Redesign of the Board's existing Website including Contact, Features and Short- and Long-Term Goals in accordance with Section 92-2.5(b)(1)(C), HRS

Mr. Ritchie explained that last month's meeting minutes encompassed the proposal from the website's taskforce regarding the functionality of the type of website that would be best for this Board to draw small business owners to it, and to have sufficient information so users can get more involved and become more interactive; as follows:

- The "regulation review card" is to have an ability to receive testimony on upcoming meetings as well as to receive information on existing regulations;
- A feature to show how rules are made through the rule-making process;
- A link to the State's Legislative website where statutes and bills are viewed;
- The design of the website will have less of a government look with more pictures and graphics;
- Dates of the agencies' public hearings will be accessed from the website's calendar;
- A sign-up e-mail link to receive monthly agendas and to monitor specific rules will be offered.

Mr. Ritchie stated that for web maintenance and web design Hawaii Information Consortium (HIC) is very good, and suggested that two to three price quotes be procured. Mr. Cundiff added that this Board can currently take steps regarding changes to the website for its end goal. It was suggested that a dialogue be created with the three potential web designers/services.

Mr. Ritchie made a motion for the website investigative taskforce to proceed with the website design by getting price quotes from at least three different IT organizations. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

B. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS

Chair Borge reminded the members that he and Mr. Baker will be on ThinkTech's live-stream show, "Business in Hawaii with Reg Baker" on Thursday, January 26th at 2:00 p.m.

VI. **NEXT MEETING** – The next meeting is scheduled for Wednesday, February 21, 2018, in Conference room 436, 250 South Hotel Street, Honolulu, Hawaii at 10:00 a.m.

VII. **ADJOURNMENT** – Vice Chair Cundiff made a motion to adjourn the meeting and Mr. Baker seconded the motion; the meeting adjourned at 12:05 p.m.

III. Old Business

A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 15, Chapter 37, **Solar Water Heater Variance**, promulgated by DBEDT

RECEIVED
JAN 25, 2018
SBRRB

SMALL BUSINESS STATEMENT "AFTER" PUBLIC HEARING TO THE SMALL BUSINESS REGULATORY REVIEW BOARD

(Hawaii Revised Statutes (HRS), §201M-3)

Department or Agency: DBEDT Energy Division

Administrative Rule Title and Chapter: "Solar Water Heater Variance," Chapter 15-37

Chapter Name: "Solar Water Heater Variance"

Contact Person/Title: Dean Masai, DBEDT Energy Analyst

Phone Number: 587-3804

E-mail Address: dean.masai@hawaii.gov **Date:** January 16, 2018

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes ☐ No ☑ Not yet on Lt. Gov's site, but on DBEDT's and Energy Office websites.
(If "Yes" please provide webpage address and when and where rules may be viewed in person.) <http://energy.hawaii.gov/resources/solar-water-heater-variance> and <http://dbedt.hawaii.gov/overview/administrative-rules/#proposed>

(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. **Rule Description: New** ☑ **Repeal** ☐ **Amendment** ☐ **Compilation** ☐

II. **Will the proposed rule(s) affect small business? Yes** ☑ **No** ☐ (If "No" no need to submit this form.)

* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business." HRS §201M-1

* "Small business" is defined as a "for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that: (1) Is domiciled and authorized to do business in Hawaii; (2) Is independently owned and operated; and (3) Employs fewer than one hundred full-time or part-time employees in Hawaii." HRS §201M-1

III. **Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes** ☐ **No** ☑ (If "Yes" no need to submit this form.) (e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. **Is the proposed rule being adopted pursuant to emergency rulemaking?** (HRS §201M-2(a)) **Yes** ☐ **No** ☑ (If "Yes" no need to submit this form.)

* * *

I. Please explain how the agency involved small business in the development of the proposed rules.

(PLEASE SEE ATTACHED PAGES.)

a. Were there any recommendations incorporated into the proposed rules? If yes, explain. If not, why not?

II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:

1. A description of how opinions or comments from affected small businesses were solicited.

2. A summary of the public's and small businesses' comments.

3. A summary of the agency's response to those comments.

4. The number of persons who:
   (i) Attended the public hearing:

   (ii) Testified at the hearing:

   (iii) Submitted written comments:

5. Was a request made at the hearing to change the proposed rule in a way that affected small business?
   (i) If "Yes" was the change adopted? **Yes** ☐ **No** ☐

   (ii) If No, please explain the reason the change was not adopted and the problems or negative result of the change.

* * *

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

The topic of the proposed new rule is the automation of the solar water heater variance approval process. The main purpose of this rule is (1) to enable the Department of Business, Economic Development and Tourism to more efficiently accept and process variances (exemptions) to the solar water heater mandate in Hawaii Revised Statutes §196-6.5 by allowing variances to be submitted via a website and (2) to charge a fee for variance submittal that offsets the administrative expenses of the hosting and maintenance of the website.

I. Please explain how the agency involved small business in the development of the proposed rules.

The development of the proposed rule was solely for the purpose of automating the statutory required variance process and to collect a processing fee for the variance. Therefore, small business input was not needed. Small businesses were invited to comment at the public hearing held for the proposed rule. The Department did not receive any comments from small businesses.

a. Were there any recommendations incorporated into the proposed rules? If yes, explain. If not, why not?

The Department did not receive any recommendations from small businesses. The recommendations proposed at the public hearing require State legislative action.

II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:

1. A description of how opinions or comments from affected small businesses were solicited.
   A public hearing notice was published in the five major county newspapers, notice was posted on the Department's website, and notice of the public hearing were included in e-mail correspondence with those submitting variance requests.

2. A summary of the public's and small businesses' comments.
   There were two testifiers at the public hearing, neither represented small business. Both people urged the Department to revise the proposed rules to stringently enforce published legislative intent prohibiting home developers and builders from applying for solar water heater variances using the gas tankless water heater option.

3. A summary of the agency's response to those comments.
   While the Department appreciates the intent of the comments, it notes that the legislative intent referenced by the testifiers is so unsupported by the structure and actual wording of the current statute that it would be difficult to justify such a change without the express assent of the Legislature through further legislative action.

4. The number of persons who:
   (i) Attended the public hearing:
   Six.

   (ii) Testified at the hearing:
   Two.

   (iii) Submitted written comments:
   One.

5. Was a request made at the hearing to change the proposed rule in a way that affected small business?
Yes. Both testifiers urged the Department to revise the proposed rules to strictly enforce publicly stated legislative intent to deny home developers and builders from using the gas tankless water heaters as justification for a variance from the mandatory solar water heater law.

(i) If "Yes" was the change adopted? **No**

(ii) If No, please explain the reason the change was not adopted and the problems or negative result of the change.

Adopting the change recommended by the testifiers requires legislative action, which is not in the purview of the Department.

HAWAII ADMINISTRATIVE RULES

TITLE 15
DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM

CHAPTER 37
SOLAR WATER HEATER VARIANCE

§1-1 Purpose. The purpose of this chapter is to provide rules for administration of the state solar water heater variance program authorized by chapter 196-6.5, Hawaii Revised Statutes ("HRS"). [Eff June 26, 2008, Act 204]

§1-2 Definitions. As used in this chapter, unless a different meaning clearly appears in the context:

"Authorized to do business in the State" means a corporation incorporated under chapter 416, HRS, a foreign corporation admitted under chapter 418, HRS, a corporation incorporated under chapter 415, HRS, or a foreign corporation admitted under chapter 415, HRS; a partnership registered under chapter 425, HRS, or 425D, HRS; or a sole proprietorship.

"County" or "counties" means the City and County of Honolulu and the counties of Hawaii, Kauai, and Maui.

"DBEDT" means the State of Hawaii Department of Business, Economic Development, and Tourism.

"Department" means the State of Hawaii Department of Business, Economic Development, and Tourism.

"Director" means the director of the Department of Business, Economic Development, and Tourism.

"Family" means any group of people, which may include children, living together as a unit.

"HRS" means Hawaii Revised Statutes, the laws of the State of Hawaii, which were passed by the State Legislature and signed by the Governor or allowed to become law without signature.

"Program" means the state solar water heater variance program authorized by chapter 196-6.5, HRS.

"Qualified professional" means any architect or mechanical engineer licensed to do business in the State, which is:

(1) Subject to the state corporate or individual income tax under chapter 235, HRS;

(2) Engaged in design or engineering of a Hawaii single family dwelling.

"Representative" is a person who submits a Request for Variance from the Mandatory Solar Water Heater Law on behalf of and with the consent of the homeowner or future homeowner.

"Request" means a valid "Request for Variance from the Mandatory Solar Water Heater Law" form.

"Requestor" is a homeowner or representative requesting a Solar Water Heating Variance (SWHV).

"Single family dwelling" means a building designed for one family to live in. This excludes duplexes, triplexes, apartments, condominiums, and other structures built for multiple families.

"Solar water heater" ("SWH") is a device in which water is heated by the sun to provide domestic hot water. Most SWH systems in Hawaii use a series of large glass and metal panels containing a metal pipe winding itself inside. The panels are usually installed on a building's roof. The heated water is usually stored in a large tank (80 gallons or more). In an active system, an electric pump pumps the water from the supply pipe through the pipe that runs through the panels and into the storage tank. In a passive system, the heated water moves through the pipe through natural convection.

"State" means the State of Hawaii.

"SWHV" is a "solar water heater variance," a request to be exempt from HRS chapter 196-6.5, which requires a solar water heating system for new single-family residential construction.

"Valid form" is a template, usually in Microsoft "Word" or an online form for the Request for Variance from the Mandatory Solar Water Heater Law that is designated by the State to be the most recent version that complies with state requirements.

SUBCHAPTER 2

ELIGIBILITY FOR, SELECTION CRITERIA,
AND TERMINATION OF SWHV

§2-1 Eligibility-criteria for a SWHV.

(a) To be eligible for a solar water heater variance, a home shall be:

(1) Built on or after January 1, 2010.

(2) A single family dwelling.

(3) Located within the state of Hawaii.

(b) The requestor shall submit to the State a valid, correctly completed Request for Variance from the Mandatory Solar Water Heater Law form.

(c) The request must be submitted by a qualified professional who is an architect or mechanical engineer licensed to do business in the State of Hawaii according to HRS 464.

(d) The form should be printed on the letterhead of the architect or mechanical engineer, or correctly completed online.

(e) A valid form can be obtained by:

(1) Accessing the DBEDT Energy Division Solar Water Heater Variance website and completing the online form;

(2) Downloading a form from the DBEDT Energy Division website; or

(3) e-mailing the program office at: DBEDT.SWH-Variance@ hawaii.gov.

(f) A request must be submitted for each dwelling.

(g) Fee: A SWHV processing fee of $25.00 shall be charged for each SWHV request. The request shall be processed when the fee is received.

§2-2 Procedure for SWHV.

(a) Homeowner or representative (requestor) submits a properly completed, valid Request for Variance from the Mandatory Solar Water Heater Law form and fee payment to the State via:

(1) Online at the DBEDT Energy Division Solar Water Heater Variance website.

(2) E-mail: DBEDT.SWH-Variance@ hawaii.gov.

(3) Fax: 808-586-2536.

(4) U.S. Postal Service: SWH Variance, c/o DBEDT Energy Division, P.O. Box 2359, Honolulu, HI 96804-2359.

(5) Hand delivery.

(b) The State reviews the request.

(c) The State shall immediately inform the requestor of any errors on the request, if the request is on an invalid form, or if there is a problem with the fee payment.

(d) After review, the correct and paid requests are sent to the director or his/her designee.

(e) The director/designee approves or denies the request.

(f) The requestor is notified of the director's/designee's decision.

(g) A copy of the approved request is sent to the requestor.

(h) Information about the request is posted on the department's SWHV webpage, including the director's approval or denial of the request.

§2-3 Criteria for state review of SWHV request.

(a) Upon receiving a Request for Variance from the Mandatory Solar Water Heater Law form and fee payment, the request is reviewed to ensure that:

(1) Request is on a valid form.

(2) Fee is paid.

(3) Request is correctly completed, including:

(A) Printed on architect's or mechanical engineer's letterhead with name, address, e-mail address, and phone number. In lieu of a letterhead, the architect's or mechanical engineer's name, address, e-mail address, and phone number shall be written on the form or inputted into the online form.

(B) Return e-mail address to which the Request for Variance from the Mandatory Solar Water Heater Law form should be returned.

(C) The property's address (at least the street name), town and island.

(D) The property's Tax Map Key (TMK) number.

(E) One of the options is checked.

(F) If Option 1 (installation impractical and/or cost-prohibitive) is checked, a Life Cycle Cost Comparison, also available from the SWHV website or the program office, is included and properly completed, including architect's or mechanical engineer's stamp and signature.

(G) If Option 2 (renewable energy technology) is checked, the renewable system to be installed is circled or otherwise marked.

(H) If Option 3 (gas tankless on-demand water heater) is checked, at least one additional gas appliance is listed on the line under the Option 3 paragraph.

(I) Request is signed and stamped by the architect or mechanical engineer.

(b) The request shall be reviewed by the department and sent to the director or director's designee for review.

(c) The director shall approve or deny a request based upon requirements of HRS 196-6.5.

(d) A requestor whose variance request is denied shall be notified and provided with the reasons for denial.

§2-4 Procedure for amendment of a SWHV.

(a) A homeowner may request amendment (or termination--see following section) of an approved SWHV by submitting a written notification to the department and a revised SWHV request.

(b) Requests for an amendment will be considered if the amendment relates to a change in the homeowner's choice of water heating device.

(c) If the amendment is to change to a solar water heater, no fee will be required. All other amendments require payment of the current SWHV processing fee.

(d) The request for amendment shall be reviewed by the department and forwarded to the director or his/her designee.

(e) If approved by the director/designee, the amendment shall take effect on the date of approval.

(f) A homeowner whose application for amendment is denied by the director/designee shall be notified and provided with the reasons for denial.

SUBCHAPTER 3
ADMINISTRATION

§3-1 Administration. (a) The department is authorized to implement and enforce the rules of this chapter.

(b) The department shall monitor the program to assure adherence to these rules, the effectiveness of the rules, and that the purpose of the program is still relevant to the intent of HRS 196-6.5.

§3-2 Fee Increases. From time to time, it may be necessary to increase the SWHV processing fee, as required in §2-1(g). A fee increase shall be instituted when approved by the department director and posted on the department's website for 30 calendar days.

§3-3 Waiver. The director may waive particular provisions of this chapter to conform to applicable federal requirements.

§3-4 Severability. If any part, section, sentence, clause, or phrase of this chapter, or its application to any person, transaction, or other circumstance, is for any reason held to be unconstitutional or invalid, the remaining parts, sections, sentences, clauses, and phrases of this chapter, or its application to other persons, transactions, or circumstances shall not be affected.

###

III. Old Business

B. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12, Chapter 22, **Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes,** promulgated by DLIR

SMALL BUSINESS STATEMENT "AFTER" PUBLIC HEARING
TO THE
SMALL BUSINESS REGULATORY REVIEW BOARD
(Hawaii Revised Statutes (HRS), §201M-3)

Department or Agency: Departmen of Labor and Industrial Relations

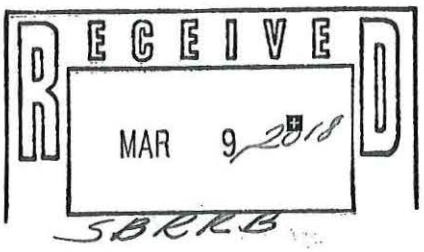
Administrative Rule Title and Chapter: HAR 12-22

Chapter Name: WAGE DETERMINATIONS AND THE ADMINISTRATION AND ENFORCEMENT OF CHAPTER 104, HAWAII REVISED STATUTES

Contact Person/Title: Pamela Martin

Phone Number: 808-586-8771

E-mail Address: pamela.b.marting@hawaii.gov **Date:** 03/08/2018



A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes ☑ No ☐

(If "Yes" please provide webpage address and when and where rules may be viewed in person.) http://labor.hawaii.gov/wsd/find-a-law/; 830 punchbowl St., Room 340, Honolulu, HI 96816 and all WSD offices on Kaual, Maui and Hawaii

(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New ☐ **Repeal** ☐ **Amendment** ☑ **Compilation** ☑

II. Will the proposed rule(s) affect small business? Yes ☑ **No** ☐ (If "No" no need to submit this form.)

* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business." HRS §201M-1

* "Small business" is defined as a "for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that: (1) Is domiciled and authorized to do business in Hawaii; (2) Is independently owned and operated; and (3) Employs fewer than one hundred full-time or part-time employees in Hawaii." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes ☐ **No** ☑ (If "Yes" no need to submit this form.) (e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) **Yes** ☐ **No** ☑ (If "Yes" no need to submit this form.)

* * *

I. Please explain how the agency involved small business in the development of the proposed rules.

Classroom activity

a. Were there any recommendations incorporated into the proposed rules? If yes, explain. If not, why not?

Yes. No inclusion of reports of no-work weeks.

II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:

1. A description of how opinions or comments from affected small businesses were solicited.

Classroom activity

2. A summary of the public's and small businesses' comments.

. The substantive testimony focused on support of inclusion for certain types of work that is regulated under the law.

3. A summary of the agency's response to those comments.

We believe this testimony supports the current amendments and past treatments the Department has made through its determinations. No testimony objecting to the amendments was received.

4. The number of persons who:
   (i) Attended the public hearing: 18

   (ii) Testified at the hearing: 13

   (iii) Submitted written comments: 2

5. Was a request made at the hearing to change the proposed rule in a way that affected small business?
   (i) If "Yes" was the change adopted? **Yes** ☐ **No** ☐

   (ii) If No, please explain the reason the change was not adopted and the problems or negative result of the change.

No change was requested

* * *

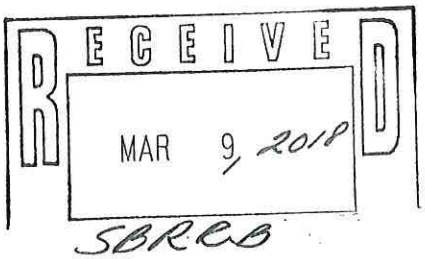
Statement of the Topic of the Proposed Rules Amendments to HAR 12-22 WAGE DETERMINATIONS AND THE ADMINISTRATION AND ENFORCEMENT OF CHAPTER 104, HAWAII REVISED STATUTES

These rules are being updated to reflect 19 statutory changes over the last 20 years and to clarify some areas where the law is not clear on enforcement or administration of the Wages and Hours of Employees on Public Works Law.

a. Bring the rules in line with statute changes.
   1) Amending the penalty provisions to track the current statutes, (see Subchapter 2)
   2) Defines "falsification" (**§12-22-1)**
   3) Amend the method of calculation of prevailing wages (**§12-22-2)**
   4) Amend that appeals go to a hearings officer appointed by the director not the Labor and Industrial Relations Appeals Board (**§12-22-9)**

b. Provide new rules for new statutes.
   1) Adds a new subchapter for construction on State and county leased buildings subject to the law. (See new Subchapter 4)
   2) Adds a new subchapter for construction projects subject to Special Purpose Revenue Bonds (SPRB). (See new Subchapter 5)

c. Make modifications to the law to improve the enforcement and administration of the law.
   1) Adds new subchapter for the administration of appeals. (See Subchapter 3)
   2) Clarifies that the employer's cost of pre-paid health care is an allowable fringe benefit. (See definition of "cost of fringe benefit" **§12-22-1)**
   3) Repeals the exemption for warranty work done by the manufacturer. (See definition of "construction of public work" **§12-22-1)** This follows the federal version of prevailing wage.
   4) Clarifies the asphalt paving industry of delivering paving materials to spreader box trucks. (See memo dated July 13, 2013) and **§12-22-1.1)**



Small Business Impact Statement
(Sec 201M-2, HRS)

Department or Agency: Department of Labor and Industrial Relations, Wage Standards Division

Relevant HRS Chapter or Section: HRS Chapter 104, Wages and Hours of Employees on Public Works Law

Administrative Rule Chapter and Title: HAR §12-22, Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes

Name: Pamela Martin

Title: Administrator, Wage Standards Division

Phone Number: 808-586-8771

Email Address: pamela.b.martin@hawaii.gov

A. Provide information described in Section 201M-2(b), HRS and in Governor's Administrative Directive No. 09-01.

The Wage Standards Division submitted this summary of proposed amendments to the administrative rules for Chapter 104, Wages and Hours of Employees on Public Works Law to the Small Business Regulatory Review Board for their consideration at their November 2017 meeting. The Board suggested we hold the public hearing and then resubmit these amendments after the public hearing.

A public hearing was held on February 16, 2018, which was noticed State wide. (See attachment B, with copies of articles that appeared in each island newspaper.) At the public hearing 18 people signed in. Two written testimonies were received and one person provided oral comments. One of the written testimonies received and the oral comment focused on support for the inclusion of certain types of work that is regulated under the law. (See Attachment C for a photocopy of the testimony submitted). WSD believes this testimony supports the current amendments and past interpretations the Department has made through its determinations. No testimony objecting to the proposed amendments was received.

The Wages and Hours of Employees on Public Works Law, regulates the wages paid to laborers and mechanics on State and county public works construction projects, commonly referred to as a "prevailing wage" law or the Davis-Bacon Act in the federal jurisdiction. The proposed rule changes are intended to bring the rules up to date with statutory changes and provide

information on procedural processes. Chapter 12-22 has not been amended since 1996. Statutory changes over the last twenty years have made many of the rules invalid and new statutory provisions were enacted without administrative or enforcement rules.

The rules apply to all contractors big and small that choose to work on public works projects. The intent of the law is to provide a level playing field for bidding on public works projects so that bids are won because of experience and expertise and not because a contractor chooses to pay their employees lower wages.

The rule changes do not require any additional costs or administration that the statute already requires. There are no direct fees imposed and any existing indirect costs of reporting and record keeping have not been affected by the proposed changes.

In developing these updates the Wage Standards Division consciously considered the existing administrative burden the law places on construction business both big and small. The Division regularly provides free workshops on understanding Hawaii's Prevailing Wage Law to promote voluntary compliance and establish a relationship with the construction industry and hear their concerns. The updates do not result in any substantial changes to administrative responsibilities for contractors.

Considering differing deadlines or exemptions for small business would obfuscate the intent of the law as providing a level playing field to bid on public works construction projects.

B. Rule Description.

1. ___New ___Repeal _X_Amendment _X_Recompilation

2. Nature of Proposed Changes:

   a. Is the proposed rule authorized by a federal or State law or statute that does not require an agency to interpret or describe the requirements of the law or statute? ___ Yes _X_No

   b. Is the proposed rule an emergency regulation? ___Yes _X_No

   c. Will the proposed rule affect small business because it:
      1) Will apply to "small business" defined as a for-profit enterprise with fewer than **100** full-time or part-time employees?
         _X_Yes ___No
      2) Will cause a direct and significant economic burden upon a small business? ___Yes _X_No
      3) Is directly related to the formation, operation, or expansion of a small business? __ Yes _X_No

3. Summarize the proposed rule(s) and reasons for the proposed rule(s):

These rules are being updated to reflect 19 statutory changes over the last 20 years and to clarify some areas where the law is not clear on enforcement or administration of the Wages and Hours of Employees on Public Works Law.

a. Bring the rules in line with statute changes.
   1) Amending the penalty provisions to track the current statutes, (see Subchapter 2)
   2) Defines "falsification" **(§12-22-1)**
   3) Amend the method of calculation of prevailing wages **(§12-22-2)**
   4) Amend that appeals go to a hearings officer appointed by the director not the Labor and Industrial Relations Appeals Board **(§12-22-9)**

b. Provide new rules for new statutes.
   1) Adds a new subchapter for construction on State and county leased buildings subject to the law. (See new Subchapter 4)
   2) Adds a new subchapter for construction projects subject to Special Purpose Revenue Bonds (SPRB). (See new Subchapter 5)

c. Make modifications to the law to improve the enforcement and administration of the law.
   1) Adds new subchapter for the administration of appeals. (See Subchapter 3)
   2) Clarifies that the employer's cost of pre-paid health care is an allowable fringe benefit. (See definition of "cost of fringe benefit" **§12-22-1)**
   3) Repeals the exemption for warranty work done by the manufacturer. (See definition of "construction of public work" **§12-22-1)** This follows the federal version of prevailing wage.
   4) Clarifies the asphalt paving industry of delivering paving materials to spreader box trucks. (See memo dated July 13, 2013) and **§12-22-1.1)**

C. Small Business Impact Statement pursuant to 201M-2(b):

The rules do not impose any new, direct or indirect, costs for small businesses. A public hearing will be held before the adoption of any rules.

D. Are there new or increased fees or fines? __Yes __X__No

Penalties are set by statute, see 104-24, HRS.

E. **Did the agency consult small businesses, departmental advisory committees, or were other small businesses organizations consulted during the drafting of the proposed rule?** ___ Yes _X_ No

If no, why not?

Awareness of their concerns and the intent of a level playing field is the same for individual businesses regardless of size.

F. **Other alternatives or less stringent measures proposed by affected businesses to reduce direct or indirect costs and, if proposed, why those proposals were not adopted.**

Proposals, if any, were addressed at the legislative level.

G. **Departmental Impact (i.e. fiscal, personnel, program)?** ___Yes _X_No

If yes, describe long and short-range impacts, estimated in dollar amounts or personnel, due to enforcement, administration, execution, or implementation of the proposed rule that may result in a savings or shortfall under the current program budget.

H. **Impact on General Public (i.e. individuals, consumers, and large businesses)?** _X_Yes ___No

If yes, describe long- and short-range impacts due to the enforcement, implementation, or execution of the proposed rule.

The construction of public works using taxpayer resources will be better managed and enforced although the direct impact to the general public will be imperceptible.

I. **Impact on state economy?** _X_Yes ___No

Penalty structure set out in Act 130, Regular Session 2014 and act 192, Regular Session 2016, should alleviate some General Fund pressure and put the economic burden directly on the activities generating the workload.

J. **Final result anticipated from the proposed rule change.**

The final result will improve the administration of Hawaii's prevailing wage law and serve to clarify enforcement for contractors.

K. Alternatives explored to carry out the statutory purpose other than rulemaking.

Public determinations and internal practices have served to bridge the gap between the statutes and the practice.

Attachment A: Ramseyer version of proposed rule changes.
Attachment B: Public hearing notices
Attachment C: Testimony received at February 16, 2018 public hearing.

February 16, 2018

LEONARD HOSHIJO, Acting Director
Department of Labor and Industrial Relations

RE; NOTICE OF PUBLIC HEARING
Department of Labor and Industrial Relations, Wage Standards Division will hold a public hearing to address proposed amendments to Hawaii Administrative Rules, Title 12, Chapter 22, relating to wage determinations and the administration and enforcement of Chapter 104, Hawaii Revised Statutes (HRS). The notice and public hearing are pursuant to Wages and Hours of Employees on Public Works Law, Section 104-29, HRS, and Chapter 91, HRS.

Dear Mr. Hoshijo:

My name is Joseph Trehern. I have lived in Hawaii for 54 years and worked in construction for 50 years. I would like to bring to your attention several points of concern as it relates to this hearing more specifically truck drivers transporting asphalt paving materials:

1. Truck drivers not only deliver paving material to the "Spreader Box" on site but drivers are also required to haul out excess "Cold Planer" asphalt material from the site of work. Language needs to be added to cover the hauling out of "Cold Planer" asphalt material.

2. The industry standard method for calculating prevailing wages and overtime pay for all employees transporting paving material to and/or from Public Works should be the Fair Labor Standards Act (FLSA).

3. Jobsite inspectors should be trained and required to hold periodic unannounced inspections of subcontractors certified payrolls or if there are indications of pay inequality.

Historically the paving industry has provided enriching employment for many of Hawaii's construction workers, but recently there has been a segment of our profession that has depressed the industry by not paying prevailing wages.

Recently the street in front of my house was being paved. I went out to chat with some of the workers and drivers. One driver told me he was being paid cash. I told him he should let the jobsite inspector know. Driver said, "No! I would rather not." I flagged down the inspector and asked "are these truck drivers supposed to be getting prevailing wages and does the company have to provide certified payrolls?" He looked at me like, what are you talking about?

On my street alone there were at least 15 trucks hauling out waste asphalt material and laying down new asphalt over the course of several days. Additionally they have dugout and repaved many of the adjoining roads in the area with these same truck drivers for several months now.

Failure to require certified payroll records and site inspections could be fostering the payments of cash to workers! If these inspectors are not asking questions and viewing payroll documents, we tax payers are being short changed.

Thank you for your attention in this matter. If you have further questions please feel free to contact me.

Joe Trehern
46-374 Kumoo Loop
Kaneohe, HI 96744
Cell 808-233-8034
joetree59@hawaii.rr.com

[JAE-YOUNG LEE]
[1419 Dominis St. #607, Honolulu HI, 96827]
[lj99@hawaii.edu]

February, 16, 2018

To: Department of Labor and Industrial Relations
Wage Standards Division
Attention: Leonard Hoshijo, Acting Director, Department of Labor and Industrial Relations

Re: Comment on the proposed amendments to Hawaii Administrative Rules, Title 12, Chapter 22, relating to wage determinations and the administration and enforcement of Chapter 104, Hawaii Revised Statutes.

Dear Leonard Hoshijo and members of the Department of Labor and Industrial Relations

Thank you for receiving and considering the public's viewpoint on Hawaii Administrative Rules' proposed amendment. My name is Jae-Young Lee, current 3L student at the University of Hawaii William S. Richardson School of Law and an attorney in South Korea. I am interested in the promulgation and the execution process of the agencies in the State of Hawaii, especially with regard to wage issues that my practice had mainly focused on.

I am testifying to express my support and gratitude for the Department of Labor and Industrial Relations, Wage Standards Division's ("Department") thoughtful work on the proposed amendments to Hawaii Administrative Rules, Title 12, Chapter 22, relating to wage determinations and the administration and enforcement of Chapter 104, Hawaii Revised Statutes, (hereinafter "proposed amendment") especially, its effort to provide reasonable a (pre) hearing process under Haw. Rev. Stat. Ann. §91-10 (2003) and Haw. Rev. Stat. Ann. 104- 23 (2015) that can resolve disputes with a neutral hearing officer appointed by the director in conformance with chapter 91, Hawaii Revised Statutes (hereinafter "HRS"). Passing comprehensive rules for hearing processes will contribute to protect workers from unnecessary confusion in our community.

With regard to §12-22-47 of the proposed amendment, which provides that the hearing officer shall render a written decision on a notification of violation within sixty days after the conclusion of the hearing in conformance with Haw. Rev. Stat. Ann. § 104-23 (2014), I believe this will promote the promptness of the administrative process, which often can be utmost priority to the parties of the wage cases.

Unlike § 104-23 and §12-22-47 of the proposed amendment, the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 203 (2014) (hereinafter "FLSA") does not set a deadline that the Wage and Hour Division (hereinafter "WHD") have to take actions after the WHD enforcement of the FLSA.[1] This is also true

[1] The Fair Labor Standards Act of 1938, 29 U.S.C.A. § 203 (2014)

in many of other hearings on the federal level[2] and state level,[3] where administrative resources are limited. I strongly support this amendment that can help wage cases to be resolved in timely manner.

Pursuant to §12-22-46 of the Department's proposed amendment, "[a]ny party shall have an opportunity to contest the facts so noticed, within the time specified by the hearings officer." Haw. Rev. Stat. Ann. §91-10 (4) (2003),[4] allowing any party to contest the facts to notice without putting any timely limitation on time to contest the facts so noticed. I agree that this added phrase in this section serves the purpose of promoting administrative effectiveness and save administrative resources for other urgent issues. It is, however, also important to give parties a sufficient opportunity to contest as our legislative intended, which I also highly value in the hearing process. In short, I suggest the Department add "reasonable" within the pertinent part. So it reads: any party shall have an opportunity to contest the facts so noticed, **within a reasonable time** specified by the hearings officer. I also believe that this will encourage the hearing officer to consider balancing both of an administrative effectiveness and fair opportunity concerns when specifying reasonable time to contest the facts so noticed and prevent him/her from arbitrary time setting.

The Department may want to consider adding a comma after "a laborer or mechanic" in §12-22-4.1 (a) of the proposed amendment to convey its meaning more clearly.[5]

Again, I support §12-22-40-47 of the proposed amendment particularly with regard to §12-22-47 of it. I suggest the Department add "reasonable" within the §12-22-46 of the proposed amendment. The Department may want to consider adding a comma after "a laborer or mechanic" in §12-22-4.1 (a) of the proposed amendment.

Thank you for allowing me this opportunity to testify on this proposed amendment.

Best Regards,

Jae-Young Lee

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[2] *See*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/federal/fed_employees/faq_hearing.cfm#q36 (last visited Feb. 12., 2018). *See also* United States Department of Labor, https://www.dol.gov/appeals/BLA_claimants.htm (last visited Feb. 12., 2018).

[3] *See* Colorado Department of Labor and Employment https://www.colorado.gov/pacific/cdle/after-hearing (last visited Feb. 12., 2018).

[4] Haw. Rev. Stat. Ann. §91-10 (4) (2003) provides: . . . they shall be afforded an opportunity to contest the facts so noticed.

[5] §12-22-4.1 (a) of the proposed amendment provides: In determining the hourly overtime compensation due a laborer or mechanic the rate shall be computed by multiplying the basic hourly rate times the overtime multiplier according to the wage rate schedule classification and then adding the hourly fringe benefit rate.

AFFIDAVIT OF PUBLICATION

IN THE MATTER OF
Notice of Public Hearing

STATE OF HAWAII }
} SS.
City and County of Honolulu }

Doc. Date: JAN 15 2018 # Pages: 1
Notary Name: COLLEEN E. SORANAKA First Judicial Circuit
Doc. Description: Affidavit of Publication

JAN 15 2018
Notary Signature Date

COLLEEN E. SORANAKA NOTARY PUBLIC No. 90-282 STATE OF HAWAII

Gwyn Pang being duly sworn, deposes and says that she is a clerk, duly authorized to execute this affidavit of Oahu Publications, Inc. publisher of The Honolulu Star-Advertiser, MidWeek, The Garden Island, West Hawaii Today, and Hawaii Tribune-Herald, that said newspapers are newspapers of general circulation in the State of Hawaii, and that the attached notice is true notice as was published in the aforementioned newspapers as follows:

Honolulu Star-Advertiser 1 times on:
01/14/2018
MidWeek 0 times on:
The Garden Island 0 times on:
Hawaii Tribune-Herald 0 times on:
West Hawaii Today 0 times on:

Other Publications: 0 times on:

And that affiant is not a party to or in any way interested in the above entitled matter.

Gwyn Pang

Gwyn Pang

Subscribed to and sworn before me this 15 day of January A.D. 20 18

Colleen E. Soranaka, Notary Public of the First Judicial Circuit, State of Hawaii
My commission expires: Jan 06 2020

Ad # 0001059621

COLLEEN E. SORANAKA NOTARY PUBLIC No. 90-282 STATE OF HAWAII

SP.NO.: _____ L.N.

NOTICE OF PUBLIC HEARING

Notice is hereby given that the Department of Labor and Industrial Relations, Wage Standards Division will hold a public hearing to address proposed amendments to Hawaii Administrative Rules, Title 12, Chapter 22, relating to wage determinations and the administration and enforcement of Chapter 104, Hawaii Revised Statutes (HRS). The notice and public hearing are pursuant to Wages and Hours of Employees on Public Works Law, Section 104-29, HRS, and Chapter 91, HRS.

The proposed rule amendments will: (1) bring the rules in line with statute changes; (2) provide new rules for new statutes; and (3) modify the rules to improve the administration and enforcement of the law including:

1. Subchapter 1, Administration and Enforcement; repeals the exemption for warranty work done by the manufacturer; clarifies that the employer's cost of prepaid health care is an allowable fringe benefit; defines "falsification"; addresses the asphalt paving industry of delivering paving materials to spreader box trucks; amends the method of calculation of prevailing wages and deletes the definition of "average rate"; adds the method of calculation of overtime compensation; amends that appeals of a classification determination go to a hearings officer appointed by the director, not the Labor and Industrial Relations Appeals Board; clarifies certified payroll and record keeping requirements;
2. Subchapter 2, Penalty for Violations; conforms the penalty provisions to be consistent with the current statutes;
3. Subchapter 3, Hearing of Appeal; new subchapter with proposed procedures and requirements for an administrative hearing of appeals of a notification of violation, under Chapter 91, HRS, including prehearing conference, evidence, and the right to judicial review of a decision;
4. Subchapter 4, Construction on Property Leased by the State or County; new subchapter with proposed procedures and requirements for construction on property leased by the state or county;
5. Subchapter 5, Construction Projects Financed with Special Purpose Revenue Bonds; new subchapter with proposed requirements for construction projects financed with special purpose revenue bonds; and
6. additional changes for technical and clarification purposes.

Copies of the proposed amendments will be made available for public viewing from the first working day that the legal notice appears in the Honolulu Star-Advertiser through the day the public hearing is held, from Monday - Friday, between the hours of 2:00 p.m. - 4:00 p.m., at the following locations: 830 Punchbowl Street, Room 340, Honolulu, Hawaii; 2264 Aupuni Street, Wailuku, Hawaii; 75 Aupuni Street, Room 108 Hilo, Hawaii; 81-990 Halekii Street, Room 2087, Kealakekua, Hawaii; and 3060 Eiwa Street, Room 202, Lihue, Hawaii. A copy of the proposed amendments will be mailed to any interested person who requests a copy at the locations above-described, and pays a prepaid fee of ten cents per page for the copy and postage. The proposed rules may also be viewed at http://labor.hawaii.gov/wsd.

The public hearing will be held on: **February 16, 2018, at 9:30 a.m.** at:
HONOLULU, OAHU
Keelikolani Building
830 Punchbowl Street, Room 314
Honolulu, Hawaii 96813

The public hearing will be continued, if necessary, to the time, date and place announced at the scheduled hearing.

Interested persons may submit any data, views, or arguments, orally or in writing, concerning the proposed amendments. All written submissions for the record must be submitted to Wage Standards Division, 830 Punchbowl Street, Room 340, Honolulu, Hawaii 96813 and must be received at or prior to the scheduled public hearing.

Auxiliary aids and services are available upon request to individuals with disabilities. TDD/TTY Dial 711 then ask for (808) 586-8771, or email dlir.wages@hawaii.gov. A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodations.

Dated: January 14, 2018
LEONARD HOSHIJO, Acting Director
Department of Labor and Industrial Relations
(SA1059621 1/14/18)

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendment and Compilation of Chapter 12-22
Hawaii Administrative Rules

(Date of adoption)

1. Chapter 12-22, Hawaii Administrative Rules, entitled "Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes", is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

CHAPTER 22

WAGE DETERMINATIONS AND THE ADMINISTRATION AND ENFORCEMENT OF CHAPTER 104, HAWAII REVISED STATUTES

Subchapter 1 Administration and Enforcement

Subchapter 2 Penalty for Violations

Subchapter 3 Hearing of Appeal

Historical Note: Chapter 22 of title 12 is based substantially upon Rule XVIII, Relating to Wage Determinations Under Chapter 104, Hawaii Revised Statutes, and the Administration and Enforcement of said Chapter of the Department of Labor and Industrial Relations. [Eff 8/15/55; am 4/16/56; am 9/1/59; R 7/27/81]

SUBCHAPTER 1

ADMINISTRATION AND ENFORCEMENT

§12-22-1 Definitions. As used in this chapter:

"Apprentice" shall [~~be as defined~~] have the same meaning as in section 372-2, [~~Hawaii Revised Statutes.~~] HRS.

[~~"Average rate" means the rate obtained by adding the hourly rates of wages paid to each worker in a designated class of laborers or mechanics and dividing the sum by the total number of workers in the class.~~]

"Basic hourly rate" shall [~~be as defined~~] have the same meaning as in section 104-1, [~~Hawaii Revised Statutes.~~] HRS.

"Construction of public work" includes without limitation new construction, reconstruction, development, improvement, alteration, repair, renovation, painting, decorating, dredging, shoring, simultaneous sewer inspection and repair, and any other activity performed by a laborer or mechanic employed at the site of a public work or at any property used by the contractor, dedicated for the performance of the contract, such as batch plants, borrow pits, fabrication plants, mobile factories, job headquarters, and tool yards. As used in this [~~section,~~] definition, "other activity performed by a laborer or mechanic employed at the site" includes the following if the activity is an integral part of or is in conjunction with a construction contract, or if there is substantial construction activity involved in a supply, service, or other type of non-construction contract:

(1) Manufacturing or furnishing of materials, articles, supplies, or equipment on the job site;
(2) Warranty work [~~except when done by the manufacturer on defective products or equipment~~];
(3) Demolition or excavation;
(4) Landscaping;
(5) Termite treatment; and
(6) Installation at the construction site of items or articles fabricated off-site, such as shelving, drapery, and communications equipment.

"Contract" means any type of agreement over $2,000 for construction of a public work, regardless of what the agreement may be called, including purchase orders and vouchers.

"Contractor" [~~means~~] shall have the same meaning as in section 104-1, HRS, including but not limited to the general contractor or any subcontractor, [~~including~~] any individual, partnership, firm, corporation, joint venture, or other legal entity, acting directly or through an agent, employee, consultant, corporate officer or corporate director, undertaking the execution of a construction contract over $2,000 with a governmental contracting agency.

"Cost of fringe benefit" means the rate of contribution irrevocably made by a contractor to a trustee or to a third person pursuant to a fund, plan, or program in providing benefits to a laborer or mechanic for:

(1) Health and welfare such as medical or hospital care, [~~compensation for injuries or illness resulting from occupational activity,~~] or insurance to provide for any of the foregoing;
(2) Unemployment, life insurance, sickness or disability insurance, or accident insurance;
(3) Vacation and holiday pay;
(4) Pensions on retirement or death;
(5) Defraying costs of apprenticeship or other similar programs; or
(6) Other bona fide fringe benefits as determined by the director;

[~~provided that~~] except for chapter 393, HRS, where a contractor is required by either federal or state law to provide these benefits the rate of contribution or other costs for these benefits shall not be included.

"Department" means the department of labor and industrial relations.

"Director" shall [~~be as defined~~] have the same meaning as in section 104-1, [~~Hawaii Revised Statutes.~~] HRS.

"Employed" includes every person paid in any manner for working in the construction of a work under a contract with a governmental contracting agency, regardless of any contractual relationship alleged to exist.

"Falsification of records" means the submission or filing of inaccurate, misleading, or incorrect payment information on certified payrolls, fringe benefit reporting forms, or other documentation required by this chapter for construction work performed on a public works construction project when the form submitted has been attested to or certified to be true and correct by the contractor or the contractor's designated representative.

"Governmental contracting agency" shall [~~be as defined~~] have the same meaning as in [~~section~~] sections 104-1 and 104-2, [~~Hawaii Revised Statutes.~~] HRS.

"Hawaii Revised Statutes" or "HRS" means laws enacted by the Hawaii state legislature.

"Prevailing area practice" means the labor classifications of the work performed by the laborers or mechanics of the group used by the contractors whose wage rates were determined to be prevailing in the locality and are incorporated into and represented in the applicable wage rate schedule issued by the department.

"Public work" shall [~~be as defined~~] have the same meaning as in section [~~104-2(a),~~] 104-1, [~~Hawaii Revised Statutes,~~] HRS, and includes without limitation:

(1) Any building, structure, road, or real property, the construction of which is undertaken:
    (A) By authority of; and
    (B) Through the use of funds, grants, loans, bonds, land, or other resources of the State or any county, board, bureau, authority, commission, or other agency or instrumentality thereof, to serve the interest of the [~~general~~] public, regardless of whether title thereof is held by a state or county agency. However, subsequent construction to fixtures or appurtenances attached to the assigned space of an individual occupant,

lessee, or tenant of the building or structure, contracted by other than a state or county agency or instrumentality thereof, shall not be subject to chapter 104, [~~Hawaii Revised Statutes.~~] HRS; or

(2) [~~Any building or structure constructed under private contract under the following conditions:~~

~~(A) The property is privately owned, but the entire building or structure is leased to the State or a political subdivision;~~

~~(B) The lease agreement between the lessor and the State or political subdivision, as lessee, was entered into prior to the construction contract; and~~

~~(C) The construction work is performed according to plans, specifications, or criteria of the State or political subdivision.~~]

A construction contract between private persons in accordance with section 104-2.5, HRS.

[~~"Trainee" means a person participating, through employment, in a schedule of work experience and who is a party to a trainee agreement approved by and registered with the department.~~]

"USDOL" means the United States Department of Labor.

"Wages", "minimum wages", "prevailing wages", "rate of wages", and "wage rates" shall [~~be as defined~~] have the same meaning as in section 104-1, [~~Hawaii Revised Statutes.~~] HRS. [Eff 7/27/81; am and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-29)

§12-22-1.1 Transporting of materials, supplies, or equipment. (a) Chapter 104, [~~Hawaii Revised Statutes,~~] HRS, and [~~these rules~~] this chapter are

applicable, but not limited to, [~~transporting of~~] a laborer or mechanic who is employed and performs work at a public work site and transports materials, supplies, or equipment:

(1) To or from a public work site; or

(2) Between a public work site and either another public work site or a dedicated site[~~;~~ ~~when performed by a laborer or mechanic employed at the public work site~~].

(b) The following illustrate situations in which chapter 104, [~~Hawaii Revised Statutes,~~] HRS, and [~~these rules~~] this chapter are not applicable:

(1) Delivery of materials, supplies, or equipment to a public work site if the delivery persons only drop off the items and perform no construction work at the public work site;

(2) Hauling of excavated material away from a public work site for disposal or recycling, where the drivers are on the site only [~~for the purpose of having~~] to have their trucks filled;

(3) Continuous hauling of material to and from a public work site, and the drivers perform no construction work at the public work site; or

(4) Delivery or removal of equipment to or from a public work site, and the delivery persons operate no equipment or perform no other work as a laborer or mechanic on the public work site. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-29)

§12-22-2 Method to determine prevailing wage rates. [~~(a) In making prevailing wage determinations under chapter 104, Hawaii Revised Statutes, the director shall make separate findings of:~~

~~(1) The basic hourly rate; and~~

~~(2) The rate of contribution or cost of fringe benefits paid by the employer when the payment of the fringe benefits by the employer constitutes a prevailing practice. The cost of fringe benefits shall be reflected in the wage rate schedule as an hourly rate.~~

~~(b)~~] (a) The rates of wages which the director shall regard as prevailing in each corresponding classification of laborers and mechanics shall be[~~:~~] as defined in section 104-2(b)(1)(A) and (B), HRS.

[~~(1) The rate of wages paid to the majority of those employed in the State in the corresponding classes of laborers or mechanics on projects that are similar to the contract work; or~~

~~(2) In the event that there is not a majority paid at the same rate, then the rate paid to the greater number, provided the greater number constitutes thirty per cent of those so employed; or~~

~~(3)~~] (b) [~~In the event less than thirty per cent of those so employed receive the same rate,~~] If there is no modal rate, then the average [~~rate.~~] of the rates that occur with the highest frequency.

[Eff 7/27/81; am and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-3 Procedure for wage rate schedules. (a) All schedules of wage rates for laborers and mechanics and any changes thereto shall be based on:

(1) Surveys or methods which the director may deem necessary to obtain data for wage determinations; [~~or~~]

(2) Wage determinations made by the Secretary of Labor, USDOL, under the Davis-Bacon Act (40 U.S.C. §§276a-276a-7); or

(3) Both paragraphs (1) and (2).

(b) Wage rate schedules shall be regularly issued on or about February 15 and September 15 of

each year. Additional wage rate schedules, addenda, and notices of changes will be issued as the director deems necessary.

(c) Requests for determination by the director of wage rates for classes of laborers and mechanics not listed on the current schedule of wage rates or for any change, modification, or review of wage rates shall be submitted by the governmental contracting agency or any interested party at least thirty calendar days before advertisement of the specifications for which the determination is sought. Exceptions from this provision shall be made only upon a proper showing in unusual circumstances.

(d) Any increase in wage rates, as determined by the director and issued in the wage rate schedule, shall be applicable during the performance of the contract, in accordance with section 104-2(a) and (b), [~~Hawaii Revised Statutes.~~] HRS.

(e) No wage rate determined by the director shall be less than the rate established by the Secretary of Labor (USDOL) for the corresponding class.

(f) Any changes to the wage rates shall be recognized by the director only upon complete and timely submission of the information, in accordance with [~~section 104-11, Hawaii Revised Statutes.~~] this chapter. [~~The~~] Notwithstanding the effective or adoption date of a collective bargaining agreement or rates contained therein, the effective date of these changes shall be the date of publication in the wage rate schedule and shall not be retroactive. [Eff 7/27/81; am and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-2, 104-31, 104-34)

§12-22-4 Method to determine fringe benefit hourly rates. In determining the hourly equivalent of a monthly rate of contribution for a fringe benefit, the monthly rate of contribution shall be divided by one hundred [~~and~~] seventy-three hours and the quotient

shall be the hourly rate. [Eff 7/27/81; comp 4/1/96; comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-4.1 Method to determine overtime compensation rate. (a) In determining the hourly overtime compensation due a laborer or mechanic, the rate shall be computed by multiplying the basic hourly rate times the overtime multiplier according to the wage rate schedule classification and then adding the hourly fringe benefit rate.

(b) No credit for fringe benefits made by monthly contributions as calculated in section 12-22-4, is allowed in determining the overtime rate. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-5 Meeting prevailing wage requirements. A contractor shall pay the prevailing wages contained in a wage rate schedule applicable to laborers or mechanics in any of the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits as specified in the wage rate schedule;

(2) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for fringe benefits in a total amount not less than the total of the fringe benefits required by the wage rate schedule;

(3) By paying the basic hourly rate in cash directly to the laborers or mechanics and by making an additional cash payment in lieu of the fringe benefits required by the wage rate schedule; or

(4) By paying an hourly rate, partly in cash and partly in fringe benefits, which total not less than the prevailing wages. [Eff 7/27/81; am and comp 4/1/96; comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-6 Apprentice [~~and trainee~~] rates. Any apprentice [~~or trainee~~] wage rates established by the director shall apply only to:

(1) Contractors who are a party to a bona fide apprenticeship program which has been registered with the department;

[~~(1)~~] (2) Apprentices [~~and trainees~~] who are parties to apprenticeship [~~and trainee~~] agreements which have been registered with the department or recognized by the department as a USDOL nationally approved apprenticeship program[~~,~~], and who have been individually registered by name with the department; and

[~~(2)~~] (3) The number of apprentices [~~or trainees~~] on any public work which, in relation to the number of journeyworkers in the same craft classification as the apprentices [~~or trainees~~] employed by the same employer on the same public work, is not in excess of the ratio allowed for employment of apprentices [~~and trainees~~] by the employer under the apprenticeship [~~or trainee~~] standards agreed and subscribed to by the employer and registered with or recognized by the department. A registered or recognized apprentice receiving the journeyworker rate will not be considered a journeyworker for the purpose of meeting the ratio requirement. [Eff 7/27/81; am and comp 4/1/96, am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-7 Contract provisions. The governmental contracting agency shall cause or require to be inserted in all specifications, solicitations, and contracts made and entered into by the agency for construction of any public work, [~~the wage rate schedule issued~~] a requirement that prevailing wages be paid as determined by the director and any other stipulation or provision required by chapter 104, [~~Hawaii Revised Statutes.~~] HRS. [Eff 7/27/81; am and comp 4/1/96, am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-8 Classification of laborers and mechanics. (a) The governmental contracting agency shall require that any class of laborers or mechanics which will be employed on a public work and for which the director has not made a wage determination shall be classified by the contractor in a manner which conforms to the classifications contained in the wage rate schedule issued by the director.

(b) If there is a disagreement on the proper classification or reclassification of a particular class of laborers or mechanics to be used, the governmental contracting agency shall submit a written report of the issues in disagreement and refer the matter to the director for determination.

(c) If the governmental contracting agency fails to refer the disagreement to the director as provided by subsection (b) within ten days after a request in writing is made to the governmental contracting agency by any interested party, the interested party may refer the question in writing to the director. [Eff 7/27/81; am and comp 4/1/96, comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-8.1 Investigation of complaints. Any complaint received by a governmental contracting agency with respect to matters under chapter 104, [~~Hawaii Revised Statutes,~~] HRS, shall be referred to the director for investigation and report. [Eff and comp 4/1/96, am and comp] (Auth: HRS §104-29) (Imp: HRS §104-21)

§12-22-9 Appeal[~~.~~] of classification determination. (a) Any person aggrieved by the director's determination made pursuant to section 12-22-8 may, within ten days after mailing of the determination, appeal in writing to the [~~labor and industrial relations appeals board.~~] hearings officer appointed by the director in conformance with chapter 91, HRS.

(b) Any party to the appeal may obtain judicial review of the appeals decision in the manner provided in chapter 91, HRS. [Eff 7/27/81; comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-10 [~~Record~~] Certified payroll and record keeping requirements. (a) Each contractor shall maintain accurate and complete payroll records and related employment records during the course of the work and preserve the records for a period of three years from the close of the project for all laborers and mechanics working on the public works construction project in English containing the following information and data on each laborer and mechanic engaged in the performance of the contract at the job site:

(1) Name in full;
(2) Home address;
(3) Last four digits of social security number;
(4) Copy of the apprentice's registration with the department;

[~~(3)~~] (5) Job classification[~~,~~] for each classification of work performed;

[~~(4)~~] (6) Rate of pay;

[~~(5)~~] (7) Hours worked each workday and total hours worked each workweek;

[~~(6)~~] (8) Total weekly straight-time earnings;

[~~(7)~~] (9) Total weekly overtime earnings;

[~~(8)~~] (10) Total weekly gross earnings;

[~~(9)~~] (11) The amount and purpose of each deduction; [~~and~~]

[~~(10)~~] (12) Total net wages paid and the date paid[~~.~~]; and

(13) Other information as the director may require.

(b) Whenever a contractor provides fringe benefits to covered workers, the contractor shall further maintain records showing the irrevocable commitment to provide the benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing the benefits.

(c) Contractors employing apprentices under an approved program shall maintain a written record of the registration of the apprenticeship program, the registration of the apprentices, and the ratios and wage rates prescribed for the applicable program.

(d) A contractor shall submit weekly for each week in which any construction work is performed a copy of all certified payrolls to the contracting agency. The certified payrolls submitted shall set out accurately and completely all of the information required to be maintained under this chapter. The general contractor is responsible for the submission of the certified payroll records for all subcontractors.

(e) Each certified payroll submitted shall be accompanied by a "Statement of Compliance", signed by the contractor or the contractor's designated representative and shall certify or attest that:

(1) The information for the payroll period reported is correct and complete;

(2) Each laborer or mechanic, or apprentice employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth by law; and

(3) Each laborer or mechanic has been paid not less than the applicable prevailing wage and fringe benefits or cash equivalent for the classification of work performed, as specified in the wage rate schedule applicable to the public work construction project at the time the work was performed.

(f) Certified payrolls submitted shall be numbered consecutively from the first week in which work is performed. Subsequent weeks shall be numbered in chronological order with the final week in which work is performed to be labeled "final".

(g) Amended certified payroll records submitted shall be labeled amended with a detailed explanation of the reason for the amendment.

(h) The falsification of any of the required documents may subject a contractor to civil penalties including suspension or criminal prosecution, or both.

(i) The contractor shall provide an electronic copy of the records or make the records available for inspection and photocopying, or transcription by the director and the director's authorized representatives. The contractor shall permit the director or the director's representatives to privately interview employees during working hours on the job. If a contractor fails to submit required records or to make the records available, or fails to allow private interviews with employees, the director may take such action as may be necessary to cause the suspension of any further payment. Failure to comply may also be grounds for immediate suspension pursuant to chapter 104, HRS. [Eff 7/27/81; comp 4/1/96; am

and comp] (Auth: HRS §104-29) (Imp: HRS §§104-3, 104-22, 104-25)

§12-22-11 Rulings and interpretations. All questions arising in any governmental contracting agency relating to the [~~application~~] applicability and interpretation of chapter 104, [~~Hawaii Revised Statutes,~~] HRS, and of this chapter shall be referred to the director for ruling and interpretation. The director, in making the ruling or interpretation, shall take into consideration the prevailing practice of the construction industry in the locality. [Eff 7/27/81; comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-21)

§12-22-12 Disbursement of accrued amounts withheld on contract. (a) Within sixty days from the date of written request by the director, the contracting agency shall pay or transfer specified amounts from accrued payment withheld on a contract to the director for:

(1) Wages, overtime compensation, or both due to laborers and mechanics;

(2) Penalties assessed for a first [~~or~~], second, or third violation; or

(3) Both paragraphs (1) and (2).

(b) Amounts collected or transferred for back wages shall be deposited or credited to the wage claim fund of the department. Amounts collected for penalties shall be deposited or credited to the general fund.

(c) The department shall disburse from the wage claim fund any wages or overtime compensation due to laborers or mechanics. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-2, 104-21)

§12-22-13 **Computation of time.** The time in which any act provided by these rules is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded. As used in this section, "holiday" includes any day designated as such pursuant to section 8-1, [~~Hawaii Revised Statutes.~~] HRS. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §104-29)

[~~§§12-22-14 to 12-22-24 (Reserved)~~]

SUBCHAPTER 2

PENALTY FOR [~~FIRST VIOLATION~~] VIOLATIONS

§12-22-25 **Notification of violation.** (a) Where the department, either as a result of its own investigation or as a result of a report by a contracting agency, finds that a [~~first~~] violation of chapter 104, [~~Hawaii Revised Statutes,~~] HRS, has been committed, the department shall issue a notification of violation to the contractor. Each notice of violation shall involve only one project. Each offense shall be as described in section 104-24(e), HRS.

(b) A first violation refers to the first investigation in which the department finds that a contractor has failed to comply with chapter 104, [~~Hawaii Revised Statutes,~~] HRS, or a violation which occurs more than two years after the date of notification of first violation. [~~A first violation investigation may involve more than one project; however, offenses shall be determined separately for each project.~~] A second violation refers to a

violation which occurs within two years of the date of the first notification of violation. A third violation refers to a violation which occurs within three years of the date of the second notification of violation. Additional violations occurring after the third violation shall be treated in the same way as the third violation.

(c) A notification of violation shall be final and conclusive twenty days after the date of mailing to the contractor, unless a written notice of appeal is filed with the director, as provided in section [~~104-5(b),~~] 104-23, [~~Hawaii Revised Statutes.~~] HRS. [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-23, 104-24)

§12-22-26 [~~Penalty.~~] Delay or falsification penalty. (a) A penalty of [~~up to $1,000~~] $10,000 per [~~offense~~] project shall be assessed against a contractor for [~~a first violation of chapter 104, Hawaii Revised Statutes.~~] interference or delay including failure to provide requested records under section 104-3, HRS, or failure to allow employees to be interviewed during working hours on the job.

(b) [~~In determining the offenses committed by a contractor, the department shall assess a separate penalty for each section of chapter 104, Hawaii Revised Statutes, under which the contractor is cited, with respect to each project and each employee.~~] An additional penalty of $1,000 for each day thereafter that the contractor fails to comply shall be assessed against the contractor.

(c) A penalty of $10,000 per project shall be assessed against a contractor for falsification of records.

[~~(c) The amount of the penalty for a first violation shall be determined by application of the following criteria:~~

~~(1) The severity of the offense;~~

~~(2) Whether the contractor has made a good faith effort to comply with the provisions of~~

~~chapter 104, Hawaii Revised Statutes, and these rules; and~~

~~(3) Other relevant factors as determined by the director.~~]

(d) The contractor shall be immediately suspended for a period of three years.

[~~(d)~~] (e) Concurrent with or after the issuance of a notification of violation, and within a reasonable period after completion of the investigation, the department shall notify the contractor of violations of the chapter committed and the penalty assessed, which shall then be due and payable within twenty days from the date of the mailing of the notification of violation.

[~~(e) Appropriate penalty shall be assessed even if the contractor, after being informed of the offense by the department, initiates immediate action to correct the offense.~~] [Eff and comp 4/1/96; am and comp] (Auth: HRS §104-29) (Imp: HRS §§104-22, 104-24, 104-25)

12-22-27 Violation penalties. (a) Where the department finds that a first, second, or third violation has been committed, penalties shall be as described in sections 104-22, 104-24, and 104-25, HRS.

(b) Additional violations committed after the third violation shall be penalized in the same way as the third violation.

(c) Concurrent with or after the issuance of a notification of violation, and within a reasonable period after completion of the investigation, the department shall notify the contractor of violations of the chapter committed and the penalty assessed, which shall then be due and payable within twenty days from the date of the mailing of the notification of violation. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§104-24, 104-25)

SUBCHAPTER 3

HEARING OF APPEAL

§12-22-40 Definitions. As used in this subchapter:

"Hearing" shall have the same meaning as the term agency hearing as defined in section 91-1, HRS.

"Party" or "parties" shall have the same meaning as in section 91-1, HRS and shall include any other person such as the contractor or contractor's representative, the department, or both. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-1, 104-23)

§12-22-41 Prehearing conference. (a) Upon docketing an appeal, but prior to a hearing, the hearings officer may hold a prehearing conference with the parties.

(b) Any matter not raised at the prehearing conference shall not be allowed during the hearing. Matters to be discussed at the prehearing conference may include but are not limited to the following:

(1) A discussion of the issues raised by the appellant and the explanations and defenses to be presented by the parties at the hearing;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining stipulations which will avoid unnecessary proof;

(4) The possibility of a settlement between the parties; and

(5) Other matters that may aid in the disposition of the case.

(c) If the parties agree to the terms of a settlement at the prehearing conference, the settlement shall be reduced to writing, signed by the parties, and approved by the hearings officer. If

approved, the case will be dismissed without a finding on the merits of the complaint and a copy of the final prehearing settlement shall be sent by mail to the department and the appellant.

(d) A prehearing settlement shall not affect the processing of any other case, including but not limited to complaints in which the allegations are like or related to the individual allegations settled.

(e) Prehearing conference statements shall be filed by the parties no later than three business days before the scheduled prehearing conference covering those areas identified in the notice of prehearing conference. Additional conferences may be scheduled at the hearings officers' discretion. [Eff and comp] (Auth: HRS §104-29) (Imp: §104-23)

§12-22-42 Prehearing order. (a) When a prehearing conference is held, the hearings officer may enter a prehearing order which recites the action taken at the prehearing conference, including;

(1) The agreements made by the parties as to any of the matters considered;

(2) The issues for hearing not otherwise disposed of by stipulation or agreement of the parties; and

(3) The exchange of exhibits, witness list, and prehearing memorandum deadlines.

(b) The prehearing order shall control the subsequent course of the appeal, unless modified by the hearings officer at the hearing or prior thereto to prevent manifest injustice. The prehearing order shall supersede the pleading where there is any conflict and shall supplement the pleading in all other respects. [Eff and comp] (Auth: HRS §104-29) (Imp: §104-23)

§12-22-43 **Hearing.** (a) Any hearing under this subchapter shall be held in accordance with chapter 91, HRS.

(b) The hearing on appeal shall be held within sixty days of the notice of appeal.

(c) All parties shall be given written notice of hearing at least fifteen days before the hearing.

(d) The parties shall be present at the hearing, and shall be allowed to call, examine, and cross-examine witnesses, and introduce papers, documents, or other evidence, in person or by counsel.

(e) At the discretion of the hearings officer, any other person may be allowed to participate, in person or by counsel, for the purposes and to the extent that the hearings officer shall determine.

(f) Witnesses at the hearing shall be examined orally, under oath or affirmation, and a record of the proceedings shall be made by the hearings officer. The hearings officer or a person designated by the hearings officer may administer oaths or affirmations at the hearing.

(g) The hearings officer may continue a hearing from day to day or adjourn it to a later day or to a different place by announcement thereof at the hearing or by appropriate notice to all parties. The hearings officer may also continue a hearing upon request of any party. At the discretion of the hearings officer, a hearing may be reopened.

(h) If the employer or employer's representative is absent without notice, the hearings officer shall base the decision on the available evidence. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-9.5, 104-23)

§12-22-44 **Powers and duties of hearings officer.** (a) The hearings officer shall have full power and authority to:

(1) Control the procedures of the hearing;

(2) Admit or exclude testimony or other evidence;

(3) Rule upon all motions and objections;
(4) Call and examine witnesses;
(5) Direct the production of papers or other matter present in the hearings room; and
(6) Take other actions that are necessary and proper for the conduct of the hearing.

(b) The hearings officer may issue subpoenas either at will or upon written request of a party to the proceeding whenever necessary to compel the attendance of witnesses and the introduction of books, records, correspondence, documents, papers, or any other evidence, which relates to any matter in question before the hearings officer. Where a subpoena is issued at the instance of a party to the proceeding other than the hearings officer, the cost of service and witness and mileage fees shall be borne by the party at whose request the subpoena is issued. Witness and mileage fees shall be the same as fees paid witnesses in the circuit court.

(c) The hearings officer, whenever necessary or required during the hearing and on terms and conditions as the hearings officer may determine, shall take or cause to be taken deposition of witnesses residing within or without the State of Hawaii in the manner prescribed by law for deposition in civil actions. A request by a party other than the hearings officer for deposition of witnesses shall be in writing. The cost of any deposition shall be borne by the party at whose request the deposition was taken. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-45 Rules of evidence. (a) The admissibility of evidence at hearing shall not be governed by the laws of evidence, and all relevant oral or documentary evidence shall be admitted if it is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into

evidence. The hearings officer shall give effect to the rules of privilege recognized by law.

(b) Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the unavailability of the original and the reasons therefor shall be considered by the hearings officer when considering the weight of the documentary evidence. [Eff and comp] (Auth: HRS §§91-2, §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-46 Official notice of facts. The hearings officer may take official notice of those matters that may be judicially noticed by the courts of the State. The hearings officer may also take official notice of generally recognized technical or scientific facts within the agency's specialized knowledge, upon notice to all parties before or during trial. Any party shall have an opportunity to contest the facts so noticed, within a reasonable time specified by the hearings officer. [Eff and comp] (Auth: HRS §§91-2, §104-29) (Imp: HRS §§91-10, 104-23)

§12-22-47 Decision. (a) The hearings officer shall render a written decision on a notification of violation within sixty days after the conclusion of the hearing, which shall include findings of fact and conclusions of law.

(b) A certified copy of the decision shall be served by personal delivery or by mail upon each party. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-23)

§12-22-48 Judicial review. Any party aggrieved by the decision of the hearings officer shall be entitled to judicial review as provided by section 91-14, HRS. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-26)

SUBCHAPTER 4

CONSTRUCTION ON PROPERTY LEASED BY THE STATE OR COUNTY

§12-22-60 Definitions. As used in this chapter:

"Assignable square feet" means the total area of the project available for lease as determined by the master lessor.

"Leasing agency" means the state or county agency who is the lessee of a leased space.

"Project" means all the buildings, other improvements, or both, on the property where a lease is located including the leasing agency's leased area. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-61 Construction for state and county leases policy. Where construction work to property to be leased by the state or any county agency is to be undertaken, the laborers and mechanics working on that construction project shall be paid prevailing wages required under section 104-2, HRS, provided that more than fifty per cent of the assignable square feet of the project is or will be leased by the state or any county agency. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-62 **Submission of leases to department.** Upon execution, renewal, termination, or any change to a lease, the leasing agency shall submit the lease to the department and the department of accounting and general services within thirty days of the execution, renewal, termination or change in the lease. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-63 **Lease required to state square footage.** Every lease entered into by the state or any county agency shall state the total assignable square footage of the project and the amount leased by the state or any county agency leasing space in or on the project. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-64 **Challenges to square footage.** All questions or challenges of the stated measurement of the square footage of the project of the lease shall be filed, heard, and decided by the hearings officer appointed by the director in conformance with chapter 91, HRS. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

§12-22-65 **Lessors required to notify contractors.** A lessor contracting any construction work to the leased property that is subject to section 104-2.5, HRS, shall provide written notice to the contractor that prevailing wages shall be paid to all laborers and mechanics employed on the construction project. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2.5)

SUBCHAPTER 5

CONSTRUCTION PROJECTS FINANCED WITH SPECIAL PURPOSE REVENUE BONDS

§12-22-75 Definitions. As used in this chapter:

"Project agreement" shall have the same meaning as in chapter 39A, HRS.

"Project party" shall have the same meaning as in chapter 39A, HRS.

"Special purpose revenue bonds" shall have the same meaning as in chapter 39A, HRS. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-76 Contract provisions, special purpose revenue bonds. (a) The director of finance shall require in a construction project under chapter 39A, HRS, that the project party insert in all solicitations and contracts made and entered into by the project party that prevailing wages in accordance with chapter 104, HRS, be paid to the laborers and mechanics employed.

(b) The following provisions shall be included in any agreement for construction of a project funded by special purpose revenue bonds between a project party and the contractor:

(1) The project party or the contractor retained by the project party shall maintain and be responsible for all payroll records in accordance with the requirements and be the responsible entity for compliance with chapter 104, HRS, and this chapter, including the maintenance of the certified payroll records during the course of the construction work and preserve these records for a period of three years from the close of the project for all laborers and mechanics so employed; and

(2) Any other information or requirement as the director may require under chapter 104, HRS, or this chapter. [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

§12-22-77 Project party collective bargaining agreement. Where the project party has entered into a collective bargaining agreement with a bona fide labor union governing the project party's workforce, as set forth in section 104-2(h), HRS, the terms of that collective bargaining agreement and associated provisions shall be deemed the prevailing wages such that the project party shall not be required to pay to its laborers and mechanics covered by the collective bargaining agreement the wages in comparable classifications as published by the director in the wage rate schedules, unless otherwise required under the director's enforcement powers contained in section 104-2(g), HRS." [Eff and comp] (Auth: HRS §104-29) (Imp: HRS §104-2)

2. Material, except source notes, to be repealed is bracketed and stricken. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 12-22, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised

Statutes, which were adopted on , and filed with the Office of the Lieutenant Governor.

LEONARD HOSHIJO
Director of Labor and
Industrial Relations

APPROVED AS TO FORM:

Deputy Attorney General

III. Old Business

C. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12, Chapter 44.1, **Testing, Certifying, and Credentialing Individuals Who Perform Maintenance and Testing of Portable Fire Extinguishers, Fire Protection Systems, and Fire Alarm Systems,** promulgated by Hawaii State Fire Council/DLIR.

LEGAL NOTICE
Notice of Proposed Rulemaking
Public Hearing

Pursuant to chapter 91, Hawaii Revised Statutes, notice is hereby given that the Department of Labor and Industrial Relations, State Fire Council ("SFC") will hold a public hearing on March 13, 2018, at 9:00 a.m. in the auditorium at the Honolulu Fire Department Headquarters, 636 South Street, Honolulu, Hawaii 96813, to hear all persons interested in the proposed rules pertaining to Testing, Certifying, and Credentialing Individuals Who Perform Maintenance of Portable Fire Extinguishers, Fire Protection Systems, and Fire Alarm Systems.

The purpose of the hearing is to adopt a new administrative rule in accordance with HRS §132-16 for the testing, certifying, and credentialing individuals who perform maintenance and testing of portable fire extinguishers, fire protection systems, and fire alarm systems that will be administered by the county fire departments.

A copy of the proposed rules will be made available for public viewing from the first working day that the legal notice appears in the Honolulu Star-Advertiser, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island, through the day the public hearing is held, from Monday - Friday between the hours of 8:00 a.m. - 4:00 p.m., at the following locations:

Honolulu Fire Department
636 South Street
Honolulu, Hawaii 96813

Department of Fire and Public Safety, County of Maui
Fire Prevention Bureau
313 Manea Place
Wailuku, Maui, Hawaii 96793

Kauai County Fire Department
4444 Rice Street, Suite 315
Lihue, Kauai, Hawaii 96766

Hawaii County Fire Department
25 Aupuni Street, Suite 2501
Hilo, Hawaii, 96720-4245

Department of Labor and Industrial Relations
830 Punchbowl Street, Room 321
Honolulu, Hawaii 96813

The proposed rules may also be viewed at: http://labor.hawaii.gov/sfc/

A copy of the proposed rules can also be mailed at no cost to any interested party, upon written request to the State Fire Council at 636 South Street, Honolulu, HI 96813

Interested persons may present written or oral testimony at the time of the public hearing. All persons wishing to submit written testimony are requested to submit 5 copies of their written testimony before the public hearing to the State Fire Council, 636 South Street, Honolulu, HI 96813 or 5 copies may be submitted to the presiding officer at the public hearing. The public hearing will be continued, if necessary, to a time, date, and place announced at the scheduled hearing.

Interested persons unable to attend the public hearing, shall submit five copies of their written testimony concerning the proposals to the State Fire Council, 636 South Street, Honolulu, HI 96813. All submissions must be received at or prior to the scheduled public hearing.

Individuals who require special needs accommodations can call the State Fire Council at (808) 723-7176(voice) or the Department of Labor and Industrial Relations at (808) 586-8847 (TTY) or 1-888-569-6859 (TTY neighbor islands) at least ten working days prior to the hearing.

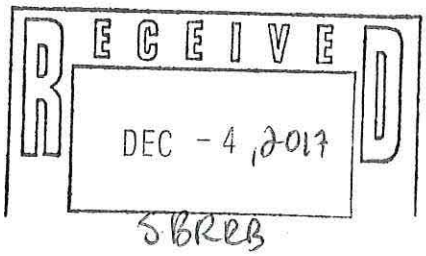
Dated: February 2, 2018
Leonard Hoshijo
Acting Director
Department of Labor and Industrial Relations

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Adoption of Chapter 12-44.1
Hawaii Administrative Rules

SUMMARY

Chapter 12-44.1, Hawaii Administrative Rules, entitled "Testing, Certifying, and Credentialing Individuals Who Perform Maintenance and Testing of Portable Fire Extinguishers, Fire Protection Systems, and Fire Alarm Systems," is adopted to read as follows:



HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 7

BOARDS

CHAPTER 44.1

TESTING, CERTIFYING, AND CREDENTIALING INDIVIDUALS WHO PERFORM MAINTENANCE AND TESTING OF PORTABLE FIRE EXTINGUISHERS, FIRE PROTECTION SYSTEMS, AND FIRE ALARM SYSTEMS

Subchapter 1 Rules of General Applicability

§12-44.1-1 Definitions. The following definitions shall apply to this chapter.

"Certificate of fitness" means a credential issued by the county fire department to any person for the purpose of granting permission to such person to conduct or engage in any operation or act to maintain and test portable fire extinguishers, fire protection systems, or fire alarm systems, or any combination of the above.

"Fire alarm system" means a system or portion of a combination system that consists of components and circuits arranged to monitor and annunciate the status of fire alarm or supervisory signal-initiating devices

and to initiate the appropriate response to those signals.

"Fire protection system" means any fire alarm device or system, or fire extinguishing device or system, or any combination of the above, that is designed and installed for detecting, controlling, or extinguishing a fire or otherwise alerting occupants or the fire department or both that a fire has occurred.

"Other fire extinguishing system" means any fixed fire extinguishing system which uses an extinguishing agent other than water. They may include dry chemical, foam, halogen-type (including nonhalogenated), carbon dioxide, and special hazard systems.

"Portable fire extinguisher" means a portable device, carried or on wheels and manually operable, containing an extinguishing agent that can be expelled under pressure for suppressing or extinguishing fire.

"Private fire hydrant" means a valved connection on a water supply system having one or more outlets that is used to supply hose and fire department pumpers with water and is located on private property.

"Water-based fire extinguishing system" means any class I, II, or III standpipe system, and combined standpipe system, automatic sprinkler system, or automatic water spray fixed system utilizing water as an extinguishing agent. [Eff]
(Auth: HRS §132-16)(Imp: HRS §132-16)

§12-44.1-2 General provisions.

(a) Certificates of fitness may only be issued to a person 18 years of age or older.

(b) Certificates of fitness are nontransferable.

(c) Certificates of fitness are valid for three years.

(d) The holder of a certificate of fitness may only perform maintenance and testing on the type or types of extinguishers or systems for which the

certificate of fitness was issued.
[Eff] (Auth: HRS §132-16)(Imp: HRS §132-16)

§12.44.1-3 Application for certificate of fitness. (a) An application for a certificate of fitness to maintain and test portable fire extinguishers, fire protection systems, or fire alarm systems, or any combination of the above, found on the State Fire Council website, shall be submitted to a county fire department along with copies of the following supporting documents:

(1) Applicant's driver's license;
(2) Approved third-party certificate; and
(3) Proof of applicable training regarding private fire hydrants.

(b) A current listing of approved third-party certifying organizations may be found on the State Fire Council website.

(c) The county fire departments shall issue certificates of fitness to persons who are qualified to maintain and test portable fire extinguishers, fire protection systems, or fire alarm systems or any combination of the above.

(d) The county fire departments shall collect applicable fees.

(e) The fee for each certificate of fitness is payable by check or money order to the county fire department and is nonrefundable. Cash will not be accepted. [Eff] (Auth: HRS §132-16)(Imp: HRS §132-16)

§12-44.1-4 Violations. (a) The county fire department may deny or suspend the certificate of fitness for up to one year if it finds that the holder of the certificate of fitness:

(1) Violated any portion of the state fire code in maintaining and testing portable fire extinguishers, fire protection systems, or fire alarm systems;
(3) Falsified any record required to be maintained by the state fire code;
(4) Falsely obtained or attempted to obtain a certificate of fitness; or
(5) Engaged in testing and maintaining a portable fire extinguisher, fire protection system, or fire alarm system, or any combination of the above, for which a certificate of fitness is required under this chapter during the suspension or expiration of any certificate of fitness.

(b) No new certificate of fitness shall be issued to a person for a period of up to one year from the date the certificate of fitness was suspended during which time the person shall cease all operations as a maintainer and tester of portable fire extinguishers, fire protection systems, or fire alarm systems, or any combination of the above. [Eff] (Auth: HRS §132-16)(Imp: HRS §132-16)

§12-44.1-5 Appeals. (a) Appeal of a certificate of fitness application denial or suspension must be in writing and filed with the county fire chief from which the denial or suspension was issued within 20 days after the date of mailing of the denial or suspension. Deposit of an appeal in the mail addressed to the county fire chief from which the denial or suspension was issued with a postmark dated within the 20 days shall be deemed a timely filing.

(b) A hearing shall be held in accordance with chapter 91, Hawaii Revised Statutes. Computation of time shall be in accordance with section 1-29, Hawaii Revised Statutes. [Eff] (Auth: HRS §132-16)(Imp: HRS §132-16)

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

The adoption of chapter 12-44.1, Hawaii Administrative Rules, on the Summary Page dated _____, was adopted on _____, following a public hearing held on _____, after public notice was given in the Honolulu Star Advertiser on _____.

The adoption of chapter 12-44.1 shall take effect ten days after filing with the Office of the Lieutenant Governor.

_____
Manuel P. Neves, Chairperson
State Fire Council

APPROVED:

_____
David Y. Ige
Governor
State of Hawaii

Dated: _____

APPROVED AS TO FORM:

_____
Deputy Attorney General

_____
Filed

III. Old Business

D. Discussion and Action on the Small Business Statement After Public Hearing on HAR Title 18, Chapter 237, **General Excise Tax Law**, as follows, promulgated by Department of Taxation

1. Amendments to Section 8.6, **County Surcharge**

2. Proposed New Section 29.53, **Exported Services**

SMALL BUSINESS STATEMENT "AFTER" PUBLIC HEARING TO THE SMALL BUSINESS REGULATORY REVIEW BOARD

(Hawaii Revised Statutes (HRS), §201M-3)

Department or Agency: Department of Taxation (Department)

Administrative Rule Title and Chapter: 18-237

Chapter Name: General Excise Tax Law

Contact Person/Title: Jacob Herlitz, Administrative Rules Specialist

Phone Number: (808) 587-5334

E-mail Address: Jacob.L.Herlitz@hawaii.gov **Date**: March 13, 2018

Webpage address for draft rules: tax.hawaii.gov/legal/taxlawandrules

General Description of Proposed Rules:

The proposed rules amend sections 18-237-8.6-01 through 18-237-8.6-10, Hawaii Administrative Rules (HAR), relating to the county surcharge to the general excise tax (GET).

Generally, each county is authorized to impose a county surcharge on gross income and gross proceeds subject to GET. The current rules provide the method of allocating gross income and gross proceeds to each county. The proposed rules simplify the allocation method by eliminating the "nexus" analysis. Additionally, the proposed rules refer to section 18-237-29.53, HAR, which are simultaneously proposed for enactment, to determine allocation of gross income and gross proceeds from services.

Rule Description: ☐ New ☐ Repeal ☒ Amendment ☐ Compilation

I. Please explain how the agency involved small business in the development of the proposed rules.

The Department invited public comment at the public hearing, but did not directly involve small business in the development of the proposed rules.

II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:

1. A description of how opinions or comments from affected small businesses were solicited.

   The Department invited the general public, including small businesses, to provide comments on the proposed rules twice in its notices of public hearing published on the Department's website and in statewide newspapers September 7, 2017 and November 6, 2017.

2. A summary of the public's and small businesses' comments.

   The Department received one item of testimony: comments from the Tax Foundation of Hawaii. The comments raised some concerns with the rules eliminating the "nexus" requirement discussed above.

3. A summary of the agency's response to those comments.

   The Department respectfully disagrees with the Tax Foundation analysis and elected to adopt the proposed rules as-is.

4. The number of persons who:
   (i) Attended the public hearings: 2 on October 17, 2017; 2 on December 11, 2017
   (ii) Testified at the hearing: 1 on October 17, 2017; 1 on December 11, 2017
   (iii) Submitted written comments: 1 on October 17, 2017

5. Was a request made at the hearing to change the proposed rule in a way that affected small business?

   No.

DEPARTMENT OF TAXATION

Amendments to Chapter 18-237,
Hawaii Administrative Rules

_____, 2017

SUMMARY

1. §§18-237-8.6-01 to 18-237-8.6-03 are amended.

2. §18-237-8.6-04 is repealed.

3. §§18-237-8.6-05 to 18-237-8.6-06 are amended.

4. §18-237-8.6-07 is repealed.

5. §§18-237-8.6-08 to 18-237-8.6-10 are amended.

§18-237-8.6-01 Definitions. As used in sections 18-237-8.6-01 to 18-237-8.6-10, unless the context otherwise requires:

"Control" means to exercise restraining or directing influence over.

"Hawaii district" means the taxation district for the county of Hawaii..

"Intangible property" means, but is not limited to, franchises, patent, copyright, formula, process, design, pattern, know how, format, or other similar items.

"Kauai district" means the taxation district for the county of Kauai.

"Maui district" means the taxation district for the counties of Maui and Kalawao, which includes the islands of Maui, Molokai, and Lanai.

"Oahu district" means the taxation district for the city and county of Honolulu.

"Tangible personal property" is generally property that may be touched or felt.

"Taxation district" means the Kauai district, Hawaii district, Maui district, or Oahu district, as those districts are defined in this section. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

18-237-8.6-02 Allocation of gross income and gross proceeds from sales of tangible personal property. Except as provided in this section, the gross income and gross proceeds of sale derived from a taxpayer's sale of tangible personal property shall be allocated to the taxation district where the property is delivered, regardless of where the title to the property passes.

Example 1:

Taxpayer, a retailer located in the Oahu district, receives an order for products from Purchaser. Taxpayer accepts the order and delivers the products to the

Maui district. Taxpayer shall allocate the gross income from the sale to the Maui district, where the products were delivered.

Example 2:

Taxpayer, a retailer located in the Maui district, sells products to Purchaser located in the Oahu district. Pursuant to Purchaser's instructions, Taxpayer directs Taxpayer's product manufacturer, who is located in the Kauai district, to deliver the products to Purchaser's office in the Maui district. Taxpayer shall allocate the gross income from the sale to the Maui district, where the products were delivered.

Example 3:

Retailer, located out of state, sells and delivers products to Purchaser in the Oahu district. Retailer shall allocate the gross income from the sale to the Oahu district, where the products were delivered. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-03 Allocation of gross income from contracting and services. (a) Gross income from contracting or services performed by a taxpayer engaged in a service business or calling shall be allocated to the taxation district where the services are used or consumed, as provided in sections 18-237-29.53-03 to 18-237-29.53-13.

(b) If services are used or consumed in more than one taxation district, gross income shall be allocated using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably quantifies the proportionate benefit received by each

taxation district. [Eff 12/7/06; am]
(Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-04 Repealed. [R]

§18-237-8.6-05 Allocation of gross income from the rental, lease, or license of tangible and intangible personal property. (a) Except as provided in this section, gross income from the rental, lease, or license of tangible and intangible personal property shall be allocated to the taxation district where the property is used.

Example 1:

Taxpayer is engaged in the business of renting motor vehicles in each of the four taxation districts. Taxpayer rents a vehicle to a customer in the Maui district. Taxpayer shall allocate the gross income received from the rental to the Maui district, where the vehicle is used.

Example 2:

Taxpayer, located in the Oahu district, is engaged in the business of renting equipment. Taxpayer rents equipment to XYZ, located in the Maui district, for a job in the Kauai district. Taxpayer shall allocate the gross income from this rental to the Kauai district, where the property is used.

Example 3:

Taxpayer, located in the Oahu district, wrote and copyrighted a song. A musician pays Taxpayer a royalty to perform that song for profit in a hotel in the Maui district. Taxpayer shall allocate the gross income

from the license of the copyright to the Maui district where the property is used.

(b) Where a taxpayer rents or leases tangible personal property or licenses or receives a royalty from intangible personal property that is used in more than one taxation district, gross income shall be allocated using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably quantifies the proportionate benefit received by each taxation district. This rule also applies to property that is constantly in transit between taxation districts, such as barges, containers, and aircrafts without home ports or bases.

Example 1:

Taxpayer rents equipment to XYZ to be used in the Maui district and the Oahu district. The equipment will be used in the Maui district for six months and in the Oahu district for six months. Taxpayer shall allocate fifty per cent of the gross income from the rental of the equipment to the Maui district and fifty per cent to the Oahu district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-06 Allocation of gross income from the rental or lease of real property. Gross income from a taxpayer's rental or lease of real property in the State shall be allocated to the taxation district where the real property is located.

Example 1:

Taxpayer rents condominium units located in each of the four taxation districts. Taxpayer shall allocate the

gross income from the rental of each unit to the taxation district where the condominium unit is located. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-07 Repealed. [R]

§18-237-8.6-08 Allocation of gross income from interest. (a) The gross income from a taxpayer's investment interest shall be allocated to the taxation district where the investment is controlled. Alternatively, the taxpayer may allocate the gross income by using any reasonable method; provided that the method is consistently used by the taxpayer and is supported by verifiable data that reasonably reflects the benefit received by the taxation district.

Example 1:

Taxpayer has retail locations in all taxation districts and has corporate offices located in the Oahu district. Taxpayer has a central cash management account controlled by the corporate office located in the Oahu district that places the gross receipts from all retail locations into one interest bearing bank account. Taxpayer shall allocate the interest received from this bank account to the Oahu district because the account is controlled by the corporate office located in the Oahu district.

Example 2:

Assume the same facts as in example 1, except that a separate bank account is created for the Maui district retail locations. The money deposited into that bank account is used for improvements to the

Maui district stores and controlled by the Maui district retail locations. Interest on this bank account shall be allocated to the Maui district.

(b) When interest is earned from the sale of tangible personal property on a deferred or installment payment plan, the interest shall be allocated to the taxation district where the tangible personal property is delivered. Alternatively, the taxpayer may allocate the gross income by using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district.

Example 1:

Taxpayer, located in the Hawaii district, sells equipment to Purchaser, located in the Kauai district, on an installment payment plan. Taxpayer delivers the equipment to Purchaser in the Kauai district. Every month for twelve months, Taxpayer receives a payment from Purchaser, which includes principal and interest. Taxpayer shall allocate the interest received from each payment to the Kauai district.

(c) When interest is earned from the sale of real property on a deferred payment plan, the gross income from the interest shall be allocated to the taxation district where the real property is located.

Example 1:

Taxpayer sells real estate located in the Oahu district pursuant to an agreement of sale, which provides for deferred payments of the sales price and an interest charge. Taxpayer shall allocate the

interest received to the Oahu district because the real estate that is the subject of the agreement of sale is located in the Oahu district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-09 **Allocation of gross income of theaters, amusements, etc.** The gross income from the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, or any other place where amusements are offered to the public shall be allocated to the taxation district where the event takes place. Alternatively, the taxpayer may allocate the gross income by using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

§18-237-8.6-10 **All others.** If sections 18-237-8.6-02 to 18-237-8.6-09 do not apply, gross income shall be allocated to a taxation district based upon the rules for allocating gross income which are the most relevant to the taxpayer's particular business activity. Alternatively, the taxpayer may allocate the gross income by using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

APPROVED AS TO FORM:

Deputy Attorney General

DATE: June 19, 2017

DEPARTMENT OF TAXATION; Amendments to Chapter 18-237, Hawaii Administrative Rules; Standard format amendments to §§18-237-8.6-01, 18-237-8.6-02, 18-237-8.6-03, 18-237-8.6-05, 18-237-8.6-06, 18-237-8.6-08, 18-237-8.6-09, and 18-237-8.6-10 and repeal of §§18-237-8.6-04 and 18-237-8.6-07 for pre-hearing approval pursuant to Hawaii Administrative Directive 09-01.

DEPARTMENT OF TAXATION

Amendments to Chapter 18-237,
Hawaii Administrative Rules

_____, 2017

1. Section 18-237-8.6-01, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-01 Definitions. [~~Where~~] As used in sections 18-237-8.6-01 to 18-237-8.6-10, unless the context otherwise requires:

[~~"Amusements" means operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station, or any other place at which amusements are offered to the public.~~

~~"Business" means the same as the term is defined in chapter 237, HRS.~~

~~"Contracting" means the same as the term is defined in chapter 237, HRS.~~

~~"Contractor" means the same as the term is defined in chapter 237, HRS.~~]

"Control" means to exercise restraining or directing influence over.

[~~"Documented" means recorded, by means of letters, figures, or marks, the original, official, or legal form of something, which is admissible as an evidence in a court of law.~~

~~"Gross income" means the same as the term is defined in chapter 237, HRS.~~

~~"Gross proceeds of sale" means the same as the term is defined in chapter 237, HRS.~~]

"Hawaii district" means the taxation district for the county of Hawaii.

[~~"Home office" means the principal place of business in this State from which the trade or business of the taxpayer is directed or managed.~~]

"Intangible property" means, but is not limited to, franchises, patent, copyright, formula, process,

design, pattern, know how, format, or other similar items.

[~~"Job site" means the place where a structure or group of structures was, is, or is to be located. It is a location of a property or a plot of land prepared for or underlying a structure or development.~~]

"Kauai district" means the taxation district for the county of Kauai.

"Maui district" means the taxation district for the counties of Maui and Kalawao, which includes the islands of Maui, Molokai, and Lanai.

[~~"Nexus" means, but is not limited to, physical presence in the State or the taxation district as the context may require.~~]

"Oahu district" means the taxation district for the city and county of Honolulu.

[~~"Physical presence" means the presence of one or more employees, representatives, property, or closely related subsidiaries.~~

~~"Place of business" means a physical location in this State at which the trade or business of the taxpayer is conducted. This term does not include a transient or insubstantial location or facilities, such as hotel rooms, dropboxes, telephone number listings, or telephone answering services.~~

~~"Profit centers" are measurement tools used by many different industries. They are a means by which management of a company can analyze revenues and related expenses generated by a profit unit. A profit unit can be a product, a line of business or a person.~~

~~"Real property" means the same as the term is defined in chapter 231-1, HRS.~~

~~"Reasonable allocation method" is a method used to distribute or apportion gross income or gross proceeds in a clear, fair and proper manner and properly reflects the gross income to each taxation district, such as based on the amount of time spent.~~

~~"Service business" means the same as the term is defined in chapter 237, HRS.~~]

"Tangible personal property" is generally property[~~, which~~] that may be touched or felt.

"Taxation district" means the Kauai district, Hawaii district, Maui district, or Oahu district, as those districts are defined in this section.

[~~"Taxpayer" means any person liable for tax under chapter 237, HRS.~~] [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

2. Section 18-237-8.6-02, Hawaii Administrative Rules, is amended to read as follows:

18-237-8.6-02 Allocation of gross income and gross proceeds from sales of tangible personal property. Except as provided in this section, the gross income and gross proceeds of sale derived from a taxpayer's sale of tangible personal property[~~,~~] shall be allocated to the taxation district [~~to which~~] where the property is delivered, regardless of where the title to the property passes. [~~The county surcharge pursuant to section 237-8.6, HRS, shall be imposed on gross income and gross proceeds for sales of tangible personal property shipped or delivered to the Oahu district provided the taxpayer has substantial nexus with the Oahu district. Substantial nexus is created by, but is not limited to physical presence, such as the presence of one or more employees, representatives, or property, in the Oahu district for purposes of the county surcharge under section 237-8.6, HRS.~~]

Example 1:

Taxpayer, a retailer located in the Oahu district, receives an order for products from Purchaser. Taxpayer accepts the order and delivers the products to the Maui district. Taxpayer shall allocate the gross income from [~~these sales~~] the sale to the Maui district, where the products were delivered. [~~Taxpayer shall not be subject to the 0.5 per cent county surcharge because the surcharge is levied on gross income from~~

~~products delivered in the Oahu district and the destination of the shipment is outside of the Oahu district.~~

~~Example 2:~~

~~Taxpayer, a retailer located in the Maui district with an office or store in the Oahu district, delivers products to Purchaser in the Oahu district. Taxpayer shall allocate the gross income or gross proceeds from these sales to the Oahu district, where the products were delivered. Taxpayer shall be subject to the 0.5 per cent county surcharge because substantial nexus with the Oahu district is established through its office or store in the Oahu district.~~]

Example [~~3:~~] 2:

Taxpayer, a retailer located in the Maui district, sells products to Purchaser located in the Oahu district. Pursuant to Purchaser's instructions, Taxpayer directs Taxpayer's product manufacturer, who is located in the Kauai district, to deliver the products to Purchaser's office [~~or project~~] in the Maui district. Taxpayer shall allocate the gross income [~~or gross proceeds~~] from [~~these sales~~] the sale to the Maui district, where the products were delivered. [~~Taxpayer shall not be subject to the 0.5 per cent county surcharge because the surcharge is levied on gross income arising from the sale of tangible personal property delivered in the Oahu district.~~]

[~~Example 4:~~

~~Company XYZ, located in the Maui district, does not have an office, store, or~~

~~other representation in the Oahu district, delivers products to Customer ABC, who maintains a central warehouse in the Oahu district. Subsequently, Customer ABC delivers the products to its branch stores located in other taxation districts. Company XYZ shall allocate the gross income or gross proceeds from these sales to the Oahu district, where the products were delivered. Company XYZ shall not be subject to the 0.5 per cent county surcharge because Company XYZ does not have an office, store, or other representation in the Oahu district, thus substantial nexus with the Oahu district is not established.~~]

Example [~~5.~~] 3:

Retailer, located [~~out of state~~] out of state, [~~has a sales agent in the Oahu district,~~] sells and delivers products to Purchaser in the Oahu district. [~~Retailer shall be subject to the general excise tax for the sales in the Oahu district because substantial nexus with the State is established through its sales agent in the Oahu district. Retailer shall also be subject to the 0.5 per cent county surcharge because substantial nexus with the Oahu district is established through its sales agent in the Oahu district.~~] Retailer shall allocate the gross income from the sale to the Oahu district, where the products were delivered.

[~~Example 6:~~

~~Same facts as in example 5, except that Retailer does not have an office, employees or other representation, including any sales person, in the Oahu district. Retailer shall not be subject to the general excise tax for~~

~~the sales in the Oahu district because Retailer does not have an office, store, or other representation in the Oahu district, thus there is no substantial nexus with the State. Retailer shall not be subject to the 0.5 per cent county surcharge either because Retailer does not have an office, store, or other representation in the Oahu district, thus substantial nexus with the Oahu district is not established.~~] [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

3. Section 18-237-8.6-03, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-03 Allocation of gross income [~~received by service businesses.~~] from contracting and services. (a) Gross income [~~received~~] from contracting or services performed by a taxpayer engaged in a service business or calling shall be allocated to the taxation district [~~in which~~] where the services are [~~intended to be~~] used or consumed[~~. Alternatively, the taxpayer may allocate the gross income by using any reasonable allocation method that clearly, fairly, and properly reflects the gross income to the appropriate taxation district; provided that the allocation method is documented. The county surcharge pursuant to section 237-8.6, HRS, shall be imposed on gross income and gross proceeds for services intended to be used or consumed in the Oahu district provided the taxpayer has substantial nexus with the Oahu district.~~] , as provided in sections 18-237-29.53-03 to 18-237-29.53-13.

(b) If services are used or consumed in more than one taxation district, gross income shall be allocated using any reasonable method; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably quantifies the proportionate benefit received by each taxation district.

[~~Example 1:~~

~~Taxpayer, an attorney whose office is in the Oahu district, is retained by a client in the Maui district to prepare a lease for land in the Kauai district. Taxpayer shall allocate the income to the Kauai district, where the services are intended to be consumed. Taxpayer shall not be subject to the 0.5 per cent county surcharge because the services are intended to be consumed outside the Oahu district.~~

~~Example 2:~~

~~Taxpayer is an accounting firm. Taxpayer has a home office in the Oahu district, which constitutes substantial nexus with the Oahu district. Taxpayer's employees travel to other taxation districts to conduct audits of clients. Taxpayer shall allocate income to the taxation districts, where the services are intended to be consumed by the clients. Taxpayer shall be subject to the 0.5 per cent county surcharge for services intended to be consumed in the Oahu district.~~

~~Example 3:~~

~~Taxpayer provides dentistry services from places of business in all of the taxation districts. Taxpayer has a home office in the Maui district. Taxpayer travels to the Oahu district to provide dentistry services. Taxpayer shall allocate the gross income to the taxation districts where the services are intended to be used or consumed. In this case, substantial nexus is established by Taxpayer's physical presence in the Oahu district. Taxpayer~~

~~shall be subject to the 0.5 per cent county surcharge for services intended to be used or consumed in the Oahu district but shall not be subject to the 0.5 per cent county surcharge for services intended to be consumed in taxation districts other than the Oahu district.~~

~~Example 4:~~

~~Taxpayer is a law firm comprised of sixty five attorneys. Sixty attorneys work in Taxpayer's home office in the Oahu district and five work in Taxpayer's place of business located in the Hawaii district. Taxpayer is retained by a client in the Hawaii district for a court case in the Hawaii district. Taxpayer shall allocate gross income from services performed by the attorneys to the Hawaii district where Taxpayer's services are intended to be used or consumed, notwithstanding incidental travel, meetings, or court appearances, outside of the taxation district, or receipt of support services from the place of business located outside of the taxation district. Taxpayer shall not be subject to the 0.5 per cent county surcharge regardless of the substantial nexus with the Oahu district because the legal services are intended to be used or consumed in the Hawaii district.~~] [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

4. Section 18-237-8.6-04, Hawaii Administrative Rules, is repealed.

[~~§18-237-8.6-04 Allocation of gross income from commissions. Commission income received by a taxpayer shall be allocated to the taxation district in which~~

~~the services are rendered by the taxpayer except for commissions earned from real estate sales, or leasing, or from financing transactions secured by real estate. The county surcharge pursuant to section 237-8.6, HRS, shall be imposed on gross income and gross proceeds from commissions when the services are rendered by the taxpayer in the Oahu district. Alternatively, the taxpayer may allocate the gross income by using any reasonable allocation method that clearly, fairly, and properly reflects the gross income to the appropriate taxation district; provided that the allocation method is documented. In the case of commissions earned from real estate sales or from financing transactions secured by real estate, commission income received by a taxpayer shall be allocated to the taxation district in which the real property is located. The county surcharge pursuant to section 237-8.6, HRS, shall be imposed on gross income and gross proceeds from commissions earned from real estate sales, or leasing, or from financing transactions secured by real estate where the real property is located in the Oahu district.~~

~~Example 1:~~

~~Taxpayer has an office located in the Oahu district, which sells a travel package for Disney World, Florida under section 237-18(f) to Purchaser located in the Oahu district. Taxpayer shall allocate the commission income to the Oahu district, where the services of selling the travel package for Disney World, Florida are rendered by Taxpayer. Taxpayer shall be subject to the 0.5 per cent county surcharge because such services are rendered in the Oahu district.~~

~~Example 2:~~

~~Same facts as in example 1, except that Purchaser is located in the Maui district.~~

~~Taxpayer shall allocate the commission income to the Oahu district, where the services of selling the travel package for Disney World, Florida are rendered by Taxpayer. Taxpayer shall be subject to the 0.5 per cent county surcharge because such services are rendered in the Oahu district.~~

~~Example 3:~~

~~Same facts as in example 1, except that Taxpayer is located in the Maui district. Taxpayer shall allocate the commission income to the Maui district, where the services of selling the travel package for Disney World, Florida are rendered by Taxpayer. Taxpayer shall not be subject to the 0.5 per cent county surcharge because such services are rendered outside of the Oahu district.~~

~~Example 4:~~

~~Same facts as in example 1, except that Taxpayer is located in the Maui district and Purchaser is located in the Hawaii district. Taxpayer shall allocate the commission income to the Maui district, where the services of selling the travel package for Disney World, Florida are rendered by Taxpayer. Taxpayer shall not be subject to the 0.5 per cent county surcharge because such services are rendered outside of the Oahu district.~~

~~Example 5:~~

~~Taxpayer is a securities broker that has an office in the Oahu district, sells securities to Purchaser who is located in the Maui district. Taxpayer shall allocate the commission income to the Oahu district~~

~~where the services of selling securities are rendered. Taxpayer shall be subject to the 0.5 per cent county surcharge because such services are rendered in the Oahu district.~~

~~Example 6:~~

~~Taxpayer is a real estate company licensed as a real estate broker under chapter 467, HRS. Taxpayer ABC has places of business in the Oahu district, Kauai district, Maui district, and Hawaii district. Each of Taxpayer's brokers and salespersons is based in one of the places of business. The brokers and salespersons travel to other taxation districts to meet with clients, manage clients' properties, show properties, negotiate, review and close transactions. Brokers and Salespersons sell a property in the Oahu district. Taxpayer shall allocate the commission income received to the taxation districts where the real property is located. The gross income derived from the sale or leasing of real property in the Oahu district shall be allocated to the Oahu district where the real property is located. All of the gross income paid to Taxpayer and Taxpayer's brokers and salespersons shall be subject to the 0.5 per cent county surcharge in this case because the real property is located in the Oahu district. Taxpayer and each of Taxpayer's brokers and salespersons shall allocate the income that Taxpayer, Brokers or Salespersons receives under section 237-18(e), HRS, to the taxation district where the real property is located, regardless of the location of the place of business of Taxpayer, Brokers or Salespersons. Brokers or Salespersons shall also be subject to the 0.5 per cent county surcharge for real~~

~~property sold in the Oahu district.~~] [Eff 12/7/06; R])

5. Section 18-237-8.6-05, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-05 Allocation of gross income from the rental, [~~or~~] lease, or license of tangible and intangible personal property. (a) Except as provided in this section, gross income from the rental, [~~or~~] lease, or license of tangible and intangible personal property[~~,~~] shall be allocated to the taxation district [~~in which~~] where the property is used. [~~If the property is used in more than one taxation district, the taxpayer shall allocate the gross income by using any reasonable allocation method that clearly, fairly and properly reflects the gross income to each taxation district; provided that the allocation method is documented. The county surcharge pursuant to section 237-8.6, HRS, shall be imposed on gross income and gross proceeds for renting or leasing of personal property to the extent that the property is used in the Oahu district.~~]

Example 1:

Taxpayer is engaged in the business of renting motor vehicles [~~from a place of business~~] in each of the four taxation districts. Taxpayer rents a vehicle to a customer in the Maui district. Taxpayer shall allocate the gross income received from the rental to the [~~taxation district in which the motor vehicle is used.~~] Maui district, where the vehicle is used. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge on the gross income from motor vehicles used in the Oahu district because the personal property is being used in the Oahu district.~~]

Example 2:

Taxpayer, located in the Oahu district, is engaged in the business of renting equipment. Taxpayer rents equipment to XYZ, located in the Maui district, for a job in the Kauai district. Taxpayer shall allocate the gross income from this rental to the Kauai district, where the property is used. [~~Taxpayer shall not be subject to the 0.5 per cent county surcharge because the property is not used in the Oahu district.~~]

Example 3:

Taxpayer, located in the Oahu district, [~~has written~~] wrote and copyrighted a song. A musician pays Taxpayer a royalty to perform that song for profit in a hotel in the Maui district. Taxpayer shall allocate the gross income from the license of the copyright to the Maui district where the property is used. [~~Taxpayer shall not be subject to the 0.5 per cent county surcharge because the property is not used in the Oahu district.~~

~~Example 4:~~

~~Same facts as in example 3, except that Taxpayer is located in the Maui district. Taxpayer shall allocate the gross income from the license or royalty of his intangible personal property to the Maui district where the property is used. Taxpayer shall not be subject to the 0.5 per cent county surcharge because the property is not used in the Oahu district.~~]

~~Example 5:~~

~~Same facts as in example 3, except that Taxpayer is located in the Maui district and the licensee is in the Oahu district. Taxpayer shall allocate the gross income from the license of his copyright to the Oahu district where the property is used. Taxpayer shall be subject to the 0.5 per cent county surcharge because the property is used in the Oahu district.~~]

(b) Where a taxpayer rents or leases tangible personal property[~~,~~] or licenses or receives a royalty from intangible personal property[~~, which~~] that is used in more than one taxation district, [~~the~~] gross income shall be allocated [~~to the taxation districts by~~] using any reasonable [~~allocation~~] method [~~that clearly, fairly, and properly reflects the gross income to each taxation district~~]; provided that the [~~allocation~~] method is [~~documented.~~] consistently used by the taxpayer and supported by verifiable data that reasonably quantifies the proportionate benefit received by each taxation district. This rule also applies to property[~~, which~~] that is constantly in transit between taxation districts, such as barges, containers, and aircrafts without home ports or bases. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge to the extent that the gross income from the rental or lease of the personal property is allocated to the Oahu district pursuant to a reasonable allocation method.~~]

Example 1:

Taxpayer [~~is engaged in the business of renting~~] rents equipment to XYZ to be used in the Maui district and the Oahu district. The equipment will be used in the Maui district for six months and in the Oahu district for six months. Taxpayer shall allocate fifty per cent of the gross income

from the rental of the equipment to the Maui district and fifty per cent to the Oahu district. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge on fifty per cent of the gross income because using a reasonable allocation method based on time used, the equipment is used fifty per cent of the time in the Oahu district.~~]

~~Example 2:~~

~~Taxpayer is engaged in the business of leasing containers to XYZ. These containers are constantly in transit between taxation districts. Taxpayer shall allocate the gross income by using a reasonable allocation method among the taxation districts that clearly, fairly, and properly reflects gross income in each taxation district and document that allocation method. Taxpayer shall be subject to the 0.5 per cent county surcharge on the gross proceeds allocable to the Oahu district as determined under a reasonable allocation method.~~] [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

6. Section 18-237-8.6-06, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-06 Allocation of gross income from the rental or lease of real property. Gross income from a taxpayer's rental or lease of real property in [~~this~~] the State shall be allocated to the taxation district where the real property is located. [~~Lessors are subject to the 0.5 per cent county surcharge for rental or lease of real property located in the Oahu district. Lessors in taxation districts other than the Oahu district are subject to the county surcharge if~~

~~they rent or lease real property located in the Oahu district.~~]

Example[~~:~~] 1:

Taxpayer rents condominium units located in each of the four taxation districts. Taxpayer shall allocate the gross income from the rental of each unit to the taxation district [~~in which~~] where the condominium unit is located. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge on gross income from the condominium units rented in the Oahu district because the real property is located in the Oahu district.~~] [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

7. Section 18-237-8.6-07, Hawaii Administrative Rules, is repealed.

[~~§18-237-8.6-07 Allocation of gross income from contracting. Gross income from contracting shall be allocated to the taxation district where the job site is located. Contractors, with a home office in taxation districts other than the Oahu district are subject to the 0.5 per cent county surcharge if the job site is located in the Oahu district. Gross income from contracting in the Oahu district shall be allocated to the Oahu district because the job site is located in the Oahu district.~~

~~Example 1:~~

~~Taxpayer with an office located in the Oahu district contracts for a construction project in the Maui district. Taxpayer shall allocate the gross income from this project to the Maui district. Taxpayer shall not be subject to the 0.5 per cent~~

~~county surcharge because the job site is located outside of the Oahu district.~~

~~Example 2:~~

~~Assume the same facts in Example 1, except that Taxpayer is the prime contractor for the project and Taxpayer subcontracts various aspects of the job to architect W and engineer X, located in the Oahu district. Taxpayer shall allocate the gross income from this project to the Maui district. W and X shall allocate the gross income they receive from Taxpayer to the Maui district. Taxpayer, W, and X shall not be subject to the 0.5 per cent county surcharge because the job site is located outside of the Oahu district.~~] [Eff 12/7/06; R]

8. Section 18-237-8.6-08, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-08 Allocation of gross income from interest. (a) The gross income from a taxpayer's investment interest shall be allocated to the taxation district where [~~the control of~~] the investment is [~~located unless the taxpayer can show that a different location should control.~~] controlled. Alternatively, the taxpayer may allocate the gross income by using any reasonable [~~allocation~~] method [~~that clearly, fairly and properly reflects the gross income to the taxation district~~]; provided that the [~~allocation~~] method is [~~documented.~~] consistently used by the taxpayer and is supported by verifiable data that reasonably reflects the benefit received by the taxation district. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge if the business's control of the investment is in the Oahu district.~~]

Example 1:

Taxpayer has retail locations in all taxation districts and has corporate offices located in the Oahu district. Taxpayer has a central cash management account controlled by the corporate office located in the Oahu district that places the gross receipts from all retail locations into one interest bearing bank account. Taxpayer shall allocate the interest received from this bank account to the Oahu district because the account is controlled by the corporate office located in the Oahu district. [~~Therefore, the interest shall be subject to the 0.5 per cent county surcharge.~~]

Example 2:

Assume [~~The~~] the same facts as in example 1, except that a separate bank account is created for the Maui district retail locations. The money deposited into that bank account is used for improvements to the Maui district stores and controlled by the Maui district retail locations. Interest on this bank account [~~shall not be subject to the 0.5 per cent county surcharge because the account is being controlled outside of the Oahu district.~~] shall be allocated to the Maui district.

(b) [~~The gross income from a taxpayer's deferred payment interest~~] When interest is earned from the sale of tangible personal property on a deferred or installment payment plan, the interest shall be allocated to the taxation district [~~in which~~] where the [~~sale that generated the interest is assigned under section 18-237-8.6-02 or 18-237-8.6-06.~~] tangible personal property is delivered. [~~Taxpayer shall be subject to the 0.5 per cent county surcharge on the interest if the sale that generated the~~

~~interest is allocated to the Oahu district.~~]
Alternatively, the taxpayer may allocate the gross income by using any reasonable [~~allocation~~] method [~~that clearly, fairly, and properly reflects the gross income to the appropriate taxation district~~]; provided that the [~~allocation~~] method is [~~documented.~~] consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district.

Example 1:

[~~Taxpayer has retail locations in all of the taxation districts. Taxpayer sells goods on an installment basis or deferred payment basis. Taxpayer shall allocate the interest received on the sales by credit or on the installment basis to the taxation district in which the sales that generated the interest is assigned under section 18-237-8.6-02. The interest income generated from sales that are allocated to the Oahu district are likewise allocated to the Oahu district and subject to the 0.5 per cent county surcharge.~~] Taxpayer, located in the Hawaii district, sells equipment to Purchaser, located in the Kauai district, on an installment payment plan. Taxpayer delivers the equipment to Purchaser in the Kauai district. Every month for twelve months, Taxpayer receives a payment from Purchaser, which includes principal and interest. Taxpayer shall allocate the interest received from each payment to the Kauai district.

(c) When interest is earned from the sale of real property on a deferred payment plan, the gross income from the interest shall be allocated to the taxation district where the real property is located.

Example [~~2.~~] 1:

Taxpayer[~~, who does not have an office in the State,~~] sells [~~business or rental~~] real estate located in the Oahu district pursuant to an agreement of sale, which provides for deferred payments of the sales price and an interest charge. Taxpayer shall [~~be subject to the 0.5 per cent county surcharge on the interest income from the agreement of sale because~~] allocate the interest received to the Oahu district because the real estate that is the subject of the agreement of sale is located in the Oahu district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

9. Section 18-237-8.6-09, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-09 Allocation of gross income of theaters, amusements, etc. The gross income from the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, or any other place [~~at which~~] where amusements are offered to the public shall be allocated to the taxation district [~~in which~~] where the event takes place. [~~Taxpayers shall be subject to the 0.5 per cent county surcharge on gross income generated from events in the Oahu district.~~] Alternatively, the taxpayer may allocate the gross income by using any reasonable [~~allocation~~] method [~~that clearly, fairly, and properly reflects the gross income to the appropriate taxation district~~]; provided that the [~~allocation~~] method is [~~documented.~~] consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

10. Section 18-237-8.6-10, Hawaii Administrative Rules, is amended to read as follows:

§18-237-8.6-10 All others. [~~The gross income or gross proceeds received by a taxpayer who reports business activity on Form G-45 or Form G-49 under the classification "all others"~~] If sections 18-237-8.6-02 to 18-237-8.6-09 do not apply, gross income shall be allocated to a taxation district based upon the rules for allocating gross income [~~for the business activity~~] which [~~is~~] are the most [~~similar~~] relevant to the taxpayer's particular business activity. Alternatively, the taxpayer may allocate the gross income by using any reasonable [~~allocation~~] method [~~that clearly, fairly and properly reflects the gross income to the appropriate taxation district~~]; provided that the [~~allocation~~] method is [~~documented.~~] consistently used by the taxpayer and supported by verifiable data that reasonably reflects the benefit received by the taxation district. [Eff 12/7/06; am] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-8.6)

11. Material to be repealed is bracketed and stricken. New material is underscored.

12. These amendments to Chapter 18-237, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on October 9, 1981, and filed with the Office of the Lieutenant Governor.

_____
Director
Department of Taxation

APPROVED AS TO FORM:

Cynthia Lee

Deputy Attorney General

SMALL BUSINESS STATEMENT "AFTER" PUBLIC HEARING TO THE SMALL BUSINESS REGULATORY REVIEW BOARD

(Hawaii Revised Statutes (HRS), §201M-3)

Department or Agency: Department of Taxation (Department)

Administrative Rule Title and Chapter: 18-237

Chapter Name: General Excise Tax Law

Contact Person/Title: Jacob Herlitz, Administrative Rules Specialist

Phone Number: (808) 587-5334

E-mail Address: Jacob.L.Herlitz@hawaii.gov **Date**: March 13, 2018

Webpage address for draft rules: tax.hawaii.gov/legal/taxlawandrules

General Description of Proposed Rules:

The proposed rules amend chapter 237, Hawaii Administrative Rules (HAR), by adding thirteen new sections which clarify how to determine whether gross income derived from services or contracting is exempt from the General Excise Tax as exported services or contracting.

Generally, under section 237-29.53, Hawaii Revised Statutes, all gross income derived from contracting or services performed by a person in the State for use outside the State is exempt from General Excise Tax. Specifically, these proposed rules clarify this exemption by adding definitions and creating rules for particular contracting or service transaction types. For example, the proposed rules create new rules dealing with services related to real property, services related to tangible personal property, services provided by travel agencies and tour packagers, legal services, and more.

Rule Description: ☒ New ☐ Repeal ☐ Amendment ☐ Compilation

I. Please explain how the agency involved small business in the development of the proposed rules.

The Department invited public comment at the public hearing, but did not directly involve small business in the development of the proposed rules.

II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:

1. A description of how opinions or comments from affected small businesses were solicited.

   The Department invited the general public, including small businesses, to provide comments on the proposed rules twice in its notices of public hearing published on the Department's website and in statewide newspapers September 7, 2017 and November 6, 2017.

2. A summary of the public's and small businesses' comments.

   The Department received three items of testimony:

   (1) Comments from the Tax Foundation of Hawaii. The comments were generally supportive of the rules but contained some recommended amendments for clarity.

   (2) Comments submitted on behalf of Priceline and Expedia. The comments expressed concern that the rules violate federal law under the Internet Tax Freedom Act.

   (3) Comments submitted on behalf of Priceline and Expedia after the second public hearing. The comments reiterated their earlier concerns.

3. A summary of the agency's response to those comments.

   The Department considered the testimony submitted and elected to make some amendments to the rules for clarity, including adding a new example.

   The Department respectfully disagrees with the concerns that the rules violate the Internet Tax Freedom Act and instead chooses to rely on the Department of the Attorney General's approval of the rules as to form.

DEPARTMENT OF TAXATION

Amendments to Chapter 18-237,
Hawaii Administrative Rules

_____, 2018

SUMMARY

1. New §§ 18-237-29.53-01, 18-237-29.53-02, 18-237-29.53-03, 18-237-29.53-04, 18-237-29.53-05, ~~18-237-29.53-06, 18-237-29.53-07, 18-237-29.53-08,~~ 18-237-29.53-09, 18-237-29.53-10, 18-237-29.53-11, 18-237-29.53-12, and 18-237-29.53-13 are added.

§18-237-29.53-01 Definitions. As used in sections 18-237-29.53-01 to 18-237-29.53-13:

"Collection actions" means all actions taken to enforce a money judgment or collect a debt.

"Commissioned agent" means an agent that:

(1) sells, buys, leases, or procures property;

(2) sells, buys, or procures services; or

(3) sells, books, or arranges transient accommodations or travel-related bookings

on behalf of a principal, with the principal's assent, for a predetermined fee. When a commissioned agent ~~enters into a sales transaction with a third party on~~ behalf of a principal, the total price of the sale is controlled by the principal; the total price cannot be unilaterally determined by the agent.

"Customer" means the person personally receiving the service.

"Noncommissioned negotiated contract rates" means the rates specified in a negotiated contract between a travel agent or tour packager and operator of a transient accommodation or operator of a travel-related booking that the operator of a transient accommodation or operator of a travel-related booking will receive for a transaction booked by the travel agent or tour packager. When transient accommodations are furnished or travel-related bookings are made through arrangements made by a travel agent or tour packager at noncommissioned negotiated contract rates, the travel agent or tour packager may unilaterally determine the mark-up of the noncommissioned negotiated contract rate and the total price charged to the customer; the operator of the transient accommodation or the operator of the travel-related booking has no control over the mark-up or the total price.

"Transient accommodation" means the same as the term is defined in section 237D-1, HRS.

"Travel-related booking" includes tours, excursions, transportation, rental vehicles, shows, dining, spa services, and any other reservation or booking made by a travel agent or tour packager.

Example 1:

World Travel Inc. enters into a contract with Gold Hotel whereby World Travel Inc. may sell the right to occupy rooms in Gold Hotel at $100 per room per night. The contract further provides that World Travel Inc. will receive a fee of ten per cent for each sale. World Travel Inc. is a commissioned agent of Gold Hotel.

Example 2:

Assume the same facts as in Example 1, except that the contract between World Travel Inc. and Gold Hotel provides that World Travel Inc. will receive a fee of eight per cent if total sales for the month are less than $10,000 or ten per cent if total sales for the month are $10,000 or more. World Travel Inc. is a commissioned agent of Gold Hotel.

Example 3:

Island Planner Co. enters into a contract with Silver Hotel whereby Island Planner Co. may sell the right to occupy rooms in Silver Hotel. For each booking made by Island Planner Co., Silver Hotel will receive $100 per room per night. Island Planner Co. may unilaterally determine the mark-up and set the total price charged to the customer. Island Planner Co. is arranging transient accommodations at noncommissioned negotiated contract rates.

Example 4:

Assume the same facts as in Example 3, except that, for each booking made by Island

Planner Co., Silver Hotel will receive ninety per cent of the net rate, the best available rate offered by Silver Hotel to the public at the time of the transaction. Island Planner Co. may unilaterally determine the mark-up of the net rate and set the total price charged to the customer. Island Planner Co. is arranging transient accommodations at noncommissioned negotiated contract rates.

Example 5:

Hawaii's Best Inc., a travel agent, enters into a contract with Oceanside Spa to sell massage and facial treatments. For each massage or facial sold by Hawaii's Best Inc., Oceanside Spa will receive $80. Hawaii's Best Inc. may unilaterally determine the mark-up and set the total price charged to the customer. Hawaii's Best Inc. is making travel-related bookings at noncommissioned negotiated contract rates. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-02 Exemption for contracting and services exported out of state, in general. (a) Absent bad faith, all of the value or gross income derived from contracting or services performed by a person engaged in a service business or calling are exempt from general excise tax if the contracting or services are used or consumed outside of the State; provided that services performed for a purchaser who resells the services are exempt from general excise tax only if the purchaser resells all of the services for use or consumption outside the State.

~~(b) If contracting or services are used or~~ consumed both in and outside of the State, all of the value or gross income will be subject to general excise tax in proportion to the benefit received in the State. Any reasonable method of apportioning all of the value or gross income may be used; provided that the method is consistently used by the taxpayer and supported by verifiable data that reasonably quantifies the proportionate benefit received in the State. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-03 Contracting. Contracting is used or consumed where the real property to which the contracting activity pertains is located.

Example 1:

General LLC, a general contractor based in Hawaii, is hired by Developer LLC, a Hawaii developer, for a construction project located in Guam. Employees of General LLC and Developer LLC meet in Hawaii on a weekly basis throughout the duration of the construction project to discuss plans, progress, and other matters related to the project. All of the value or gross income that General LLC receives for the construction project is exempt under section 237-29.53, HRS, because the contracting is used or consumed in Guam, where the real property is located.

Example 2:

Second Hawaiian Bank, a bank with its headquarters in Hawaii, hires General LLC, a general contractor based in Hawaii, to build two new branches, one in Guam and one in Hawaii. All of the value or gross income that General LLC receives for the Guam branch is exempt under section 237-29.53, HRS, because the contracting is used or consumed in Guam, where the real property is located. All of the value or gross income that General LLC receives for the Hawaii branch is not exempt under section 237-29.53, HRS, because the contracting is used or consumed in Hawaii, where the real property is located. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-04 Services related to real property. Services related to real property are used or consumed where the real property is located. Services related to real property include, but are not limited to, property management, real estate sales, real estate inspections, and real estate appraisals.

Example 1:

RPM Co., a Hawaii real property management company, is hired by RE Investor Inc., a Hawaii corporation, to manage a California property. All of the value or gross income that RPM Co. receives from RE Investor Inc. to manage the California property is exempt under section 237-29.53, HRS, because the property management services are used or consumed in California, where the real property is located.

Example 2:

CPM LLC, a California real property management company, is hired by Irene Investor, a California resident who owns real property in Hawaii, to manage her property. All of the value or gross income that CPM LLC receives to manage the Hawaii property is not exempt under section 237-29.53, HRS, because the property management services are used or consumed in Hawaii, where the real property is located.

Example 3:

The Hawaii office of Legal Services LLP, a law firm with offices throughout the United States, is hired by Lisa Landlord, a Hawaii resident, to draft lease agreements for her rental properties in Hawaii, Arizona, and Nevada. Legal Services LLP charges Lisa Landlord $200 each for the

Hawaii lease, Arizona lease, and Nevada lease, for a total fee of $600. Legal Services LLP shall report $600 in gross income on its general excise tax return and may claim two-thirds, or $400, as exempt under section 237-29.53, HRS, because two-thirds of the services relate to real property located outside Hawaii and are therefore used or consumed outside Hawaii. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-05 Services related to tangible personal property. Services related to tangible personal property are used or consumed where the tangible personal property is delivered after the services are performed. Services related to tangible personal property include, but are not limited to, inspection, appraisal, testing, and repair of tangible personal property. Services related to tangible personal property do not include services performed by commissioned agents.

Example 1:

Tom Tourist, a resident of Montana vacationing in Hawaii, takes his broken mobile phone to Fixer LLC, an electronic repair shop in Hawaii. After Fixer LLC repairs the mobile phone, Tom Tourist picks it up from Fixer LLC's shop in Hawaii. All of the value or gross income that Fixer LLC receives is not exempt under section 237-29.53, HRS, because Fixer LLC's service is used or consumed in Hawaii, where the property was delivered after the service was performed.

Example 2:

Assume the same facts as in Example 1, except that Fixer LLC, upon Tom Tourist's request, ships the mobile phone to Tom Tourist's home in Montana after completing the repair. All of the value or gross income that Fixer LLC receives is exempt under section 237-29.53, HRS, because Fixer LLC's service is used or consumed in Montana, where the property was delivered after the service was performed.

Example 3:

Assume the same facts as in Example 1, except that Fixer LLC is unable to repair Tom Tourist's mobile phone at its shop in Hawaii. Fixer LLC sends the phone to its warehouse in Arizona, where the repair is completed. The mobile phone is shipped back to Fixer LLC's shop in Hawaii, where Tom Tourist picks it up. All of the value or gross income that Fixer LLC receives is not exempt under section 237-29.53, HRS, because Fixer LLC's service is used or consumed in Hawaii, where the property was delivered after the service was performed.

Example 4:

Derrick Driver, a resident of Hawaii, calls Aloha Auto Finder, LLC, a car broker located in Hawaii, and hires it to find and negotiate a purchase price for a green classic car. Derrick Driver provides Aloha Auto Finder, LLC with a list of specifications that the car must have and the total amount he is willing to pay for the car. Derrick Driver and Aloha Auto Finder, LLC agree that Aloha Auto Finder, LLC will be paid a flat fee of $500. Aloha Auto Finder, LLC finds a green classic car in Michigan and negotiates a purchase price on behalf of Derrick Driver. Derrick Driver purchases the car and instructs the seller to ship the car from Michigan to Derrick Driver's second home in Rhode Island. Section 237-29.53-05 does not apply because Aloha Auto Finder, LLC is a commissioned agent. Instead, section 237-29.53-10 applies. Under that rule, all of the value or gross income that Aloha Auto Finder, LLC receives is not exempt under section 237-29.53, HRS, because Aloha Auto Finder, LLC's

services are used or consumed in Hawaii, where Aloha Auto Finder, LLC is located. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-06 Services provided by a travel agency or tour packager at noncommissioned negotiated contract rates. (a) When transient accommodations are furnished through arrangements made by a travel agency or tour packager at noncommissioned negotiated contract rates, the travel agency's or tour packager's service is used or consumed where the transient accommodation is located.

(b) When travel-related bookings other than transient accommodations are made or sold by a travel agency or tour packager at noncommissioned negotiated contract rates, the travel agency's or tour packager's service is used or consumed where the travel-related booking is located.

Example 1:

Travel Services Corporation ("TSC") sells a five-night stay at Luau Loft, a hotel in Hawaii, to Tammy Traveler, a resident of New Jersey. TSC arranges the transient accommodation at noncommissioned negotiated contract rates. The contract between TSC and Luau Loft provides that Luau Loft will receive ninety per cent of the net rate, the best available rate offered by Luau Loft to the public at the time of the transaction, and that TSC may unilaterally determine the mark-up of the net rate and set the total price charged to the customer. TSC charges Tammy Traveler $600 for the booking. The net rate at the time of TSC's sale to Tammy Traveler is $100 per night, or $500 for five nights. TSC unilaterally sets the mark-up for the booking and the final price of $600. All of the value or gross income that TSC receives is not exempt under section 237-29.53, HRS. TSC's service is used or consumed in Hawaii, where the transient accommodation is located, because the transient accommodation was furnished through arrangements made by a travel agency

at noncommissioned negotiated contract rates.

Example 2:

Assume the same facts as in Example 1, except that TSC books a five-day rental of a vehicle in Hawaii for Tammy Traveler. TSC arranges the travel-related booking at noncommissioned negotiated contract rates. The contract between TSC and the rental vehicle company provides that the rental vehicle company will receive $50 per day for each vehicle rented and that TSC may unilaterally determine the mark-up and set the total price charged to the customer. TSC charges Tammy Traveler $300 for the booking. All of the value or gross income that TSC receives is not exempt under section 237-29.53, HRS. TSC's service is used or consumed in Hawaii, where the travel-related booking is located. The travel-related booking was made by a travel agency at noncommissioned negotiated contract rates.

Example 3:

Alex Adventurer, a resident of Hawaii, visits the office of Maui Travel Agency ("MTA"), a travel agency located in Hawaii, to plan a vacation to Alaska. MTA sells a seven-night stay at Glacier Hotel, a hotel in Alaska, to Alex Adventurer. MTA arranges the transient accommodation at noncommissioned negotiated contract rates. The contract between MTA and Glacier Hotel provides that Glacier Hotel will receive $100 per room per night and that MTA may independently determine the mark-up and set the total price charged to the customer. MTA charges Alex Adventurer $1,000 for the

booking, unilaterally determining to charge a mark-up of $300. All of the value or gross income that MTA receives is exempt under section 237-29.53, HRS. MTA's service is used or consumed in Alaska, where the transient accommodation is located. The transient accommodation was furnished through arrangements made by a travel agency at noncommissioned negotiated contract rates.

Example 4:

Assume the same facts as in Example 3, except that the contract between MTA and Glacier Hotel provides that MTA may book rooms at Glacier Hotel for $125 per room per night and that, for each booking, MTA will receive ten per cent of the sale. MTA does not have the authority to mark up or unilaterally change the total price charged to the customer. Section 18-237-29.53-06 does not apply because transient accommodations are not being furnished through arrangements made by a travel agency at noncommissioned negotiated contract rates. Instead, MTA is a commissioned agent and section 18-237-29.53-10 applies. Under that rule, all of the value or gross income that MTA receives is not exempt because MTA is in Hawaii and the booking occurred in Hawaii. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-07 **Legal services in an action or proceeding.** Legal services provided to a party in a judicial action or proceeding, administrative proceeding, arbitration, mediation, or other method of dispute resolution are used or consumed where the case or matter is filed. For purposes of this section, "party" means a party in an action or proceeding, including but not limited to, a plaintiff, defendant, petitioner, respondent, appellant, appellee, or real party in interest.

Example 1:

Annie Attorney, an attorney based in Hawaii, is hired by Aaron Appellant, a Hawaii resident, to represent him in an appeal pending in the Court of Appeals in California. Annie Attorney drafts the briefs in her office in Hawaii and attends the hearing in California. All of the value or gross income that Annie Attorney receives from Aaron Appellant is exempt under section 237-29.53, HRS, because Annie Attorney's services are used or consumed in California, where the case was filed.

Example 2:

Annie Attorney, an attorney based in Hawaii, is hired by Daniel Defendant, an Oregon resident, to represent him in a lawsuit filed against him in Hawaii. All of the value or gross income that Annie Attorney receives from Daniel Defendant is not exempt under section 237-29.53, HRS, because Annie Attorney's services are used or consumed in Hawaii, where the case was filed.

Example 3:

XYZ, a multistate business, hires Legal Services LLP, a law firm with offices throughout the United States, including California and Hawaii, to represent it in a lawsuit filed in the United States District Court in Hawaii. The California office of Legal Services LLP performed eighty hours of work on the case and the Hawaii office of Legal Services LLP performed twenty hours of work on the case. All of the value or gross income that Legal Services LLP receives for its work performed in the California and Hawaii offices is not exempt under section 237-29.53, HRS, because Legal Services LLP's services are used or consumed in Hawaii, where the case was filed.

Example 4:

Chris Client, a Hawaii resident, hires Legal Services LLP, a law firm with offices throughout the United States, to represent him in a personal injury case in California. Legal Services LLP drafts a complaint to be filed in California. Before the complaint is filed, however, Legal Services LLP settles the dispute. Because the complaint was not filed, section 18-237-29.53-07 does not apply. Instead, section 18-237-29.53-11 will apply. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-08 Debt collection services. Debt collection services are used or consumed where the collection actions take place. This section does not apply to businesses that engage in collection actions to recover their own debts.

Example 1:

Irene Investor, a California resident, hires Repo LLC to enforce a civil judgment against David Debtor, a Hawaii resident. Repo LLC performs the work necessary to levy David Debtor's bank accounts and garnish David Debtor's wages in Hawaii. All of the value or gross income that Repo LLC receives is not exempt under section 237-29.53, HRS, because Repo LLC's services are used or consumed in Hawaii, where the collection actions took place.

Example 2:

Sam Spender, a California resident, has an outstanding debt owed to Credit Card Company. Cash Collectors Inc., a corporation located in Hawaii, purchases David Debtor's debt from Credit Card Company and takes actions to recover the debt from Sam Spender. Section 237-29.53, HRS, does not apply because Cash Collectors Inc., in attempting to recover its own debt, is not engaging in a service business or calling. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-09 Services requiring customer to be physically present. Except as provided in sections 18-237-29.53-03 to 18-237-29.53-08, services that require the customer to be physically present at the time the service is performed are used or consumed where the service is performed.

Example 1:

Fiona Facial, an esthetician in Hawaii, sells a spa package consisting of a facial and manicure to Carol Colorado, a Colorado resident. Carol Colorado purchases the spa package online as a gift for her mother for an upcoming vacation to Hawaii. Carol Colorado's mother travels to Hawaii, where she receives the facial and manicure from Fiona Facial. All of the value or gross income that Fiona Facial receives is not exempt under section 237-29.53, HRS, because Fiona Facial's services are used or consumed in Hawaii. Carol Colorado's mother, the customer, must be physically present in Hawaii at the time the service is performed.

Example 2:

ABC Company, an Arizona corporation, holds a corporate retreat in Hawaii. ABC Company hires Sue Speaker, a motivational speaker who resides in New Mexico, to fly to Hawaii and speak to ABC Company and its employees at the corporate retreat. All of the value or gross income that Sue Speaker receives from ABC Company is not exempt under section 237-29.53, HRS, because ABC Company must be physically present (through the presence of its employees) in Hawaii at the time the service is performed.

Example 3:

Assume the same facts as in Example 2 except that some employees of ABC Company are unable to attend the corporate retreat in Hawaii. Sue Speaker's presentation is live-streamed to ABC Company's office in Arizona for the employees in Arizona to view. All of the value or gross income that Sue Speaker receives from ABC Company is not exempt under section 237-29.53, HRS, because ABC Company must be physically present (through the presence of its employees) in Hawaii at the time the service is performed, notwithstanding the fact that some of its employees are not required to be physically present.

Example 4:

ABC Company, an Arizona corporation, hires Paul Presenter, a motivational speaker who resides in Hawaii, to speak to ABC Company and its employees via live-stream from Hawaii. The live-stream is accessed solely from ABC Company's office in Arizona. Paul Presenter's service does not require ABC Company to be physically present where the service is performed. Accordingly, section 18-237-29.53-09 does not apply. Instead, section 18-237-29.53-11 will apply. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-10 Services performed by commissioned agents. (a) Except as provided in section 18-237-29.53-04, services performed by a commissioned agent are used or consumed where the agent is located at the time the agent's services are performed; provided that:

(1) when property is sold, purchased, leased, or procured online through a commissioned agent, the agent's service is used or consumed where the property is delivered;

(2) when services are sold, purchased, or procured online through a commissioned agent, the agent's service is used or consumed where the transacted services are performed;

(3) when transient accommodations or travel-related bookings are sold, purchased, or arranged online through a commissioned agent, the agent's service is used or consumed where the transient accommodation or travel-related booking is located.

(b) For purposes of this section, "online" means that the transaction occurs exclusively through a website or web application without any in-person contact.

Example 1:

Alex Adventurer, a resident of Hawaii, visits the office of Maui Travel Agency ("MTA"), a travel agency located in Hawaii, to plan a vacation to Alaska. MTA sells a seven-night stay at Glacier Hotel, a hotel in Alaska, to Alex Adventurer. The contract between MTA and Glacier Hotel provides that MTA may book rooms at Glacier Hotel for $125 per room per night and that, for each booking, MTA will receive ten per cent of the sale. MTA does not have the authority to mark up or unilaterally change the total price charged to the customer. All of the value or gross income that MTA receives is

not exempt under section 237-29.53, HRS, because MTA is a commissioned agent and its services are used or consumed in Hawaii, where MTA is located.

Example 2:

Assume the same facts as in Example 1, except that Alex Adventurer books the stay at Glacier Hotel online through MTA's website and does not visit MTA's office. All of the value or gross income that MTA receives is exempt under section 237-29.53, HRS. MTA's service is used or consumed in Alaska, where the transient accommodation is located, because the transient accommodation was booked online through MTA, a commissioned agent.

Example 3:

Vacation Rentals Online ("VRO") operates a website that allows guests to book transient accommodations listed for rent by owners. Ryan Renter, a resident of Florida, uses VRO's website to book a two-night stay at Olivia Owner's unit in Hawaii for $100 per night. The contract between VRO and Olivia Owner provides that for each booking of Oliva Owner's unit made through VRO's website, VRO will receive ten per cent of the rental price, which is determined solely by Olivia Owner. VRO also charges Ryan Renter a fee of five per cent of the rental price. All of the value or gross income that VRO receives is not exempt under section 237-29.53, HRS. VRO's service is used or consumed in Hawaii, where the transient accommodation is located, because the transient accommodation was booked online through VRO, a commissioned agent.

Example 4:

Errand Runner Inc. operates a website through which users can request or offer the performance of short-term services, such as picking up dry cleaning, dog walking, and grocery shopping. Carrie Consumer, a resident of Virginia, uses Errand Runner Inc. to hire Andy Assistant, a resident of Hawaii, to stand in line at the Hanauma Bay State Park in Hawaii, where the first one hundred persons to enter the park will receive a collectible item. The terms of service between Errand Runner Inc. and Andy Assistant provides that Errand Runner Inc. will receive ten per cent of the income Andy Assistant receives for services booked through Errand Runner Inc. The amount charged for Andy Assistant's services are determined solely by Andy Assistant. Errand Runner Inc. also charges Carrie Consumer a fee of ten dollars for using its website to book the service. All of the value or gross income that Errand Runner Inc. receives is not exempt under section 237-29.53, HRS. Errand Runner Inc.'s service is used or consumed in Hawaii, where Andy Assistant's service was performed, because Andy Assistant's service was booked online through Errand Runner Inc., a commissioned agent.

Example 5:

Derrick Driver, a resident of Hawaii, calls Aloha Auto Finder, LLC, a car broker located in Hawaii, and hires it to find and negotiate a purchase price for a green classic car. Derrick Driver provides Aloha Auto Finder, LLC with a list of specifications that the car must have and the total amount he is willing to pay for

the car. Derrick Driver and Aloha Auto Finder, LLC agree that Aloha Auto Finder, LLC will be paid a flat fee of $500. Aloha Auto Finder, LLC finds a green classic car in Michigan and negotiates a purchase price on behalf of Derrick Driver. Derrick Driver purchases the car and instructs the seller to ship the car from Michigan to Derrick Driver's second home in Rhode Island. All of the value or gross income that Aloha Auto Finder, LLC receives is not exempt under section 237-29.53, HRS, because Aloha Auto Finder, LLC is a commissioned agent and its services are used or consumed in Hawaii, where Aloha Auto Finder, LLC is located. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-11 Other services. (a) Except as provided in sections 18-237-29.53-03 to 18-237-29.53-10:

(1) If the customer is a business and the service relates to the customer's business activities, the service is used or consumed where the related business activities occur;

(2) If the customer is a business and the service is unrelated to the customer's business activities, the service is used or consumed where the customer's principal place of business is located;

(3) If the customer is an individual, the service is used or consumed where the individual resides; or

(4) If the customer is the military or federal, state, or local government, the service is used or consumed where the benefit of the service is received.

(b) For purposes of this section, "business activities" means the transactions and activities engaged in the regular course of trade or business for the ultimate purpose of obtaining gains or profits, or if the business is a tax-exempt organization, also includes the transactions and activities that further the exempt purpose of the organization.

Example 1:

Chris Client, a Hawaii resident, hires Legal Services LLP, a law firm with offices throughout the United States, including Hawaii, to represent him in a personal injury case in California. Legal Services LLP drafts a complaint to be filed in California. Before the complaint is filed, however, Legal Services LLP settles the dispute. All of the value or gross income that Legal Services LLP receives is not exempt under section 237-29.53, HRS, because Legal Services LLP's services are used or consumed in Hawaii, where Chris Client

resides, pursuant to section 18-237-29.53-11(a)(3).

Example 2:

ABC Company, an Arizona corporation with its principal place of business in Arizona, hires Paul Presenter, a motivational speaker who resides in Hawaii, to speak to ABC Company and its employees via live-stream from Hawaii. The motivational speech is a personal benefit that ABC Company provides to its employees and is not related to its business activities. The live-stream is accessed solely from ABC Company's office in Arizona. All of the value or gross income that Paul Presenter receives is exempt under section 237-29.53, HRS, because Paul Presenter's service is used or consumed in Arizona, where ABC Company's principal place of business is located, pursuant to section 18-237-29.53-11(a)(2).

Example 3:

Annie Attorney, a Hawaii attorney, is hired by Wendy Wyoming, a Wyoming resident who owns stock and partnership interests in various enterprises, as well as Hawaii real property, to prepare her estate plan. All of the value or gross income that Annie Attorney receives to prepare Wendy Wyoming's estate plan is exempt under section 237-29.53, HRS, because Annie Attorney's services are used or consumed in Wyoming, where Wendy Wyoming resides, pursuant to section 18-237-29.53-11(a)(3).

Example 4:

XYZ, a multistate business, hires Legal Services LLP, a law firm with offices throughout the United States, including Hawaii, to represent it in a contract dispute relating to business activities in Hawaii. Legal Services LLP settles the case before a lawsuit is filed and charges XYZ $30,000 in legal fees. Attorneys from Legal Services LLP's Hawaii office performed twenty per cent of the work and attorneys from Legal Services LLP's California office performed the remaining eighty per cent of work. All of the value or gross income that Legal Services LLP receives is not exempt under section 237-29.53, HRS, because the legal services are used or consumed in Hawaii, where the business activities relating to the legal services occurred, pursuant to section 18-237-29.53-11(a)(1).

Example 5:

Arnold Accountant, an accountant located in Hawaii, is hired by Mary Mover, a California resident, in 2017 to prepare her 2016 federal and state tax returns. Mary Mover must file state tax returns in California, where she resided for the first half of 2016, and Hawaii, where she currently resides. All of the value or gross income that Arnold Accountant receives from Mary Mover is not exempt under section 237-29.53, HRS, because Arnold Accountant's services are used or consumed in Hawaii, where Mary Mover resides, pursuant to section 18-237-29.53-11(a)(3).

Example 6:

XYZ, a multistate business, hires Accounting Services LLP, a Hawaii accounting firm, to perform accounting services related to XYZ's business activities in Hawaii. All of the value or gross income that Accounting Services LLP receives from XYZ is not exempt under section 237-29.53, HRS, because Accounting Services LLP's services are used or consumed in Hawaii, where XYZ's business activities related to the accounting services occur, pursuant to section 18-237-29.53-11(a)(1).

Example 7:

SP LLC, a software programmer located in Hawaii, is hired by MedServ, Inc., a medical service provider doing business in several states, including Hawaii, to create a customized and integrated patient file and billing program for use at all of its medical offices for a fee of $70,000. MedServ, Inc. has two of its seven medical offices in Hawaii. SP LLC's services are used or consumed where MedServ, Inc.'s business activities relating to SP LLC's services occurred, pursuant to section 18-237-29.53-11(a)(1). Because SP LLC's service is used or consumed both in and outside of the State, SP LLC shall apportion its income pursuant to section 18-237-29.53-02(b). In this case, it is reasonable for SP LLC to apportion two-sevenths of its gross income to Hawaii. SP LLC shall report $70,000 in gross income on its general excise tax return and may claim $50,000 as exempt under section 237-29.53, HRS.

Example 8:

Honolulu Hut, a Hawaii retailer, hires GD Company, a graphic design company in California, to design a company logo that will be used on Honolulu Hut's merchandise sold in Hawaii and in marketing materials distributed in Hawaii. GD Company contracts with Ashley Artist, a Hawaii resident, to create a digital image, which GD Company will incorporate into the logo it designs for Honolulu Hut. All of the value or gross income that GD Company receives from Honolulu Hut is not exempt under section 237-29.53, HRS, because GD Company's services are used or consumed in Hawaii, where Honolulu Hut's business activities related to the design services occur, pursuant to section 18-237-29.53-11(a)(1). All of the value or gross income that Ashley Artist receives is also not exempt under section 237-29.53, HRS, because Ashley Artist's services are resold by GD Company for use or consumption in Hawaii. Pursuant to section 18-237-29.53-02, services performed for a purchaser who resells the services are exempt from general excise tax only if the purchaser resells all of the services for use or consumption outside the State.

Example 9:

California Surf Co., a retail store in California, hires Hawaii Designs LLC, a Hawaii graphic design company, to design a logo that will be used on California Surf Co.'s merchandise sold in California and in marketing materials distributed in California. Hawaii Designs LLC hires Ashley Artist, a Hawaii resident, to design a digital image, which Hawaii Designs LLC

incorporates into the logo it designs for California Surf Co. All of the value or gross income that Hawaii Designs LLC receives is exempt under section 237-29.53, HRS, because Hawaii Designs LLC's services are used or consumed in California, where California Surf Co.'s business activities related to the design services occur, pursuant to section 18-237-29.53-11(a)(1). All of the value or gross income that Ashley Artist receives is also exempt under section 237-29.53, HRS, because Ashley Artist's services are resold for use or consumption in California. Pursuant to section 18-237-29.53-02, services performed for a purchaser who resells the services are exempt from general excise tax if the purchaser resells all of the services for use or consumption outside the State.

Example 10:

Data Inc., a company located in Hawaii, is paid $10,000 by the United States Navy to analyze data and prepare reports that will be used by Naval Base Guam. Naval Base Guam is the only naval base that will benefit from Data Inc.'s services. All of the value or gross income that Data Inc. receives is exempt under section 237-29.53, HRS, because the services are used or consumed by the military in Guam, where the benefit of the service is received, pursuant to section 18-237-29.53-11(a)(4).

Example 11:

Data Inc., a company located in Hawaii, is paid $10,000 by the United States Navy to analyze data and prepare reports that will be used by the United States Pacific Fleet. Data Inc.'s reports will be used by and

benefit the United States Pacific Fleet in Hawaii, where its headquarters is located, as well as in other locations in the United States and abroad. Because Data Inc.'s service is used or consumed both in and outside of the State, Data Inc. shall apportion its income pursuant to section 18-237-29.53-02(b). Data Inc. shall report $10,000 in gross income on its general excise tax return and may claim an exemption under section 237-29.53, HRS, for the portion of income attributable to services used or consumed outside of the State.

Example 12:

Remodelers Hawaii LLC, a general contractor, is hired by the United States Army to renovate a building at Schofield Barracks in Hawaii. Section 18-237-29.53-11 does not apply because Remodelers Hawaii LLC is performing contracting work, which is governed by section 18-237-29.53-03. Under that rule, all of the value or gross income that Remodelers Hawaii LLC receives is not exempt because the contracting is used or consumed in Hawaii, where the real property is located. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-12 Cancellation and forfeiture charges. Section 237-29.53, HRS, shall not apply where all of the value or gross income is derived from cancellation fees, forfeited deposits, or other charges resulting from the cancellation or nonperformance of services.

Example 1:

ABC Company, an Arizona corporation with its principal place of business in Arizona, hires Paul Presenter, a motivational speaker who resides in Hawaii, to speak to ABC Company and its employees via live-stream from Hawaii. The live-stream will be accessed solely from ABC Company's office in Arizona. Two days before the live-stream event, ABC Company cancels the event. Paul Presenter charges ABC Company a cancellation fee pursuant to their contract. The gross income that Paul Presenter receives for the cancellation fee is not exempt under section 237-29.53, HRS. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

§18-237-29.53-13 Telecommunication services. Sections 18-237-29.53-01 to 18-237-29.53-12 shall not apply to interstate or foreign common carrier telecommunication services. [Eff] (Auth: HRS §§231-3(9), 237-8) (Imp: HRS §237-29.53)

DEPARTMENT OF TAXATION

Chapter 18-237, Hawaii Administrative Rules, on the Summary Page dated _____, was adopted on _____, following public hearings held on October 17 and December 11, 2017 after public notice was given in the Honolulu Star Advertiser, the Garden Isle, the Maui News, West Hawaii Today, and the Hawaii Tribune-Herald on September 7, 2017 and November 6, 2017, respectively.

These amendments to chapter 18-237 shall take effect ten days after filing with the Office of the Lieutenant Governor.

_____
LINDA CHU TAKAYAMA
Director of Taxation

APPROVED:

_____
DAVID Y. IGE
Governor
State of Hawaii

Dated: _____

APPROVED AS TO FORM:

_____
Deputy Attorney General

_____
Filed

IV. New Business

A. Discussion and Action on Proposed Amendments to HAR Title 13, Chapter 104, **Rules Regulating Activities Within Forest Reserves**, promulgated by DLNR

RECEIVED
OCT - 3 ,2017
SBRRB

PRE-PUBLIC HEARING SMALL BUSINESS IMPACT STATEMENT TO THE SMALL BUSINESS REGULATORY REVIEW BOARD

(Hawaii Revised Statutes §201M-2)

Department or Agency: DLNR

Administrative Rule Title and Chapter: HAR 13-104

Chapter Name: Rules Regulating Activities Within Forest Reserves

Contact Person/Title: Ryan Peralta, Forest Management Supervisor I

Phone Number: 808-973-9784

E-mail Address: ryan.k.peralta@hawaii.gov **Date:** September 28, 2017

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes [✓] No [ ] (If **Yes**, please provide webpage address and when and where rules may be viewed in person☺
https://dlnr.hawaii.gov/wp-content/uploads/2012/12/FDraftHARCh13-104.pdf
(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New [✓] **Repeal** [✓] **Amendment** [ ] **Compilation** [ ]

II. Will the proposed rule(s) affect small business? Yes [✓] **No** [ ] (If **No**, no need to submit this form.)

* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business." HRS §201M-1

* "Small business" is defined as a "for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that: (1) Is domiciled and authorized to do business in Hawaii; (2) Is independently owned and operated; and (3) Employs fewer than one hundred full-time or part-time employees in Hawaii." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes [ ] **No** [✓] (If **Yes,** no need to submit this form.)

(e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) **Yes** [ ] **No** [✓] (If **Yes,** no need to submit this form.)

* * *

If the proposed rule affects small business and are not exempt as noted above, please provide a reasonable determination of the following:

1. Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected.

No adverse effect on small businesses as current Forest Reserve Rules do not allow any of the new activities being proposed. The proposed rules create more opportunity for small businesses.

2. In dollar amounts, the increase in the level of direct costs such as fees or fines, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs associated with compliance.

No increase in fees. The proposed rules will establish a fee schedule.

If the proposed rule imposes a new or increased fee or fine:

a. Amount of the current fee or fine and the last time it was increased.

No current fee.

b. Amount of the proposed fee or fine and the percentage increase.

Fee schedule will be based on the potential impact to the natural resources. The fee increases with as the potential impact increases. Pedestrian=$5, Bicycle=$7, Commercial film permit=$100, Commercial cabin rental=$100

c. Reason for the new or increased fee or fine.

To promote a mixed use management strategy in Forest Reserves. To promote eco-tourism in Hawaii. To increase revenue to supplement DLNR management.

d. Criteria or methodology used to determine the amount of the fee or fine (i.e., Consumer Price Index, Inflation rate, etc.).

The fee schedule was modeled after existing fee schedules being used by other DLNR agencies.

3. The probable monetary costs and benefits to the agency or other agencies directly affected, including the estimated total amount the agency expects to collect from any additionally imposed fees and the manner in which the moneys will be used.

It is unknown much revenue will be generated. Approximately 30 commercial film permits are issued per year. This proposed rule will provide an additional $3,000 for DLNR.

4. The methods the agency considered or used to reduce the impact on small business such as consolidation, simplification, differing compliance or reporting requirements, less stringent deadlines, modification of the fines schedule, performance rather than design standards, exemption, or other mitigating techniques.

N/A. Current rules provide more opportunities for small businesses.

5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.

N/A. Without proposed rules, commercial activities in the Forest Reserves would not be possible.

6. Consideration of creative, innovative, or flexible methods of compliance for small businesses. The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules.

N/A. Without proposed rules, commercial activities in the Forest Reserves would not be possible.

7. How the agency involved small business in the development of the proposed rules.

Proposed fee schedules are modeled after existing fee schedules.

a. If there were any recommendations made by small business, were the recommendations incorporated into the proposed rule? If yes, explain. If no, why not.

N/A

8. Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more stringent standard.

N/A

If yes, please provide information comparing the costs and benefits of the proposed rules to the costs and benefits of the comparable federal, state, or county law, including the following:

a. Description of the public purposes to be served by the proposed rule.

To promote a mixed use management strategy in Forest Reserves. To promote eco-tourism in Hawaii. To increase revenue to supplement DLNR management.

b. The text of the related federal, state, or county law, including information about the purposes and applicability of the law.

Proposed fee schedule pursuant to: HAR 13-104-18: Fees and charges as set by the board may be assessed when permits are granted for the exclusive use of areas or facilities, or when charges are necessary to defray the cost of special facilities, services, or supplies provided by the State, or as otherwise determined by the board or its authorized representative when necessary to carry out the provisions of chapter 183, Hawaii Revised Statutes. Charges may be waived by the board or its authorized representative if the waiver is in the public interest.

c. A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes, application, and administration.

See attached.

d. A comparison of the monetary costs and benefits of the proposed rule with the costs and benefits of imposing or deferring to the related federal, state, or county law, as well as a description of the manner in which any additional fees from the proposed rule will be used.

All proposed fees are not currently in the rules. Revenue generated from fees will be deposited into Forest Stewardship fund and will be used to benefit Forest Reserve management.

e. A comparison of the adverse effects on small business imposed by the proposed rule with the adverse effects of the related federal, state, or county law.

No adverse effects on small business as current rules do not allow small businesses to operate in the Forest Reserves. Therefore, the proposed rules create more opportunities for small businesses.

* * *

Small Business Regulatory Review Board / DBEDT
Phone: (808) 586-2594
Email: DBEDT.sbrrb.info@hawaii.gov

This Statement may be found on the
SBRRB Website at:
http://dbedt.hawaii.gov/sbrrb/small-business-impact-statements-pre-and-post-pubic-hearing

DRAFT RULES PENDING PUBLIC HEARING AND FINAL APPROVAL

Amendment and Compilation of Chapter 13-104
Hawaii Administrative Rules

(date)

1. Chapter 13-104, Hawaii Administrative Rules, entitled "Rules Regulating Activities Within Forest Reserves", is amended and compiled to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 5 FORESTRY AND WILDLIFE

PART 1 FORESTRY

CHAPTER 104

RULES REGULATING ACTIVITIES WITHIN FOREST RESERVES

Subchapter 1 General Provisions

Subchapter 2 Public Use

Subchapter 3 Permits

Subchapter 4 Fees and Charges

Historical Note: Chapter 104 of Title 13, Administrative Rules, is based substantially upon Regulation 1 [Eff. 12/9/43; am 8/12/76] and Regulation 10 [Eff. 12/12/59] of the Division of Forestry, Department of Land and Natural Resources [R 9/28/81].

SUBCHAPTER 1

GENERAL PROVISIONS

[~~§13-104-1 Purpose and applicability.~~] **§13-104-1 Purpose and applicability.** (a) The purpose of [~~these rules~~] this chapter is to regulate activity within forest reserves established pursuant to sections 183-11 and 183-15, Hawaii Revised Statutes.

(b) These rules shall apply to all persons entering the boundaries and jurisdiction of a forest reserve. All persons shall observe and abide by officially posted signs within forest reserves. Everyone using the forest reserves should conduct themselves in a safe and courteous manner. Users of the forest reserves should be aware that there are [~~certains~~] certain inherent risks involved due to other users and the environment and should use caution at all times. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-1.5, 183-2)

[~~§13-104-2 Definitions.~~] **§13-104-2 Definitions.** As used in [~~these rules,~~] this chapter, unless the context requires otherwise:

"Abandoned and unattended property" means any and all property, including personal property, items, materials, equipment, fixtures, motor vehicles, or vessels that have been left unattended on land owned or controlled by the State for a continuous period of more than forty-eight hours without the written permission of the board or its authorized representative.

"Administrator" means the administrator of the division of forestry and wildlife.

"Authorized representative" means the administrator, foresters, conservation enforcement officers, and other persons authorized by the board [~~of land and natural resources~~] to act for the board.

"Board" means the board of land and natural resources.

"Camping" or "to camp" means [~~being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia,~~] a person's physical presence any time [~~after~~] one hour after sundown until sunrise in a forest reserve. Indicia of camping includes the use of a forest reserve one hour

after sundown until sunrise for living accommodation purposes, including, but not limited to: sleeping activities or making preparations to sleep (including the laying down of bedding for the purpose of sleeping); storing personal belongings; making any fire; the presence or use of any tents, temporary shelters, unauthorized structures or vehicles; or digging or breaking ground without proper authorization.

"Commercial activity" means the use of or activity in the forest reserve for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity. Soliciting, demanding, or requesting gifts, money, or services shall be considered commercial activity. Commercial activities include activities [~~whose~~] with base of operations [~~are~~] outside the boundaries of the forest reserve, display of merchandise, or activities which provide transportation to or from the forest reserve.

"Commercial use" is any type of commercial activity which is considered compatible with the functions and purposes of each individual area, facility, or unit within a forest reserve.

"Compensation" includes but is not limited to, monetary fees, donations, barter, or services in-kind.

[~~"Division" means the division of forestry and wildlife.~~]

"Department" means the department of land and natural resources.

"Division" means the division of forestry and wildlife.

"Forest product" means any natural material from a forest reserve, including but not limited to timber, seedlings, seeds, fruits, greenery, tree fern, cinder, lava rock, ti leaves, and bamboo.

"Forest reserve" means those lands designated as forest reserves by the department pursuant to sections 183-11 and 183-15, Hawaii Revised Statutes, and other lands for plant sanctuaries, facilities, nurseries, and baseyards under the custody and control of the division.

"Motorized vehicle" means a vehicle of any shape or form that depends on a motor (gas, electric, or other fuels) for propulsion.

"Non-motorized vehicle" means a vehicle of any shape or form that depends on human, animal, wind, spring, and other non-motorized means for propulsion.

[~~"Residing" means being in the same forest reserve for more than seven (7) continuous days.~~]

[~~"Spark arrester" means a device constructed of nonflammable materials specifically for the purpose of removing and retaining carbon and other flammable particles over 0.0232 of an inch in size from the exhaust flow of an internal~~

~~combustion engine that is operated by hydrocarbon fuels.~~]

"Structure" means any object or improvement constructed, installed, or placed on state lands, including but not limited to buildings, sheds, lean-tos, picnic tables, memorials, hunting blinds, tree stands, mobile homes, campers, trailers; provided that tents, campers, vehicles, and other temporary objects related to authorized activities shall not be considered structures for the purposes of this definition; provided further that the objects are in compliance with rules and regulations governing those activities on state lands.

"Tree harvesting" means the removal of live trees from a forest reserve. [Eff 9/28/81; am and comp 10/15/93; am 12/9/02; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-3 Penalty.~~] **§13-104-3 Penalty.** (a) Any person violating any of the provisions of [~~these rules~~] this chapter shall be [~~guilty of a misdemeanor and shall be penalized~~] subject to penalty as provided by law. All revenues generated from fines or penalties imposed pursuant to this section shall be deposited into the forest stewardship fund. Any equipment, article, instrument, aircraft, vehicle, business record, or natural resource used or taken in violation of the provisions of this chapter may be seized and subject to forfeiture as provided by section 199-7, Hawaii Revised Statutes, and chapter 712A, Hawaii Revised Statutes.

(b) Restrictions and prohibitions imposed by this chapter shall not apply to state employees or their agents acting in the scope of their employment while within the forest reserve. Any penalty imposed may take into account emergency situations, such as fire or other disasters or where necessary to protect life or property. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-4, 183-5, 183-16, 195D-8, 199-7)

SUBCHAPTER 2

PUBLIC USE

[~~§13-104-4 Preservation of public property and resources.~~] **§13-104-4 Preservation of public property and resources.** The following activities are prohibited within a forest reserve:

(1) To remove, injure, or kill any form of plant or animal life, either in whole or in part, except as authorized by the [~~Board~~] board or authorized representative or as provided by the rules of the [~~Board;~~] board;
(2) To remove, damage, or disturb any natural feature or resource (e.g., natural stream beds) except as authorized by the board or its authorized representative;
(3) To remove, damage, or disturb any historic or prehistoric remains;
(4) To remove, damage, or disturb any notice, marker, or structure;
(5) To enter, occupy, or use any building, structure, facility, motorized vehicle, machine, equipment, or tool within [~~or on~~] a forest reserve except as authorized by the board or its representative;
(6) To engage in any construction or improvement except as authorized by the board[~~.~~];
(7) To sell, peddle, solicit, or offer for sale any merchandise or service except with written authorization from the board[~~.~~];
(8) To distribute or post handbills, circulars, or other notices[~~.~~];
(9) To introduce any plant or animal except as approved by the [~~Board.~~] board; and
(10) To enter or remain within a forest [~~reserves when~~] reserve while under the influence of alcohol, narcotics, or drugs, to a degree that may [~~endanger oneself or~~] endanger or cause annoyance to other persons, or endanger oneself or property. The use or possession of narcotics, drugs, or alcohol within forest reserves is prohibited. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-2, 183-17)

[~~§13-104-5 Litter and sanitation.~~] **§13-104-5 Litter and sanitation.** The following acts are prohibited within a forest reserve:
(1) To drain, dump, or leave any litter, animal waste or remains, or any other material which pollutes or is likely to cause pollution in the forest reserve, including streams and other water sources;
(2) To deposit any body waste in areas without comfort stations, without digging a hole and covering all

signs of the waste;

(3) To deposit any body waste within 150 feet of a spring, stream, lake, or reservoir; and

(4) To leave or abandon [~~a vehicle or~~] any [~~other~~] large refuse, such as refrigerators or stoves, household garbage or trash, or other forms of waste or debris.

[Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

§13-104-5.5 Abandoned and unattended property. No person shall abandon or leave personal property unattended within a forest reserve for any purpose not otherwise authorized or inconsistent with the purposes of the forest reserve. All such property may be seized, impounded, or otherwise confiscated by the board or any authorized representative.

(1) If unattended personal property, including but not limited to motor vehicles, interferes with the safe or orderly management of a forest reserve or is stored on the publicly-managed lands, the personal property may be seized or impounded by the board or its authorized representative. Any article or instrument that is dangerous, noxious, hazardous, or considered as contraband under the laws of the State of Hawaii, which could endanger the health, safety, or welfare of the public, or public property, may be immediately seized and disposed of by any authorized representative of the department if found abandoned or unattended in the forest reserve.

(2) All impounded vehicles shall be towed to a place of storage. Owners of towed vehicles shall contact the division or the division of conservation and resource enforcement branch office for information on towed vehicles. Towing, storage, and other related costs shall be assessed pursuant to section 290-11, Hawaii Revised Statutes.

(3) All impounded or confiscated property, other than vehicles, shall be moved to a place of storage, and the owner shall be assessed moving, storage, and other related costs. Additionally, the owner of this property shall bear the responsibility for the risk of any loss or damage to their property.

(4) Abandoned vehicles may be sold at public auction pursuant to section 290-11, Hawaii Revised Statutes.

All other impounded or confiscated property shall be disposed of pursuant to section 171-31.5, Hawaii Revised Statutes. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §§171-31.5, 183-2, 290-11)

[~~§13-104-6 Report of injury or damage.~~] **§13-104-6 Report of injury or damage.** All incidents resulting in injury or death to persons or damage to property shall be reported by the person or persons involved as soon as possible to the board or its authorized representative. This report does not relieve persons from the responsibility of making any other accident reports which may be required under federal, state, or county statutes, ordinances, and rules. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-7 Fire use restrictions.~~] **§13-104-7 Fire use restrictions.** The following acts are prohibited within a forest reserve:

(1) To build any fire on the ground or in any structure[~~:~~] not otherwise authorized by this section;

(2) To build any fire without using a portable stove or other self-contained unit;

(3) To leave a fire unattended without extinguishing all traces of heat;

(4) To deposit or discard any potential fire-producing material, such as embers, coals, or ashes that are too hot to touch;

(5) To set on fire or cause to be set on fire any live or dead vegetation except for department fire control measures; and

(6) To start a fire in windy conditions in a place or manner that is likely to cause live or dead vegetation to be set on fire[~~; and~~

~~(7) To use any motor vehicle, motorized equipment, internal combustion engines, or electric motors unless equipped with efficiently operating fire or spark arresting equipment~~]. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-2, 185-7)

§13-104-7.5 **Closing of areas.** (a) The board, or its chairperson, may close or restrict the public use of all or any portion of a forest reserve in the event of an emergency or when deemed necessary for:

(1) The protection of the biological, geological, or cultural resources of the area;

(2) Health, safety, or welfare reasons;

(3) The protection of property; or

(4) Management activities,

by the posting of appropriate signs indicating the duration, extent, and scope of closure.

(b) The chairperson is authorized to effect a given closure or restriction under subsection (a) for a period of not more than ninety days. The board is authorized to effect a closure or restriction for any period as deemed necessary to accommodate the condition or conditions indicated under subsection (a). [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §§183-1.5, 183-2, 185-3)

[~~§13-104-8 Hunting and fishing.~~] **§13-104-8 Hunting and fishing.** The hunting, fishing, trapping, or disturbing of any fish, animal, or bird is prohibited except as permitted by department hunting or fishing rules. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-9 Firearms or other weapons.~~] **§13-104-9 Firearms or other weapons.** Firearms and other weapons, including those discharging projectiles by air or gas [~~operated,~~] operation; or bow and arrow, [~~and other weapons~~] are prohibited except as permitted by department hunting rules and are subject to all applicable federal, state, and county statutes, ordinances, and rules. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-10 Swimming and bathing.~~] **§13-104-10 Swimming and bathing.** Swimming and bathing in all waters within a forest reserve are permitted at an individual's own risk except in waters and at times where the activities are prohibited by the

board or its authorized representative in the interest of public health and safety. The [~~excepted~~] prohibited waters and times shall be designated by posted signs. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-11 Vehicles and transportation.~~] **§13-104-11 Vehicles and transportation.** [~~(a)~~] The following acts are prohibited while under the jurisdiction of the state within a forest reserve:

(1) To drive, operate, or use any motorized or non-motorized land vehicle, glider, hang glider, aircraft, unmanned aircraft system, balloon, or parachute carelessly and without due caution for the rights or safety of others and in a manner that endangers any person or property;

(2) To launch or land [~~airplanes,~~] aircraft, gliders, helicopters, balloons, parachutes, or other similar means of transportation without a [~~special use~~] permit for that purpose from the board or its authorized representative; provided[~~, however,~~] that landing is authorized without a permit in case of any emergency;

(3) To drive, operate, or use any motorized vehicle in any area or trails not designated for that purpose[~~.~~], including areas requiring four-wheel drive only;

(4) To park any motorized or non-motorized vehicle or trailer except in designated areas;

(5) To drive, lead, or ride a horse, mule, other animal, or non-motorized land vehicle in areas and on roads or trails that are posted against such activity; [~~and~~]

(6) To drive, operate, or use any motorized [~~ground~~] land vehicle without a functioning street legal muffler, and without a valid vehicle license plate, registration and safety sticker if required by [~~each~~] the appropriate respective county[~~.~~]; and

(7) To launch, land, or operate any unmanned aircraft system without a permit for that purpose from the board or its authorized representative.

[~~(b) Any vehicle or property left unattended within a forest reserve for longer than forty-eight hours without prior written permission from the board or its authorized representative shall be considered abandoned. Any abandoned vehicle or property may be impounded or towed away by the board or its authorized representative at the expense of the owner.~~] [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS

§183-2) (Imp: HRS §§183-1.5, 183-2)

[~~§13-104-12 Animals.~~] **§13-104-12 Animals.** (a) Dogs, cats, and other animals are prohibited within a forest reserve unless crated, caged, or on a leash, at all times except for hunting dogs when permitted by chapters [~~122 and 123, Administrative Rules.~~] 13-122 and 13-123.

(b) All dogs used for hunting shall be crated, caged, or leashed or otherwise under restrictive control during transportation while in transit at all times, to and from hunting areas within the forest reserve.

(c) Dogs, cats, or other domestic animals, observed by an authorized representative of the board to be running at large or in the act of killing, injuring, or molesting humans, wildlife, or property, may be disposed of in the interest of public safety and the protection of the forest reserve. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-13 Audio devices and noise.~~] **§13-104-13 Audio devices and noise.** Creating noise or sound within a forest reserve, either vocally or otherwise ([~~i.e.~~] e.g., public address systems, radios, television sets, musical instruments) or use of any noise producing devices ([~~i.e.~~] e.g., electric generating plants or other equipment driven by motors or engines) in a manner and at times which creates a nuisance is prohibited. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-14 Explosives.~~] **§13-104-14 Explosives.** The use or possession of fireworks, firecrackers, or explosive devices within a forest reserve is prohibited. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-15 Disorderly conduct.~~] **§13-104-15 Disorderly conduct.** Disorderly conduct, as defined in section 711-1101, Hawaii Revised [~~Statues,~~] Statutes, is prohibited within a

forest reserve. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-2, 711-1101)

[~~§13-104-16 Residence on forest reserve lands. Residing within a forest reserve is prohibited except with written permission from the board.~~] **§13-104-16 Camping.** No person shall camp, erect any tent, tarpaulin, or other structure, or use recreational trailers or other camper units within any forest reserve, except with the prior written authorization of the board or its authorized representative and as permitted by the rules of the department. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-17 Compliance with laws.~~] **§13-104-17 Compliance with laws.** All persons entering the boundaries of a forest reserve shall comply with all federal, state, and county laws, ordinances, and rules. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

SUBCHAPTER 3

PERMITS

[~~§13-104-18 General provisions for permits.~~] **§13-104-18 General provisions for permits.** (a) The board or its authorized representative may issue the following types of permits:

(1) Camping;
(2) Special use;
(3) Collecting;
(4) [~~Commercial harvest;~~] Commercial; and
(5) Access.

(b) All permits are subject to the following provisions:

(1) Permits are subject to denial, cancellation, or termination at any time by the board or its authorized representative upon violation of these rules or any conditions of the permit or any federal, state, or county statutes, ordinances, and rules or for danger to the public or because of natural causes. Persons

who have violated permit conditions or the rules may be ordered by the department to leave the forest reserve. Permittees who have violated permit conditions or the rules may be denied future permits for forest reserves or subject to the imposition of additional permit restrictions;

(2) Permits shall not be transferable[~~.~~];

(3) Persons or organizations to whom permits are issued shall be held responsible for all conditions [~~stipulated~~] on the permit[~~.~~];

(4) All persons eighteen years of age or older shall be eligible to secure a permit and all minors shall be allowed use of the premises; provided that they are under the direct supervision of one adult for every ten minors[~~.~~];

(5) The size of groups as well as the length of time any permit may be in effect may be limited by the board or its authorized representative[~~.~~];

(6) The board or its authorized representative may require the permittee, at the permittee's own cost, to provide police protection in the interest of the public safety and welfare and for the protection of property when the number of persons using the forest reserve is one hundred or more[~~.~~];

(7) Fees and charges as set by the board may be assessed when permits are granted for the exclusive use of areas or facilities, or when charges are necessary to defray the cost of special facilities, services, or supplies provided by the State, or as otherwise determined by the board or its authorized representative when necessary to carry out the provisions of chapter 183, Hawaii Revised Statutes. [~~Charges~~] Fees and charges contained in this chapter may be waived or reduced by the board or its authorized representative if the waiver or reduction is in the public interest[~~.~~];

(8) The board may set and approve a forest product price list. Charges may be assessed when permits are granted for forest products. The forest product price list shall reasonably reflect fair market value and be periodically updated by the board;

(9) All permittees [~~shall~~], upon request, shall show the permit to any law enforcement officer, the board, or its authorized representative[~~.~~];

(10) By signing the permit and entering into the forest reserve, all persons included on the permit agree to

comply with all the terms and conditions of the permit, as well as applicable laws and regulations; and consent to present the permit to a duly authorized representative of the department upon request; and

(11) Persons applying for a permit shall provide, if requested, identification for all persons included on a permit, satisfactory to the board or its authorized representative. The board or its authorized representative may require the names, addresses, and telephone numbers of all persons included on a permit.

[Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-1.5, 183-2)

[~~§13-104-19 Camping permits.~~] **§13-104-19 Camping permits.** (a) All persons, groups, organizations, or associations wishing to camp within a forest reserve shall obtain a camping permit authorizing the use of the specific area and facilities for camping purposes[~~.~~] for the stated date or dates.

[~~(b) Camping permits shall be obtained from the district offices of the division during regular working hours of the department.~~

~~(c) Persons applying for a permit shall provide, if requested, identification for all persons included on a permit, satisfactory to the board or its authorized representative.~~

~~(d)~~] (b) Each camping permit will reserve the use of a designated area for the stated date or dates of use. Camping is permitted only in designated areas or sites.

[~~(e)~~] (c) No person, group, organization, or association shall remain at any one specific camping site for longer than seven days; provided that the board or its authorized representative may extend the length of stay for good cause[~~; provided further that the length of stay (including the extension as well as the permitted stay) shall not exceed fourteen days~~].

[~~(f)~~] (d) After [~~the expiration~~] issuance of a camping permit, a period of at least thirty days shall pass before another camping permit for the same designated area may be issued to [~~the same person for the same designated area.~~] any person listed on any previously valid or current camping permit. [~~This restriction shall apply to all persons named on the expired permit.~~] The board or its authorized representative may waive a portion of the thirty-day period for good cause.

[~~(g)~~] (e) [~~Permits~~] Camping permits may be denied, canceled, or terminated for the following reasons:

(1) When the size of the group will exceed or exceeds the capacity of the existing site or facilities;
(2) When there are inadequate facilities to meet the immediate needs of the camper or campers;
(3) When repairs or improvements are being made at the campsite; or
(4) When a state of emergency is declared or for other reasons involving the health, safety, and welfare of the applicants or permittees; [~~by the board or its authorized representative~~]

upon the declaration of the board or its authorized representative. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-20 Special use permits.~~] **§13-104-20 Special use permits.** (a) Special [~~uses are permitted within a forest reserve only by a permit~~] use permits are only issued by the board or its authorized representative. Special uses are [~~all types of uses other than~~] those provided for [~~herein~~] in this section and which are considered compatible with the functions and purposes of each individual area, facility, or unit within a forest reserve. Special uses include but are not limited to community activities, such as meetings, weddings, concerts, shows, and other community events; [~~or activities~~] and the scientific collection of plants and animals.

(b) Applications for special use permits shall be received by the board or its authorized representative at least fifteen working days in advance of the date the permit is to be in effect, [~~unless otherwise received and accepted by the board or its authorized representative.~~] however, the deadline may be waived by the board or its authorized representative upon a showing of good cause.

(c) A request for a special use permit shall be considered on its own merits, including its potential effect on [~~the premises, facilities,~~] forest reserve resources and the public's use and enjoyment of the forest reserve. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-21 Collecting permits.~~] **§13-104-21 Collecting permits.** (a) Persons wishing to collect forest [~~items~~] products [~~(e.g. ti leaves, bamboo)~~] for personal use and at no

charge shall obtain a collecting permit authorizing the collection in a specific area.

[~~(b) Collecting permits shall be obtained from the district offices of the division during regular working hours of the department.~~

~~(c) Persons applying for a permit shall provide, their names and addresses and shall produce if requested, identification of all persons named on a permit, satisfactory to the board or its authorized representative.~~

~~(d)~~] (b) Each application for a collecting permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

(c) Collecting permits shall specify:

(1) The date or dates of collection;

(2) The quantities and [~~items~~] products to be collected;

(3) The areas of collection; and

(4) Any other terms and conditions deemed necessary by the board or its authorized representative.

[~~(e)~~] (d) Permits shall not be issued for collecting [~~items~~] products for sale.

[~~(f)~~] (e) No permits shall be issued for the collection of endangered or threatened wildlife or plants except as provided by chapter [~~124, Administrative Rules.~~] 13-124.

(f) No more than one permit within a seven-day period may be issued to the same person or persons, group, organization, or association listed on the permit for collecting any of the same forest products. [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-22 Commercial harvest permits.~~] §13-104-22 **Commercial permits.** (a) Commercial use permits. The board or its authorized representative may issue commercial use permits.

(1) Applications for commercial use permits shall be received by the board or its authorized representative at least thirty working days in advance of the date the permit is to be in effect; however, the deadline may be waived by the board or its authorized representative upon a showing of good cause.

(2) A request for a commercial use permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

(3) The value of the commercial activity shall be decided

by the board or its authorized representative and shall not exceed $10,000.

(4) The time of entry for the commercial activity shall not exceed thirty days, except that the board or its authorized representative may extend this time for good cause.

[~~(a)~~] (b) Commercial harvest permits. The board or its authorized representative may issue permits for the purpose of purchasing[~~,~~] and harvesting[~~, and removing~~] forest products from a forest reserve [~~(e.g., timber, seedlings, greenery, tree fern, cinder, and lava rock)~~].

[~~(b) Permits shall be obtained from the district offices of the division during regular working hours of the department.~~

~~(c)~~] (1) Each application for a commercial harvest permit shall be considered on its own merits, including its potential effect on [~~the premises~~] forest reserve resources and the public's use and enjoyment of the forest reserve[~~.~~]; provided further that tree harvesting shall be done in accordance with a management plan as required by section 183-16.5, Hawaii Revised Statutes.

[~~(d) Permits will not be issued for harvesting material for direct resale.~~

~~(e)~~] (2) The value of the raw material to be harvested shall not exceed $10,000. The quantity to be harvested shall be decided by the board or its authorized representative.

[~~(f)~~] (3) The time of entry for harvesting shall not exceed [~~14~~] fourteen days for permits with designated raw material value not in excess of $1,000, or [~~30~~] thirty days for permits with designated raw material the value of which exceeds $1,000 but does not exceed $10,000, except that the board or its authorized representative may extend this time for good cause.

[~~(g)~~] (4) No more than one permit within a thirty day period or six permits within a calendar year may be issued to the same person, group, organization, or association for harvesting the same product.

[~~(h)~~] (5) Each permit shall specify:

[~~(1)~~] (A) The products to be harvested;

[~~(2)~~] (B) The amount to be harvested;

[~~(3)~~] (C) The dollar value of the products;

[~~(4)~~] (D) The designated area to be harvested;

[~~(5)~~] (E) The date or dates the harvesting may take place; and

[~~(6)~~] (F) Any other terms or conditions deemed necessary by

the board or its authorized representative.

(c) Commercial salvage permits. The board or its authorized representative may issue commercial salvage permits for the purpose of purchasing and removing dead or hazardous trees.

(1) A request for a commercial salvage permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

(2) The value of the raw material to be salvaged shall not exceed $10,000. The quantity to be salvaged shall be decided by the board or its authorized representative.

(3) The time of entry for salvaging shall not exceed fourteen days for permits with designated raw material value not in excess of $1,000, or thirty days for permits with designated raw material the value of which exceeds $1,000 but does not exceed $10,000, except that the board or its authorized representative may extend this time for good cause. [Eff 9/28/81; comp 10/15/93; am 10/4/05; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-23 Access permits.~~] **§13-104-23 Access permits.** [~~(a)~~] Permits for access to or entry into forest reserves may be required by the board or its authorized representative for the following [~~purpose:~~] purposes:

(1) To comply with the requirements of private landowners or lessees who permit access to forest reserves through their land;

(2) To control the number of people using a forest reserve or an area within a forest reserve in order to minimize [~~the~~] any impact upon environmentally sensitive [~~area;~~] areas;

(3) To control the types of uses of a forest reserve or an area within a forest reserve in order to minimize the dangers of incompatible uses in the same area (e.g., horseback riding and motorcycle riding); [~~and~~]

(4) To control [~~periods of use~~] uses of a forest reserve, [~~especially during periods when fire danger levels are high.~~] or any portion thereof, which may be under closure or otherwise restricted; and

(5) [~~To collect plants or animals for scientific purposes.~~] For scientific research activities that are otherwise prohibited by this chapter.

[~~(b) Access permits shall be obtained from the district offices of the division during regular working hours of the department.~~

~~(c) Persons applying for an access permit shall provide their names and addresses and shall produce identification satisfactory to the board or its authorized representative. The board or its authorized representative may require the names, addresses, and telephone numbers of all persons included on a permit.~~] [Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

[~~§13-104-24 Commercial activities.~~] **§13-104-24 Commercial activities.** No person shall engage in commercial activities of any kind in a forest reserve without a written permit from the board or its authorized representative. [Eff 12/9/02; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

SUBCHAPTER 4

FEES AND CHARGES

§13-104-25 General statement. (a) This subchapter establishes user fees and charges for services, facilities, and activities for forestry and recreational purposes, where applicable under the jurisdiction of the division.

(b) The fees and charges are:

(1) Collected to offset the expenses of operating, maintaining, and managing the facilities and services;

(2) Fixed with due regard to the primary purposes of providing public outdoor recreational facilities and promoting an appreciation and connection with Hawaii's forests; and

(3) Set by categories.

(c) The acceptance of payment or billings shall not waive the nature of trespass or ratify or permit illegal camping.

[Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

§13-104-26 Payment. (a) Method of payment of fees and charges shall be online by credit card or by business check,

cashier's check, money order, or cash at division branch offices or the administration office.

(b) All fees shall be paid in advance of issuance of a permit, except as specified by chapter 13-104. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

§13-104-27 Camping and cabin rental fees. The camping and cabin rental fees shall be set according to the amounts in Schedule A - Camping and Cabin Rental Fees - 12/28/16. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

Schedule A
Camping and Cabin Rental Fees
12/28/16

	Maximum No. Campsites	Maximum No. Persons per campsite	Resident Fee ($/night/ campsite)	Nonresident Fee ($/night/ campsite)
Category 1	Up to 5	Up to 15	$12*	$18**
Unimproved campsite or improved campsite with minimal amenities (i.e., trailside camping or a campsite with picnic table and shelter and clivus toilet)				
Category 2	1 Cabin	Up to 6	$30/night per cabin ***	$50/night per cabin ***
Improved campsite or small cabin that houses no more than 6 persons				
Category 3	1 Cabin	Up to 20	$60/night per cabin ***	$90/night per cabin ***
Improved campsite or large cabin that houses 7 or more persons				

* A resident camping permit for up to 6 persons is $12. Additional persons will cost $2 per person.
** A nonresident camping permit for up to 6 persons is $18. Additional persons will cost $3 per person.
***Fee reflects total cost for cabin rental regardless of number of persons staying overnight.

§13-104-28 Commercial use permit fees. Commercial use permit fees are listed in Schedule B - Commercial Use Permit Fees - 12/28/16 and shall apply depending on the applicable commercial activity or activities; provided that the requested recreational facility is approved for commercial use by the forestry and wildlife manager. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

Schedule B Commercial Use Permit Fees 12/28/16	
Base commercial use permit processing fee	$10
Price per pedestrian	$5
Price per non-motorized bicycle or horseback rider	$7
Price per motorized vehicle up to 5 people	$25
Price per motorized vehicle up to 8 people	$50
Price per motorized vehicle up to 12 people	$75
Price per motorized vehicle up to 15+ people	$100
Price per operator and/or passenger of aerial craft launching from and/or landing in a forest reserve	$5
Price per campsite, facility, or cabin per day	$100
Price per commercial film permit	$100
Price per item/activity (miscellaneous)	$20

§13-104-29 **Kiln fees.** Kiln fees are listed in Schedule C - Kiln Fees - 12/28/16 and shall be paid no later than fifteen days after kiln services are rendered. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

Schedule C Kiln Fees 12/28/16	
Unit	**Unit Cost**
1 - 900 Board Feet	$0.70 each
901 - 1000 Board Feet	$0.60 each
1001 - 1500 Board Feet	$0.50 each
1501 and up Board Feet	$0.40 each

§13-104-30 **Permit processing fees.** The fee for the processing of an access permit for scientific research purposes shall be $50. The fee for processing any other permit shall be $10. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

§13-104-31 **Parking and entrance fees.** The fee for parking a vehicle may be assessed at $5 per vehicle, per day. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

§13-104-32 **Fee for copies of rules.** The fee per copy of these rules shall be 10 cents per page. No fee shall be charged for copies furnished to federal, state, or local governmental agencies. The fee may be waived in other instances at the discretion of the administrator or the administrator's authorized representative when a waiver is in the public interest. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §§91-2.5, 183-2)

§13-104-33 **Negotiable instruments; service charge.** The service charge for any dishonored check, draft, certificate of deposit, or other negotiable instrument is $10." [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

2. Material, except source notes, to be repealed is bracketed and stricken. New material is underscored.

3. Additions to update source notes to reflect these amendments and compilation are not underscored.

4. These amendments to and compilation of chapter 13-104, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____, and filed with the Office of the Lieutenant Governor.

Suzanne D. Case
Chairperson, Board of Land
and Natural Resources

APPROVED FOR PUBLIC HEARING:

/s/ Colin J. Lau
DEPUTY ATTORNEY GENERAL

Existing rule

PURPOSE of the RULES

§13-104-1 Purpose and applicability. (a) The purpose of these rules is to regulate activity within forest reserves established pursuant to sections 183-11 and 183-15, Hawaii Revised Statutes. (b) These rules shall apply to all persons entering the boundaries of a forest reserve. Everyone using the forest reserves should conduct themselves in a safe and courteous manner. Users of the forest reserves should be aware that there are certains inherent risks involved due to other users and the environment and should use caution at all times.

NEW and UPDATED DEFINITIONS

§13-104-2 Definitions. As used in these rules, unless context requires otherwise: "Administrator" means the administrator of the division of forestry and wildlife.

[No comparable existing rule provision:]

"Authorized representative" means the administrator, foresters, conservation enforcement officers, and other persons authorized by the board of land and natural resources to act for the board.

"Board" means the board of land and natural resources.

"Camping" means being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia, any time after one hour after sundown until sunrise in a forest reserve.

Rule Change

PURPOSE of the RULES

[~~§13-104-1 Purpose and applicability.~~] §13-104-1 **Purpose and applicability.** (a) The purpose of [~~these rules~~] this chapter is to regulate activity within forest reserves established pursuant to sections 183-11 and 183-15, Hawaii Revised Statutes.

(b) These rules shall apply to all persons entering the boundaries and jurisdiction of a forest reserve. All persons shall observe and abide by officially posted signs within forest reserves. Everyone using the forest reserves should conduct themselves in a safe and courteous manner. Users of the forest reserves should be aware that there are [~~certains~~] certain inherent risks involved due to other users and the environment and should use caution at all times.

NEW and UPDATED DEFINITIONS

[~~§13-104-2 Definitions.~~] §13-104-2 **Definitions.** As used in [~~these rules,~~] this chapter, unless the context requires otherwise:

"Abandoned and unattended property" means any and all property, including personal property, items, materials, equipment, fixtures, motor vehicles, or vessels that have been left unattended on land owned or controlled by the State for a continuous period of more than forty-eight hours without the written permission of the board or its authorized representative.

No Change

No Change

"Camping" or "to camp" means [~~being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia,~~] a person's physical presence any time [~~after~~] one hour after sundown until sunrise in a forest reserve. Indicia of camping includes the use of a forest reserve one hour after sundown until sunrise for living accommodation purposes, including, but not limited to: sleeping activities or making preparations to sleep (including the laying down of bedding for the purpose of sleeping); storing personal belongings; making any fire; the presence or use of any tents, temporary shelters, unauthorized structures or vehicles; or digging or breaking ground

"Commercial activity" means the use of or activity in the forest reserve for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity. Commercial activities include activities whose base of operations are outside the boundaries of the forest reserve, or provide transportation to or from the forest reserve.

[No comparable existing rule provision.]

"Compensation" includes but is not limited to, monetary fees, barter, or services in-kind.

"Division" means the division of forestry and wildlife.

"Department" means the department of land and natural resources.

"Forest reserve" means those lands designated as forest reserves by the department pursuant to sections 183-11 and 183- 15, Hawaii Revised Statutes, and other lands for plant sanctuaries, facilities, nurseries and baseyards under the custody and control of the division.

[No comparable existing rule provision.]

"Motorized vehicle" means a vehicle of any shape or form that depends on a motor (gas, electric, or other fuels) for propulsion.

"Non-motorized vehicle" means a vehicle of any shape or form that depends on human, animal, wind, spring and other nonmotorized means for propulsion.

"Residing" means being in the same forest reserve for more than seven (7) continuous days.

"Spark arrester" means a device constructed of

without proper authorization.

"Commercial activity" means the use of or activity in the forest reserve for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity. Soliciting, demanding, or requesting gifts, money, or services shall be considered commercial activity. Commercial activities include activities [~~whose~~] with base of operations [~~are~~] outside the boundaries of the forest reserve, display of merchandise, or activities which provide transportation to or from the forest reserve.

"Commercial use" is any type of commercial activity which is considered compatible with the functions and purposes of each individual area, facility, or unit within a forest reserve.

"Compensation" includes but is not limited to, monetary fees, donations, barter, or services in-kind.

No Change

No Change

No Change

"Forest product" means any natural material from a forest reserve, including but not limited to timber, seedlings, seeds, fruits, greenery, tree fern, cinder, lava rock, ti leaves, and bamboo.

No Change

No Change

[~~"Residing" means being in the same forest reserve for more than seven (7) continuous days.~~]

[~~"Spark arrester" means a device constructed of nonflammable materials specifically for the purpose of removing and retaining~~

nonflammable materials specifically for the purpose of removing and retaining carbon and other flammable particles over 0.0232 of an inch in size from the exhaust flow of an internal combustion engine that is operated by hydrocarbon fuels.

[No comparable existing rule provision.]

[No comparable existing rule provision.]

PENALTIES

§13-104-3 Penalty. Any person violating any of the provisions of these rules shall be guilty of a misdemeanor and shall be penalized as provided by law.

- Current rules limits the Department's enforcement ability and needs to be updated to be more consistent with enforcement capacity for Department land management areas.

~~arbon and other flammable particles over 0.0232 of an inch in ize from the exhaust flow of an internal combustion engine that s operated by hydrocarbon fuels.~~]

"Structure" means any object or improvement constructed, nstalled, or placed on state lands, including but not limited to uildings, sheds, lean-tos, picnic tables, memorials, hunting linds, tree stands, mobile homes, campers, trailers; provided hat tents, campers, vehicles, and other temporary objects related o authorized activities shall not be considered structures for he purposes of this definition; provided further that the objects re in compliance with rules and regulations governing those ctivities on state lands.

"Tree harvesting" means the removal of live trees from a orest reserve.

ENALTIES

[~~§13-104-3 Penalty.~~] §13-104-3 **Penalty.** (a) Any person iolating any of the provisions of [~~these rules~~] this chapter hall be [~~guilty of a misdemeanor and shall be penalized~~] subject o penalty as provided by law. All revenues generated from fines r penalties imposed pursuant to this section shall be deposited nto the forest stewardship fund. Any equipment, article, nstrument, aircraft, vehicle, business record, or natural esource used or taken in violation of the provisions of this hapter may be seized and subject to forfeiture as provided by ection 199-7, Hawaii Revised Statutes, and chapter 712A, Hawaii evised Statutes.

b) Restrictions and prohibitions imposed by this chapter shall ot apply to state employees or their agents acting in the scope f their employment while within the forest reserve. Any penalty mposed may take into account emergency situations, such as fire r other disasters or where necessary to protect life or property.

§13-104-11 Vehicles and transportation. ...

(b) Any vehicle or property left unattended within a forest reserve for longer than forty-eight hours without prior written permission from the board or its authorized representative shall be considered abandoned. Any abandoned vehicle or property may be impounded or towed away by the board or its authorized representative at the expense of the owner. [Eff 9/28/81; am and comp 10/15/93] (Auth: HRS §183-2) (Imp: HRS §183-2)

- This rule is proposed to be repealed and replaced by the new rule

§13-104-7 Fire use restrictions. The following acts are prohibited within a forest reserve:

(1) To build any fire on the ground or in any structure;

(2) To build any fire without using a portable stove or other self-contained unit;

(3) To leave a fire unattended without

§13-104-5.5 **Abandoned and unattended property.** No person shall abandon or leave personal property unattended within a forest reserve for any purpose not otherwise authorized or inconsistent with the purposes of the forest reserve. All such property may be seized, impounded, or otherwise confiscated by the board or any authorized representative.

(1) If unattended personal property, including but not limited to motor vehicles, interferes with the safe or orderly management of a forest reserve or is stored on the publicly-managed lands, the personal property may be seized or impounded by the board or its authorized representative. Any article or instrument that is dangerous, noxious, hazardous, or considered as contraband under the laws of the State of Hawaii, which could endanger the health, safety, or welfare of the public, or public property, may be immediately seized and disposed of by any authorized representative of the department if found abandoned or unattended in the forest reserve.

(2) All impounded vehicles shall be towed to a place of storage. Owners of towed vehicles shall contact the division or the division of conservation and resource enforcement branch office for information on towed vehicles. Towing, storage, and other related costs shall be assessed pursuant to section 290-11, Hawaii Revised Statutes.

(3) All impounded or confiscated property, other than vehicles, shall be moved to a place of storage, and the owner shall be assessed moving, storage, and other related costs. Additionally, the owner of this property shall bear the responsibility for the risk of any loss or damage to their property.

(4) Abandoned vehicles may be sold at public auction pursuant to section 290-11, Hawaii Revised Statutes. All other impounded or confiscated property shall be disposed of pursuant to section 171-31.5, Hawaii Revised Statutes. [Eff and comp] (Auth: HRS §183-2) (Imp: HRS §§171-31.5, 183-2, 290-11)

- This new rule provides more detail and procedure.

(1) §13-104-2 **Definitions.** ...

"Abandoned and unattended property" means any and all property, including personal property, items, materials, equipment, fixtures, motor vehicles, or vessels that have been left unattended on land owned or controlled by the State for a continuous period of more than forty-eight hours without the written permission of the board or its authorized representative.

- A new definition of Abandoned and unattended property has been added in the propose rule change.

§13-104-7 **Fire use restrictions.** The following acts are prohibited within a forest reserve:

(1) To build any fire on the ground or in any structure[~~:~~] not otherwise authorized by this section;

(2) To build any fire without using a portable stove or other self-contained unit;

(3) To leave a fire unattended without extinguishing all traces

extinguishing all traces of heat;

(4) To deposit or discard any potential fire-producing material such as embers, coals, or ashes that are too hot to touch;

(5) To set on fire or cause to be set on fire any live or dead vegetation except for department fire control measures; and

(6) To start a fire in windy conditions in a place or manner that is likely to cause live or dead vegetation to be set on fire; and

(7) To use any motor vehicle, motorized equipment, internal combustion engines, or electric motors unless equipped with efficiently operating fire or spark arresting equipment. [Eff 9/28/81; am and comp 10/15/93] (Auth: HRS §183-2) (Imp: HRS §§183-2, 185-1)

- Existing rule prohibits the use motors in the forest reserve unless it is equipped with working fire or spark arresting equipment. This is meant to provide a measure reducing ignition of wildfire from motorized equipment.

§13-104-23 Access permits. (a) Permits for access to or entry into forest reserves may be required by the board or its authorized representative for the following purpose:

(2) ...

(4) To control periods of use of a forest reserve, especially during periods when fire danger levels are high.

... . [Eff 9/28/81; am and comp 10/15/93] (Auth: HRS §183-2) (Imp: HRS §183-2)

- Highlighted in yellow is the existing provision (imbedded within access permits) that provided the mechanism for the Division to close a forest reserve when it was needed due to natural resources concerns or for health and public safety.

of heat;

(4) To deposit or discard any potential fire-producing material, such as embers, coals, or ashes that are too hot to touch;

(5) To set on fire or cause to be set on fire any live or dead vegetation except for department fire control measures; and

(6) To start a fire in windy conditions in a place or manner that is likely to cause live or dead vegetation to be set on fire[~~; and~~

~~(7) To use any motor vehicle, motorized equipment, internal combustion engines, or electric motors unless equipped with efficiently operating fire or spark arresting equipment~~].

[Eff 9/28/81; am and comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §§183-2, 185-7)

- The proposed rule change removes the requirement that motors must be equipped with working fire or spark arresting equipment.
- The definition of spark arrester has been repealed from HAR §13-104-2 in the proposed rule change

§13-104-7.5 Closing of areas. (a) The board, or its chairperson, ay close or restrict the public use of all or any portion of a forest eserve in the event of an emergency or when deemed necessary for:

(1) The protection of the biological, geological, or cultural resources of the area;

(2) Health, safety, or welfare reasons;

(3) The protection of property; or

(4) Management activities,

y the posting of appropriate signs indicating the duration, extent, and cope of closure.

(b) The chairperson is authorized to effect a given closure or estriction under subsection (a) for a period of not more than ninety ays. The board is authorized to effect a closure or restriction for ny period as deemed necessary to accommodate the condition or onditions indicated under subsection (a). [Eff and omp] (Auth: HRS §183-2) (Imp: HRS §§183-1.5, 183-2, 85-3)

- This new proposed rule (above) provides clear language and procedure for closing a forest reserve.

§13-104-23 Access permits. ~~(a)~~...

(4) To control [~~periods of use~~] uses of a forest reserve, [~~especially during periods when fire danger levels are high.~~] or any portion thereof, which may be under closure or otherwise restricted; and

- Highlighted in yellow are the corresponding changes being made to current access permit rules that served as the original forest reserve closure mechanism.

§13-104-11 Vehicles and transportation. (a) The following acts are prohibited within a forest reserve:

(1) To drive, operate, or use any motorized or non- motorized land vehicle, glider, hang glider, aircraft, balloon, or parachute carelessly and without due caution for the rights or safety of others and in a manner that endangers any person or property;

(2) To launch or land airplanes, gliders, helicopters, balloons, parachutes, or other similar means of transportation without a special use permit from the board or its authorized representative; provided, however, that landing is authorized without a permit in case of any emergency;

(3) To drive, operate, or use any motorized vehicle in any area or trails not designated for that purpose;

(4) To park any motorized or non-motorized vehicle or trailer except in designated areas;

(5) To drive, lead or ride a horse, mule, other animal, or non-motorized land vehicle in

§13-104-11 **Vehicles and transportation.** [~~(a)~~] The following acts are prohibited while under the jurisdiction of the state within a forest reserve:

(1) To drive, operate, or use any motorized or non- motorized land vehicle, glider, hang glider, aircraft, unmanned aircraft system, balloon, or parachute carelessly and without due caution for the rights or safety of others and in a manner that endangers any person or property;

(2) To launch or land [~~airplanes,~~] aircraft, gliders, helicopters, balloons, parachutes, or other similar means of transportation without a [~~special use~~] permit for that purpose from the board or its authorized representative; provided[~~, however,~~] that landing is authorized without a permit in case of any emergency;

(3) To drive, operate, or use any motorized vehicle in any area or trails not designated for that purpose[~~;~~], including areas requiring four-wheel drive only;

(4) To park any motorized or non-motorized vehicle or trailer except in designated areas;

(5) To drive, lead, or ride a horse, mule, other animal, or non-motorized land vehicle in areas and on roads or trails that are posted against such activity; [~~and~~]

(6) To drive, operate, or use any motorized [~~ground~~] land vehicle

areas and on roads or trails that are posted against such activity; and

(6) To drive, operate, or use any motorized ground vehicle without a functioning street legal muffler, and without a valid vehicle license plate, registration and safety sticker if required by each respective county.

- The existing rules on vehicles and transportation are shown above.

§13-104-16 Residence on forest reserve lands. Residing within a forest reserve is prohibited except with written permission from the board.

- The proposed rule change repeals and replaces this rule with a prohibition on camping.

§13-104-19 Camping permits. (a) All persons, groups, organizations, or associations wishing to camp within a forest reserve shall obtain a camping permit authorizing the use of the specific area and facilities for camping purposes.

- The current rules that contain provisions that require permits for camping in the forest reserve.

§13-104-2 Definitions. ..."Camping" means being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia, any time after one hour after sundown until sunrise in a forest reserve.

- Current definition of camping in the forest reserve rules

"Residing" means being in the same forest reserve for more than seven (7) continuous days.

- Current definition of residing in the forest reserve rules
- The "residing" definition has been repealed in the proposed rule change

without a functioning street legal muffler, and without a valid vehicle license plate, registration and safety sticker if required by [~~each~~] the appropriate respective county[~~.~~]; and

(7) To launch, land, or operate any unmanned aircraft system without a permit for that purpose from the board or its authorized representative.

- The proposed rule changes to vehicles and transportation were done to include regulation for unmanned aircraft systems such as drones (highlighted above).
- All other changes are non-substantial and were done for clarification purposes.

[~~§13-104-16 Residence on forest reserve lands. Residing within a forest reserve is prohibited except with written permission from the board.~~]§13-104-16 **Camping.** No person shall camp, erect any tent, tarpaulin, or other structure, or use recreational trailers or other camper units within any forest reserve, except with the prior written authorization of the board or its authorized representative and as permitted by the rules of the department. [Eff 9/28/81; comp 10/15/93; am and comp] (Auth: HRS §183-2) (Imp: HRS §183-2)

- The term residing has been replaced by Camping.
- This proposed rule provides clear language and procedure for the prohibition on camping in the forest reserve without a permit.

§13-104-2 **Definitions.** ..."Camping" or "to camp" means [~~being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia,~~] a person's physical presence any time [~~after~~] one hour after sundown until sunrise in a forest reserve. Indicia of camping includes the use of a forest reserve one hour after sundown until sunrise for living accommodation purposes, including, but not limited to: sleeping activities or making preparations to sleep (including the laying down of bedding for the purpose of sleeping); storing personal belongings; making any fire; the presence or use of any tents, temporary shelters, unauthorized structures or vehicles; or digging or breaking ground without proper authorization.

- The definition of "Camping" and has also been revised.

§13-104-2 **Definitions.** ..."Structure" means any object or improvement constructed, installed, or placed on state lands, including but not limited to buildings, sheds, lean-tos, picnic tables, memorials, hunting blinds, tree stands, mobile homes, campers, trailers; provided that tents, campers, vehicles, and other temporary objects related to authorized activities shall not be considered structures for the purposes of this definition; provided further that the objects are in compliance with rules and regulations governing those activities on state lands.

- A new definition of "Structure" has been added in the propose rule change.

SUBCHAPTER 3

PERMITS

§13-104-18 General provisions for permits. (a) The board or its authorized representative may issue the following types of permits:

(1) Camping;
(2) Special use;
(3) Collecting;
(4) Commercial harvest; and
(5) Access.

(b) All permits are subject to the following provisions:

(1) Permits are subject to denial, cancellation, or termination at any time by the board or its authorized representative upon violation of these rules or any conditions of the permit or any federal, state, or county statutes, ordinances, and rules or for danger to the public or because of natural causes.

(2) ...

[No comparable existing rule provision.]

[No comparable existing rule provision.]

- Regulation highlighted in yellow is proposed to be repealed from the following provisions:
  - HAR §13-104-19(c)
  - HAR §13-104-21(c)
  - HAR §13-104-23(c)
- Regulation highlighted in blue is proposed to be repealed from the following provisions:
  - HAR §13-104-21(c)
  - HAR §13-104-23(c)

SUBCHAPTER 3

PERMITS

[~~§13-104-18 General provisions for permits.~~] §13-104-18 General provisions for permits. (a) The board or its authorized representative may issue the following types of permits:

(1) Camping;
(2) Special use;
(3) Collecting;
(4) [~~Commercial harvest;~~] Commercial; and
(5) Access.

(b) All permits are subject to the following provisions:

(1) Permits are subject to denial, cancellation, or termination at any time by the board or its authorized representative upon violation of these rules or any conditions of the permit or any federal, state, or county statutes, ordinances, and rules or for danger to the public or because of natural causes. Persons who have violated permit conditions or the rules may be ordered by the department to leave the forest reserve. Permittees who have violated permit conditions or the rules may be denied future permits for forest reserves or subject to the imposition of additional permit restrictions;

(2) ...

(8) The board may set and approve a forest product price list. Charges may be assessed when permits are granted for forest products. The forest product price list shall reasonably reflect fair market value and be periodically updated by the board;

(9) ...

(10) By signing the permit and entering into the forest reserve, all persons included on the permit agree to comply with all the terms and conditions of the permit, as well as applicable laws and regulations; and consent to present the permit to a duly authorized representative of the department upon request; and

(11) Persons applying for a permit shall provide, if requested, identification for all persons included on a permit, satisfactory to the board or its authorized representative. The board or its authorized representative may require the names, addresses, and telephone numbers of all persons included on a permit.

§13-104-19 Camping permits. (a) All persons, groups, organizations, or associations wishing to camp within a forest reserve shall obtain a camping permit authorizing the use of the specific area and facilities for camping purposes.

(b) Camping permits shall be obtained from the district offices of the division during regular working hours of the department.

(c) ...

(e) No person, group, organization, or association shall remain at any one specific camping site for longer than seven days; provided that the board or its authorized representative may extend the length of stay for good cause; provided further that the length of stay (including the extension as well as the permitted stay) shall not exceed fourteen days.

(f) ...

(g) Permits may be denied, canceled, or terminated for the following reasons:

(1) When the size of the group exceeds the capacity of the existing site or facilities;
(2) When there are inadequate facilities to meet the immediate needs of the camper or campers;
(3) When repairs or improvements are being made at the campsite; or
(4) When a state of emergency is declared by the board or its authorized representative

[~~§13-104-19 Camping permits.~~] §13-104-19 Camping permits. (a) ll persons, groups, organizations, or associations wishing to camp ithin a forest reserve shall obtain a camping permit authorizing the se of the specific area and facilities for camping purposes[~~.~~] for the tated date or dates.

[~~(b) Camping permits shall be obtained from the district offices of he division during regular working hours of the department.~~

...

[~~(c)~~] (c) No person, group, organization, or association shall emain at any one specific camping site for longer than seven days; rovided that the board or its authorized representative may extend the ength of stay for good cause[~~; provided further that the length of stay including the extension as well as the permitted stay) shall not exceed ourteen days~~].

...

[~~(g)~~] (e) [~~Permits~~] Camping permits may be denied, canceled, or erminated for the following reasons:

(1) When the size of the group will exceed or exceeds the capacity of the existing site or facilities;

(2) When there are inadequate facilities to meet the immediate needs of the camper or campers;

(3) When repairs or improvements are being made at the campsite; or

(4) When a state of emergency is declared or for other reasons involving the health, safety, and welfare of the applicants or permittees; [~~by the board or its authorized representative~~]upon the declaration of the board or its authorized representative.

§13-104-20 Special Use Permits. (a)...

(b) Applications for special use permits shall be received by the board or its authorized representative at least fifteen working days in advance of the date the permit is to be in effect, unless otherwise received and accepted by the board or its authorized representative.

§13-104-21 Collecting permits. (a) Persons wishing to collect forest items (e.g. ti leaves, bamboo) for personal use and at no charge shall obtain a collecting permit authorizing the collection in a specific area

...

[No comparable existing rule provision.]

[No comparable existing rule provision.]

§13-104-22 Commercial harvest permits. (a) The board or its authorized representative may issue permits for the purpose of purchasing, harvesting, and removing forest products (e.g., timber, seedlings, greenery, tree fern, cinder, and lava rock).

[No comparable existing rule provision.]

§13-104-20 **Special Use Permits.** (a)...

(b) Applications for special use permits shall be received by the board or its authorized representative at least fifteen working days in advance of the date the permit is to be in effect, [~~unless otherwise received and accepted by the board or its authorized representative.~~] however, the deadline may be waived by the board or its authorized representative upon a showing of good cause.

[~~§13-104-21 Collecting permits.~~] §13-104-21 **Collecting permits.** (a) Persons wishing to collect forest [~~items~~] products [~~(e.g. ti leaves, bamboo)~~] for personal use and at no charge shall obtain a collecting permit authorizing the collection in a specific area.

...

[~~(c)~~] (b) Each application for a collecting permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

...

(f) No more than one permit within a seven-day period may be issued to the same person or persons, group, organization, or association listed on the permit for collecting any of the same forest products.

§13-104-2 **Definitions.** ... "Forest product" means any natural material from a forest reserve, including but not limited to timber, seedlings, seeds, fruits, greenery, tree fern, cinder, lava rock, ti leaves and bamboo.

[~~§13-104-22 Commercial harvest permits.~~] §13-104-22 **Commercial permits.** (a) Commercial use permits. The board or its authorized representative may issue commercial use permits.

(1) Applications for commercial use permits shall be received by the board or its authorized representative at least thirty working days in advance of the date the permit is to be in effect; however, the deadline may be waived by the board or its authorized representative upon a showing of good cause.

[No comparable existing rule provision.]

[No comparable existing rule provision.]

[No comparable existing rule provision.]

(a) The board or its authorized representative may issue permits for the purpose of purchasing, harvesting, and removing forest products (e.g., timber, seedlings, greenery, tree fern, cinder, and lava rock).

(c) Each application for a harvest permit shall be considered on its own merits including its effect on the premises and the public's use and enjoyment of the forest reserve.

(d) Permits will not be issued for harvesting material for direct resale.

[No comparable existing rule provision.]

[No comparable existing rule provision.]

[No comparable existing rule provision.]

(2) A request for a commercial use permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

(3) The value of the commercial activity shall be decided by the board or its authorized representative and shall not exceed $10,000.

(4) The time of entry for the commercial activity shall not exceed thirty days, except that the board or its authorized representative may extend this time for good cause.

[~~(a)~~] (b) Commercial harvest permits. The board or its authorized representative may issue permits for the purpose of purchasing[~~,~~] and harvesting[~~, and removing~~] forest products from a forest reserve [~~(e.g., timber, seedlings, greenery, tree fern, cinder, and lava rock)~~].

~~(c)~~] (1) Each application for a commercial harvest permit shall be considered on its own merits, including its potential effect on [~~the premises~~] forest reserve resources and the public's use and enjoyment of the forest reserve[~~.~~]; provided further that tree harvesting shall be done in accordance with a management plan as required by section 183-16.5, Hawaii Revised Statutes.

[~~(d) Permits will not be issued for harvesting material for direct resale.~~

(c) Commercial salvage permits. The board or its authorized representative may issue commercial salvage permits for the purpose of purchasing and removing dead or hazardous trees.

(1) A request for a commercial salvage permit shall be considered on its own merits, including its potential effect on forest reserve resources and the public's use and enjoyment of the forest reserve.

(2) The value of the raw material to be salvaged shall not exceed $10,000. The quantity to be salvaged shall be decided by the board or its authorized representative.

(2) The time of entry for salvaging shall not exceed fourteen days for permits with designated raw material value not in excess of $1,000, or thirty days for permits with designated

[No comparable existing rule provision.]	
[No comparable existing rule provision.]	
[No comparable existing rule provision.]	
[No comparable existing rule provision.]	

raw material the value of which exceeds $1,000 but does not exceed $10,000, except that the board or its authorized representative may extend this time for good cause.

§13-104-2 **Definitions.** ... "Tree harvesting" means the removal of live trees from a forest reserve.

SUBCHAPTER 4

FEES AND CHARGES

§13-104-25 **General statement.** (a) This subchapter establishes user fees and charges for services, facilities, and activities for forestry and recreational purposes, where applicable under the jurisdiction of the division.

(b) The fees and charges are:

(1) Collected to offset the expenses of operating, maintaining, and managing the facilities and services;

(2) Fixed with due regard to the primary purposes of providing public outdoor recreational facilities and promoting an appreciation and connection with Hawaii's forests; and

(3) Set by categories.

(c) The acceptance of payment or billings shall not waive the nature of trespass or ratify or permit illegal camping.

§13-104-26 **Payment.** (a) Method of payment of fees and charges shall be online by credit card or by business check, cashier's check, money order, or cash at division branch offices or the administration office.

(b) All fees shall be paid in advance of issuance of a permit, except as specified by chapter 13-104.

§13-104-27 **Camping and cabin rental fees.** The camping and cabin rental fees shall be set according to the amounts in Schedule A - Camping and Cabin Rental Fees - 12/28/16.

Schedule A
Camping and Cabin Rental Fees
12/28/16

	Maximum No. Campsites	Maximum No. Persons per campsite	Resident Fee ($/night/ campsite)	Nonresident Fee ($/night/ campsite)
Category 1	Up to 5	Up to 15	$12*	$18**
Unimproved campsite or improved campsite with minimal amenities (i.e., trailside camping or a campsite with picnic table and shelter and clivus toilet)				
Category 2	1 Cabin	Up to 6	$30/night per cabin ***	$50/night per cabin ***
Improved campsite or small cabin that houses no more than 6 persons				
Category 3	1 Cabin	Up to 20	$60/night per cabin ***	$90/night per cabin ***
Improved campsite or large cabin that houses 7 or more persons				

[No comparable existing rule provision.]
[No comparable existing rule provision.]
[No comparable existing rule provision.]
[No comparable existing rule provision.]

* A resident camping permit for up to 6 persons is $12. Additional persons will cost $2 per person.
** A nonresident camping permit for up to 6 persons is $18. Additional persons will cost $3 per person.
***Fee reflects total cost for cabin rental regardless of number of persons staying overnight.

§13-104-28 Commercial use permit fees. Commercial use permit fees are listed in Schedule B - Commercial Use Permit Fees - 12/28/16 and shall apply depending on the applicable commercial activity or activities; provided that the requested recreational facility is approved for commercial use by the forestry and wildlife manager.

Schedule B Commercial Use Permit Fees 12/28/16	
Base commercial use permit processing fee	$10
Price per pedestrian	$5
Price per non-motorized bicycle or horseback rider	$7
Price per motorized vehicle up to 5 people	$25
Price per motorized vehicle up to 8 people	$50
Price per motorized vehicle up to 12 people	$75
Price per motorized vehicle up to 15+ people	$100
Price per operator and/or passenger of aerial craft launching from and/or landing in a forest reserve	$5
Price per campsite, facility, or cabin per day	$100
Price per commercial film permit	$100
Price per item/activity (miscellaneous)	$20

§13-104-29 Kiln fees. Kiln fees are listed in Schedule C - Kiln Fees - 12/28/16 and shall be paid no later than fifteen days after kiln services are rendered.

Schedule C Kiln Fees 12/28/16	
Unit	**Unit Cost**
1 - 900 Board Feet	$0.70 each
901 - 1000 Board Feet	$0.60 each
1001 - 1500 Board Feet	$0.50 each
1501 and up Board Feet	$0.40 each

§13-104-30 Permit processing fees. The fee for the processing of an access permit for scientific research purposes shall be $50. The fee for processing any other permit shall be $10.

§13-104-31 Parking and entrance fees. The fee for parking a vehicle may be assessed at $5 per vehicle, per day.

[No comparable existing rule provision.]
[No comparable existing rule provision.]

§13-104-32 **Fee for copies of rules.** The fee per copy of these rules shall be 10 cents per page. No fee shall be charged for copies furnished to federal, state, or local governmental agencies. The fee may be waived in other instances at the discretion of the administrator or the administrator's authorized representative when a waiver is in the public interest.

§13-104-33 **Negotiable instruments; service charge.** The service charge for any dishonored check, draft, certificate of deposit, or other negotiable instrument is $10."

IV. New Business

B. Discussion and Action on Proposed Amendments to HAR Title 12, Chapter 162, **Food Safety Certification Costs Grant Program**, promulgated by DoAg

RECEIVED
MAR 9, 2018
SBRRB

PRE-PUBLIC HEARING
SMALL BUSINESS IMPACT STATEMENT
TO THE
SMALL BUSINESS REGULATORY REVIEW BOARD
(Hawaii Revised Statutes §201M-2)

Department or Agency: Agriculture

Administrative Rule Title and Chapter: Chapter 4-162

Chapter Name: Food Safety Certification Costs Grant Program

Contact Person/Title: Jeri Kahana, Quality Assurance Division Administrator

Phone Number: 832-0705

E-mail Address: Jeri.M.Kahana@hawaii.gov Date: December 20, 2016

To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

Are the draft rules available on the Lieutenant Governor's Website pursuant to HRS §91-2.6? Yes ☐ No ☑

If **Yes,** provide webpage address: _____

Please keep the proposed rules on this webpage until after the SBRRB meeting.

I. Rule Description: ☑ **New** ☐ **Repeal** ☐ **Amendment** ☐ **Compilation**

II. Will the proposed rule(s) affect small business? Yes ☑ **No** ☐

"Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business." (HRS §201M-1)

"Small business" is defined as a "for-profit enterprise consisting of fewer than one hundred full-time or part-time employees." (HRS §201M-1)
(If No, you do not need to submit this form.)

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? (e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) (HRS §201M-2(d)) **Yes** ☐ **No** ☑ (If Yes, you do not need to submit this form.)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) **Yes** ☐ **No** ☑ (If Yes, you do not need to submit this form.)

* * *

If the proposed rule(s) affect small business and are not exempt as noted above, please provide a reasonable determination of the following:

1. Description of the small businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules, that are required to comply with the proposed rules, and how they may be adversely affected.

The proposed rules is a grant program to provide farmers with assistance pay for costs associated with the compliance with the U.S. Food and Drug Administration's (FDA) Food Safety Modernization Act (FSMA).

2. In dollar amounts, the increase in the level of direct costs such as fees or fines, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs associated with compliance.

There are no fees or fines. The costs for farmers may vary depending on their present infrastructure, training, and other food safety practices.

If the proposed rule imposes a new or increased fee or fine:

a. Amount of the current fee or fine and the last time it was increased.

None

b. Amount of the proposed fee or fine and the percentage increase.

None

c. Reason for the new or increased fee or fine.

None

d. Criteria used to determine the amount of the fee or fine.

None

3. The probable monetary costs and benefits to the agency or other agencies directly affected, including the estimated total amount the agency expects to collect from any additionally imposed fees and the manner in which the moneys will be used.

The costs to the agency will be personnel costs to administer the grant money.

4. The methods the agency considered or used to reduce the impact on small business such as consolidation, simplification, differing compliance or reporting requirements, less stringent deadlines, modification of the fines schedule, performance rather than design standards, exemption, or other mitigating techniques.

This program will benefit small business with monetary assistance to comply with a federal requirement.

5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.

None.

6. Consideration of creative, innovative, or flexible methods of compliance for small businesses.

None.

7. How the agency involved small business in the development of the proposed rules.

The agency has conducted outreach training with farmers on food safety practices.

   a. If there were any recommendations made by small business, were the recommendations incorporated into the proposed rule? If yes, explain. If no, why not.

No recommendations were provided. Criteria is based on the necessary requirements in meeting the federal rule.

8. Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more stringent standard.

We are not aware of any other similar state programs.

If yes, please provide information comparing the costs and benefits of the proposed rules to the costs and benefits of the comparable federal, state, or county law, including the following:

a. Description of the public purposes to be served by the proposed rule.

Federal law and most other state's programs do not have a limit on cultivated acres. Limiting the acreage is necessary for the department at this time given the pilot program nature of the project, and the lack of personnel available to conduct sampling. Hawaii's program will have one inspector, Colorado, for example, has 13 inspectors to conduct sampling.

b. The text of the related federal, state, or county law, including information about the purposes and applicability of the law.

c. A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes, application, and administration.

See "a."

d. A comparison of the monetary costs and benefits of the proposed rule with the costs and benefits of imposing or deferring to the related federal, state, or county law, as well as a description of the manner in which any additional fees from the proposed rule will be used.

The benefit to the state is increased revenue of $250 for each additional 10 acres, and a manageable program given current resources. Additional fees will go to the special fund to defray the administrative costs of the program. The financial benefit of deferring to the no acreage limit of federal and other state's laws, is that more growers may apply, but that is an unknown benefit.

e. A comparison of the adverse effects on small business imposed by the proposed rule with the adverse effects of the related federal, state, or county law.

Small businesses will have to pay $250 for each additional 10 acres they wish to cultivate. Most prospective small businesses surveyed did not wish to grow more than 10 acres of industrial hemp, so this rule will effect comparatively few growers.

* * *

DEPARTMENT OF AGRICULTURE

Adoption of Chapter 4-162
Hawaii Administrative Rules

<Date of Adoption>

1. Chapter 4-162, Hawaii Administrative Rules, entitled "FOOD SAFETY CERTIFICATION COSTS GRANT PROGRAM", is adopted to read as follows:

HAWAII ADMINISTRATIVE RULES

TITLE 4

DEPARTMENT OF AGRICULTURE

SUBTITLE 7

QUALITY ASSURANCE DIVISION

CHAPTER 162

FOOD SAFETY CERTIFICATION COSTS GRANT PROGRAM

§4-162-1 Definitions. As used in this chapter:

"Department" means the department of agriculture.

"Farming or ranching" means operations that grow, harvest, and pack fresh produce; or grow, harvest, pack, and hold fresh produce; or grow, harvest, manufacture and hold livestock feed for commercial sale purposes.

"FDA" means the federal Food and Drug Administration.

"FDA regulations" means title 21 of the Code of Federal Regulations, parts 112, 112, 117, and 507.

"FSMA" means the FDA Food Safety Modernization Act (P.L. 111-353).

"Program" means the Hawaii food safety certification costs grant program.

"HRS" means the Hawaii Revised Statutes.

"Good agricultural practices and good handling practices audits" means audits performed by a third party government agency or private company to verify that fruits and vegetables are produced, packed, handled, and stored as safely as possible to minimize risks of microbial food safety hazards.

"Produce Safety Alliance" means the collaboration between Cornell University, the FDA, and the USDA to prepare fresh produce growers to meet the regulatory requirements included in the FSMA's Produce Safety Rule.

"Food Safety Preventive Controls Alliance" means the collaboration between Illinois Institute of Technology and the FDA to help industry comply with the FSMA preventive controls rules for human and animal food.

"State" means the State of Hawaii.

"State food safety laws" means chapter 321, Hawaii Revised Statutes, and chapter 11-50, Hawaii Administrative Rules.

"USDA" means the United States Department of Agriculture. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-2 Purpose of program. The purpose of the Hawaii food safety certification costs grant program is to provide grants to assist farmers or ranchers in meeting the costs of complying with the FSMA, FDA regulations, and state food safety laws. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-3 Eligibility requirements. (a) To be eligible for a food safety certification costs grant, an applicant shall:

(1) Be engaged in farming or ranching in the State as defined in this chapter; and

(2) Be:

(A) An individual person residing in the State;

(B) An institution of higher education in the State; or

(C) A business entity having its principal place of business in the State with employees for whom the business is legally required to provide employee benefits.

[Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-4 Eligible costs. (a) Grants shall be awarded to reimburse costs incurred for practices necessary for compliance with the FSMA, FDA regulations, or state food safety laws.

(b) Eligible costs may include:

(1) Training

(A) Training recognized by the FDA to be equivalent to the Produce Safety Alliance's standardized curriculum;

(B) Training recognized by the FDA to be equivalent to the Food Safety Preventive Control Alliance's standardized curriculum;

(C) Training recognized by the FDA to comply with the hazard analysis and risk-based preventive controls for human foods rule;

(D) Training recognized by the FDA to comply with the hazard analysis and risk-based preventive controls for animal foods rule; and

(E) Preventive controls systems training emphasizing prevention of hazards before they occur, such as hazard analysis critical control point, or hazard analysis and risk-based preventive controls;

(2) Water systems, sanitizer treatment supplies, and monitoring meters;

(3) Microbial testing of water, raw produce, or facility;

(4) Personal hygiene equipment and supplies, including:
    (A) Fixed or portable restroom, but not including septic systems or sewer connections;
    (B) Rental of portable restroom including cleaning and disposal of waste;
    (C) Hand washing sinks;
    (D) Hand sanitizer and sanitizing stations;
    (E) Worker protection clothing; and
    (F) First aid kits;
(5) Harvest and packing supplies to reduce food safety risks;
(6) Costs associated with food and safety compliance in the production of livestock feed for resale, including forage grasses, hay, grains;
(8) Wildlife fencing and pest deterrents and traps;
(9) Good agricultural practices and good handling practices audit costs with a passing score;
(10) General clean-up of farm and removal of hazardous debris;
(11) Traceability software, tools, and supplies;
(13) Food grade sanitizing solutions and detergents; and
(15) Costs of other practices necessary for compliance with the FSMA, FDA regulations, or state food safety laws.

(c) Only costs that were incurred within five years prior to the time the application for the grant is received by the department shall be eligible for reimbursement. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-5 Ineligible costs. Costs that are not eligible for reimbursement include but are not limited to:

(1) Costs that are not directly related to, and necessary for, compliance with the FSMA, FDA regulations, or state food safety laws;
(2) Costs related to the general operation of the applicant's business;
(3) Wages, compensation, or benefits for the applicant's employees;
(4) Costs of travel, entertainment, or lobbying activities;
(5) Costs of vehicles and related vehicle expenses;
(6) Costs for which the applicant already has been or will be reimbursed;
(7) Insurance costs; and
(8) Costs incurred more than five years prior to the time the application for grant is received by the department.

[Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-6 Applications. (a) Each applicant for a food safety certification costs grant shall submit a signed, complete, accurate, and legible application, on a form provided by the department, and shall include the following:

(1) The applicant's name, and business name if different, mailing address, farm or ranch's physical address, phone number, and if applicable, electronic mail address;
(2) If the applicant is an individual or partnership, the date of birth of the individual or partners;
(3) Proof of compliance with the State's business registration, tax, and labor laws;
(4) A photocopy of the applicant's general excise tax license;
(5) A completed W-9 tax information form signed by the applicant;
(6) Evidence of the implementation of farm food safety plan and practices, including photographs of equipment and their use;

(7) Proof of third party audit of good agricultural practices or good handling practices; and

(8) The applicant's agricultural operation details, including but not limited to:

(A) Acreage in production;

(B) Crops produced;

(C) Agricultural production experience;

(D) Food safety plan information;

(E) Farm size;

(F) Good agricultural practices certifications, if any;

(G) Applicable income categories, as specified by the FSMA; and

(b) The application shall also include applicant's acknowledgment and agreement to the following terms and conditions:

(1) The applicant has the legal authority to authorize, and by submitting an application does authorize, the department to enter the applicant's place of business at reasonable times to inspect records, facilities, and the premises either in the processing of the application or in the administration of the grant;

(2) The applicant certifies that all information and documents submitted in support of the application are correct and complete to the best of the applicant's knowledge;

(3) The applicant has all licenses, permits, and other approvals required by federal, state, or county governmental entities to conduct its operations and implement the practices for which the grant is intended;

(4) The applicant shall comply with all applicable federal and state laws prohibiting discrimination against any person on the basis of race, color, national origin, religion, creed, sex, age, sexual orientation, or disability; and

(5) The applicant shall allow the State full access to its records, files, and other

related documents for the purpose of measuring the effectiveness, and ensuring the proper expenditures, of the grant.

(c) The department may require additional documentation to verify compliance with this chapter. Any incomplete application for a grant shall be denied. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-7 Invoicing. (a) All applications shall be accompanied by invoices or receipts showing eligible costs incurred for practices necessary for compliance with the FSMA, FDA regulations, or state food safety laws.

(b) Invoices and receipts shall be original and shall include:

(1) The date of purchase, the vendor's name, mailing address, and phone number;

(2) An itemization of each good or service; and

(3) Verification of payment by the applicant.

(c) The department may require additional documentation to verify compliance with this chapter. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

§4-162-8 Grant amounts. (a) All grants are subject to available funding.

(b) Grant awards shall be made on a reimbursement, pro-rata basis out of the funds available for food safety certification costs grants.

(c) The maximum grant amount to any one applicant in a fiscal year shall not exceed $5,000. [Eff] (Auth: HRS §141-12.5) (Imp: HRS §141-12.5)

2. The adoption of chapter 4-162, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on Month xx, xxxx, and filed with Office of the Lieutenant Governor.

SCOTT E. ENRIGHT
Chairperson
Board of Agriculture

APPROVED AS TO FORM

Deputy Attorney General

III. Section-Specific Changes

Subchapter 1 Purpose

Subchapter 1 (Purpose) creates a distinct subchapter for the section setting forth the purpose of chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-1 Purpose

Section 11-200.1-1 expresses the purpose of chapter 11-200.1, HAR. It consolidates the policy statements about conducting EISs into this section and reframes the policy statements to be about the environmental review process as a whole. Section 11-200-1, HAR (1996) was a standalone paragraph. It is now numbered and combines other sections from chapter 11-200, HAR (1996) addressing the purpose of EAs and EISs. Subsection (a) of 11-200.1-1 was formerly section 11-200-1, HAR (1996).

Subsection (b) derives from 11-200-14, HAR (1996), "General Provisions", which is the first section in subchapter 7, "Preparation of Draft & Environmental Impact Statements" under the 1996 Rules. It is modified to apply to both EAs and EISs. The subsection emphasizes that EAs and EISs should be prepared at the earliest practicable time and the spirit in which the documents should be prepared. It emphasizes that the purpose of preparing the documents is to enlighten decision-makers about any environmental consequences, and the addition "prior to decision-making" emphasizes the timing of when an EA or EIS should be prepared. EAs and EISs are intended to inform decision-makers prior to decision-making, therefore an after-the-fact EA or EIS would be inappropriate.

Subsection (c) combines language from section 11-200-19, HAR (1996) regarding Environmental Impact Statement Style to make it applicable to both agencies and applicants and to all environmental review documents. Applicants are authorized to prepare both the EA and EIS. The language is modified to be grammatically correct and increase readability.

Paragraph (c)(3) is new language regarding consultation. Council members and numerous commenters raised concerns that the process of "consultation" had in some cases become a mere formality, without a true, open, and mutual dialogue occurring between action proponents and members of the public. Paragraph (c)(3) provides the spirit in which consultation should be conducted with both agencies and members of the public.

Several housekeeping changes are made consist with the discussion above in the General Changes section. In addition, the terms "environmental impact statement" and "environmental assessment" are introduced and the acronyms "EIS" and "EA" provided. The syntax of the sentences is also revised to improve readability as appropriate.

Subchapter 2 Definitions

Subchapter 2 (Definitions and Terminology) creates a distinct subchapter for the section setting forth definitions and terminology used in chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-2 Definitions

Section 11-200.1-2 Definitions and Terminology was formerly section 11-200-2, HAR (1996). It sets forth the definitions and terms used in chapter 11-200.1, HAR. New language in the Proposed Rules direct agencies to use their own statutes and rules when a term is not defined in this chapter or in chapter 343, HRS. Several housekeeping changes are made, including arranging definitions into alphabetical order based on revisions to their wording. Various definitions are also amended to remove process steps, to clarify their meaning, or to make them more consistent with other proposed changes throughout the Proposed Rules.

The Proposed Rules propose to modify and amend the following definitions in the following ways:

The definition for "acceptance" is modified to remove redundant language. The modifications also remove process steps and redirect the reader to the appropriate section for determining those steps.

The definition for "accepting authority" is modified by removing the word "final" before "official who, or agency that" because the word "final" did not contribute additional meaning to the definition. The 1996 Rules provided only that the accepting authority "determines the acceptability of the EIS document". The modified definition replaces that language and clarifies that the role of the accepting authority is to determine both that a final EIS is required to be filed pursuant to chapter 343, HRS, and that the final EIS fulfills the definitions and requirements of an EIS. It reflects changes to chapter 343, HRS in 2012 authorizing the direct preparation of an EIS without first preparing an EA.

The definition "addendum" is modified to incorporate housekeeping changes and to include that an "applicant" also may attach an addendum to a draft EA or EIS.

The definition "approval" is modified to remove the word "actual" from the phrase "prior to the actual implementation of the action" because "actual" was an unnecessary adjective. The definitions of "discretionary consent" and "ministerial consent" that were embedded in the 1996 definition of "approval" have been removed and made into a standalone definition under "discretionary consent".

The definition "approving agency" is modified to remove the word "actual" from the phase "prior to the actual implementation of the action" because "actual" was an unnecessary adjective. The word "applicant" was added before the word "action" because an approving agency is only necessary within the environmental review context for applicants. Chapter 343, HRS only applies to applicants when an applicant action needs a discretionary consent (an approval) to proceed and contains a trigger under section 343-5, HRS.

The definition "cumulative impact" is slightly modified for housekeeping purposes ("which" to "that").

The definitions of "discretionary consent" and "ministerial consent" are removed from the 1996 definition of "approval" and made into a standalone, combined definition (discretionary consent and ministerial consent). The definition of "discretionary consent" is consistent with both chapter 343, HRS and the 1996 Rules language. The definition of "ministerial consent" is consistent with the 1996 Rules language. It is not a defined term in chapter 343, HRS.

The definition "draft environmental assessment" is modified for housekeeping purposes, and also to use the term "finding of no significant impact" in place of "a negative declaration determination".

The definition of "effects" and "impacts" is slightly modified for housekeeping purposes (changing "which" to "that"), and to incorporate the language "immediate or delayed" that is part of the 1996 Rules definition of "environmental impact", which is proposed to be deleted due to redundancy.

The definition of "EIS preparation notice" re-orders the words "EIS preparation notice" and "preparation notice", and adds in the acronym "EISPN" because "EISPN" and "EIS preparation notice" are used most frequently throughout the rules. The definition is accordingly put in alphabetical order. The definition is updated to incorporate the direct-to-EIS route, which, pursuant to section 343-5(e), HRS, begins with an EISPN. Note that section 343-5(e), HRS, only allows an agency to use its judgment and experience to determine whether an agency or applicant may begin with an EISPN. An applicant must consult with an agency first to receive this authorization. Housekeeping changes are also included.

The definition of "EIS public scoping meeting" is added. An EIS public scoping meeting is a new requirement as part of the EIS preparation process and is outlined in section 11-200.1-23.

The definition of "environment" is modified to include health, in order for it to correspond with the definition of "effects" or "impacts" under both chapter 343, HRS and the 1996 Rules. It is also modified to include "cultural", as required by Act 50 Session Laws Hawaii of 2000.

The definition of "environmental assessment" is modified to clarify that an EA needs to provide sufficient evidence to make a significance determination as opposed to merely making that assertion, or, on the opposite end of the spectrum, providing an unduly long analysis. The

statutory and 1996 Rules provide only that an EA is a written evaluation "to determine whether an action has a significant environmental effect". The proposed definition expands it to "a written evaluation that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect".

The definition of "environmental impact" is deleted because it was unnecessary with both "impact" and "environment" already included as defined terms. The words "immediate or delayed" have been incorporated into the definition of "effect" or "impacts".

The definition of "environmental impact statement" is modified with housekeeping changes.

The definition of "exempt classes of action" is deleted because the concept of "classes of action" is removed in subchapter 8A. Subchapter 8A uses the term "general types" of action that may be exempted in order to be more consistent with chapter 343, HRS.

The definition of "exemption list" is added because it is a frequently used term in subchapter 8A.

The definition of "exemption notice" is modified to reflect the updates to the exemption process under subchapter 8A. It recognizes that an exemption notice may be prepared for both agency and applicant actions. Further, it removes the reference that the notice be kept on file because in some circumstances a notice may be required to be published in the bulletin.

The definition of "final environmental assessment" is modified to reflect that chapter 343, HRS, now provides for a direct-to-EIS pathway when, based on an agency's judgment and experience, the agency concludes that the proposed action may have a significant effect on the environment. The agency may then directly proceed to an EIS, or in the case of an applicant, may authorize an applicant to proceed directly to the preparation of an EIS. For both proposing agencies and applicants, the EIS preparation begins with an EISPN. Because the direct-to-EIS pathway exists, it is less likely that an agency will submit or require the applicant to submit a final EA without the preparation of a draft EA. The line referring to this process has therefore been removed. The definition has also been modified to include housekeeping changes.

The definition of "finding of no significant impact" removes the previous reference to "negative declaration" and reorders the definition alphabetically. The acronym FONSI is used most frequently in the Proposed Rules and in practice.

The definition of "impacts" is added to redirect the reader to "effects". "Impacts" and "effects" are used synonymously throughout the Proposed Rules.

The definition of "National Environmental Policy Act" is slightly modified to include housekeeping changes, including adding in the acronym "NEPA".

The definition of "negative declaration" is deleted and moved alphabetically under "finding of no significant impact".

The definition of "office" includes minor housekeeping changes.

The definition of "periodic bulletin" is modified to include "bulletin" as an abbreviated reference to the "periodic bulletin".

The definition of "preparation notice" is deleted and moved under "Environmental Impact Statement Preparation Notice" or "EISPN". The term EISPN is used more frequently throughout the Proposed Rules.

The definition of "primary impact" is modified slightly to incorporate housekeeping changes.

The definition of "project' is added to distinguish projects and programs from one another and to facilitate discussion of a programmatic approach to environmental review. The proposed definition is aligned with but expands upon the definition set forth by the Supreme Court of Hawaii in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017). See the section on "Programmatic Approaches and Defining Project and Program" for additional details.

The definition of "program" is added to distinguish projects and programs from one another and to facilitate discussion of a programmatic approach to environmental review. The proposed definition is aligned with but significantly expands upon the definition set forth by the Supreme Court of Hawaii in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017). See the section on "Programmatic Approaches and Defining Project and Program" for additional details.

A definition of "proposing agency" is added because the term is used frequently throughout both the 1996 Rules and the Proposed Rules, but was not previously defined.

The definition of "secondary impact", "secondary effect", "indirect impact" or "indirect effect" is modified to correct grammar and readability.

The definition for "significant effect" or "significant impact" is amended according to Act 50 of the 2000 legislative session, which added "cultural practices of the community and State" to the definition of "significant effect" in chapter 343, HRS.

The definition of "supplemental EIS" is amended to refer to an "updated" instead of an "additional" EIS.

The definition of "trigger" is added to refer to any use or activity listed in section 343-5(a) HRS. The 1996 Rules listed out what were commonly referred to as the "triggers" from section 343-5(a), HRS, which determine whether an action requires chapter 343, HRS environmental review. The Proposed Rules remove the list and refer to the "triggers" as establishing whether an action requires environmental review.

Subchapter 3 Computation of Time

Subchapter 3 (Computation of Time) creates a distinct subchapter standardizing the computation of time for all time periods prescribed by this chapter and chapter 343, HRS. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-3 Computation of Time

Section 11-200.1-3 (Computation of Time) is a new section. It clarifies and standardizes how days should be counted when there are time requirements within the Proposed Rules. The language is drawn from the Environmental Council Rules of Practice and Procedure, specifically section 11-201-14, HAR (1985), to ensure that the computation of time for all Council-related business is consistent.

This new section is intended to remove confusion about when comment periods begin and end. Section 343-5, HRS sets the comment periods for EAs as 30 days and for EISs as 45 days from the publication date. The section clarifies that for counting purposes, the publication date is day zero and the last day of the period is included. Holidays and weekends (see HRS § 1-29 and HRS § 8-1) are counted when counting to 30 or 45. However, when the last day falls on a state holiday or non-working day, the deadline is the next working day.

For example, the OEQC publishes the periodic bulletin on April 8, 2018, which is a Sunday. For a draft EA published on that date, April 8 is counted as zero. Holidays and weekends are included in counting to 30 days, but if the deadline falls on a state holiday or non-working day, the deadline is the next working day. In this example, the comment period deadline is Tuesday, May 8, 2018.

Subchapter 4 Filing and Publication in the Periodic Bulletin

Subchapter 4 (Filing and Publication in the Periodic Bulletin) (*The Environmental Notice*) creates a distinct subchapter setting forth information about the periodic bulletin and requirements for filing submittals to OEQC for publication in the periodic bulletin. This subchapter reorganizes the previous periodic bulletin subchapter from the 1996 Rules into three sections.

Section 200.1-4 addresses the purpose of the periodic bulletin and requirements for its publication. Section 200.1-5 establishes procedures for filing submittals for publication and consolidates previous language in various sections of the 1996 Rules regarding filing requirements into one place. Section 200.1-6 includes new language addressing occasions when an agency or applicant seeks to publish the same notice, document, or determination that it has published before and addresses the associated comment periods that arise when republication occurs.

§ 11-200.1-4 Periodic Bulletin

Section 11-200.1-4 (Periodic Bulletin) sets forth the publication requirements for the periodic bulletin. This section derives from sections 11-200-3, 11.2, 21, and 27 of the 1996 Rules. The previous Section 11-200-3, HAR (1996) has been divided into two sections in the Proposed Rules, including this section and one specific to filing (§ 11-200.1-5).

This section explicitly lists the types of notices, documents, and determinations published in the periodic bulletin, pursuant to chapter 343, HRS. The Proposed Rules require publishing lists of exempted actions, which the 1996 Rules do not require. This section also acknowledges that other statutes and rules (e.g., HAR § 13-222-12) have requirements for publication in the bulletin, such as shoreline certifications.

This section makes explicit that the OEQC may publish additional items in the bulletin on a time available basis as well as a space available basis. Given that the process is moving to a digital format, space is a less of a concern. However, the Proposed Rules reduce the submittal deadline from eight days to four days (see section 5 for more) so the capacity of the OEQC at any given point (i.e., staffing fluctuations) may limit the ability of the OEQC to include non-mandatory material in the bulletin.

This section also explicitly allows for the republication of any chapter 343, HRS notices, documents or determinations, and for notices of their withdrawal in accordance with other applicable requirements of the chapter.

§ 11-200.1-5 Filing Requirements for Publication and Withdrawal

This is a new section synthesizing language from multiple sections of the 1996 Rules (Sections 3, 9, 10, 11.1, 11.2, 20 and 23). In the 1996 Rules, the filing requirements are integrated into content or process steps and require numerous cross-references. This section consolidates and standardizes the filing requirements for each type of submittal document or determination into one section, making it easy to know where to look, who is responsible for the submittal, and to reference one section.

This section also captures notices, documents, and determinations required under chapter 343, HRS as well as requirements for publication pursuant to other statutes or administrative rules (e.g., HAR § 13-222-12 for shoreline applications).

Other changes of note include: decreasing the submission deadline from eight days to four business days as the OEQC no longer needs eight days to prepare the periodic bulletin; clarifying that the OEQC may ask for geographic data such as that included in a standard geographic information systems file; clarifying that the OEQC may require identification of the specific approval requiring an applicant to undertake environmental review; and adding language regarding the submission of paper copies to the State Library.

This section consolidates language on withdrawal from environmental review and makes explicit that both documents and determinations can be withdrawn for any level of review.

The Proposed Rules require paper copies in only two circumstances, both related to the State Library. In line with the State Library's archival requirements, the Proposed Rules require submission of one paper copy of any draft or final EA or EIS to be deposited with the State Library Document Center. The second is that a paper copy of a draft EA, EISPN, or draft EIS must be deposited in the local library nearest to the proposed action. This is so that those living nearest to the proposed impacts and have limited electronic access (or capability) are still able to participate in the environmental review process at the scoping and draft phases.

For EISs, section 18 includes a requirement to record oral comments at the public scoping meeting. This requirement is incorporated into this section as part of the submittal requirement for a draft EIS. It is incumbent upon the preparer of the draft EIS to ensure that one unaltered/unedited copy of the recording of the oral comments is submitted to the OEQC. Therefore, it is recommended that backup methods for recording oral comments are implemented in the event of file corruption. Standard audio quality means all oral comments can be clearly heard.

§ 11-200.1-6 Republication of Notices, Documents, and Determinations

This is a new section addressing the practice of republication of chapter 343 notices, documents, and determinations. Chapter 343, HRS is silent on whether comment periods may be extended. In practice, proposing agencies, applicants, and approving agencies have sought to extend comment periods. When this occurs outside of the standard time period for public comment or outside of the notification process through the periodic bulletin, inconsistencies arise in the process creating questions of public notification and, in some cases, standing. To end inconsistently applied "extended comment periods," this section states that the standard filing, comment, and response requirements of chapter 343, HRS apply each time something is published.

This section also provides that any agency or applicant that filed a chapter 343 notice, document, or determination may withdraw and republish a notice, document, or determination that has not been changed. Other submittals to the OEQC required by council rules, statute other than chapter 343, HRS, or an agency's administrative rules other than this chapter, may also be withdrawn and republished, but must be done in accordance with that statute or those rules. There is no chapter 343, HRS obligation to publish an unchanged document again; however, a proposing or approving agency's own statutes, rules, or procedures may require or call for it.

Lastly, this section clarifies when a public comment period is required with the republication of a chapter 343, HRS notice, document, or determination and how comments received in two or more comment periods for an unamended but republished notice, document, or determination are to be handled. The requirement to address comments in all comment periods resulting from multiple publications is to reduce the possibility of repeated publications to achieve fewer comments. Comments received outside of the multiple comment periods are not required to be addressed, but all comments received within multiple comment periods must be addressed.

Subchapter 5 Responsibilities

Subchapter 5 (Responsibilities) creates a distinct subchapter identifying the decision-making authority when agencies and applicants undergo chapter 343, HRS environmental review in various circumstances. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-7 Identification of Approving Agency and Accepting Authority

This section was previously section 11-200-4, HAR (1996). All language in this section comes from sections 11-200-3, -4, and -23, HAR (1996) or is in addition to it.

This section clarifies a number of points in the 1996 Rules:

State or County Lands and Funds Trigger. Language and cases where a proposed action has mixed state and county lands or funds or both lands and funds.

Approving Agency & Accepting Authority for Applicants. Provides that, in the case of applicants, the approving agency for environmental review compliance is also the accepting authority. Section 343-5(e), HRS states that for applicants "the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an [EA] of the proposed action," which is the approving agency. It further states that the "authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval." The agency with the authority to accept a final statement is the accepting authority, which is the agency initially receiving and agreeing to process the request for approval. This section adds language for applicants undertaking an EA.

Selection of Accepting Authority: Guidance to agencies on how to select the most appropriate accepting authority. This section instructs agencies and the OEQC to consider which agency has the most land or funds involved in an action when deciding which agency will be responsible for complying with chapter 343, HRS. Specifically, the changes to subsections (c) and (d) of this section provide a process for agencies to decide amongst themselves which agency shall be responsible for complying with chapter 343, HRS when two or more agencies are involved in an action. A list of considerations is provided for the agencies to make their decision, including a new consideration for which agency may have the most lands or funds involved in a proposed action. This section is also now divided into two subsections, providing that if agencies cannot make a decision, the OEQC shall make a decision for the agencies using the same considerations listed in subsection (c). This section also clarifies that the OEQC may not serve as the accepting authority but may make recommendations on the applicability of the Proposed Rules to an agency or applicant.

Subchapter 6 Applicability

Subchapter 6 (Applicability) creates a distinct subchapter setting forth procedures for determining whether an activity requires chapter 343, HRS environmental review. This subchapter reorganizes the previous applicability subchapter from the 1996 Rules to show the chronological steps that a proposing or an approving agency will follow when making this determination.

Section 11-200.1-9 addresses applicability of chapter 343, HRS environmental review with regard to agency actions and in particular, the use of state or county lands or funds trigger, and emergency actions. Section 11-200.1-10 addresses applicability with regard to applicant actions and incorporates section 343-5.5, HRS. Section 11-200.1-11 addresses the treatment of multiple or phased actions.

§ 11-200.1-8 Applicability of Chapter 343, HRS to Agency Actions

Formerly section 11-200-5, HAR (1996). All language in this section comes from section 11-200-5, HAR (1996) or is in addition to it. This section includes language in response to *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277 (Haw. 2017) ("For an activity to be subject to HEPA environmental review, the second requirement is that it must fall within at least one category of land uses or administrative acts (known as "triggers", now defined as a term in the Proposed Rules) enumerated in section 343-5(a), HRS (2010)").

This section specifically:

Lists the section 343-5, HRS triggers that necessitate environmental review under chapter 343, HRS.

Agricultural Tourism: Addresses exemptions for agricultural tourism (HRS § 343-5(a)(1)).

Emergency Actions: Addresses situations where an agency must respond to an emergency and that response would fall within the scope of chapter 343, HRS, but the nature of the emergency requires immediate response. For example, during a forest fire, an emergency firebreak may need to be cut. In the case of King Tides, an issue raised by one commenter, it would not extend to reconstruction of homes after the emergency has passed, but may apply to immediate measures taken to address the situation. The Proposed Rules emphasize that an agency must take immediate action to address the emergency in order for the exemption to apply. The agency has a responsibility to document the exemption when it undertakes an emergency action, whether an emergency proclamation has been made or not, in case a question arises about the lack of an assessment. That documentation, like other non-published exemptions, must be available upon public request and must be included in the list of exemptions required to be routinely filed with and published by OEQC pursuant to Section 11-200.1-17(d). The language also ensures that the exclusions from chapter 343, HRS, are related to the declared emergency by requiring substantial commencement of the action within sixty

days of the emergency proclamation. (Under chapter 127A-14(d), HRS, a state of emergency automatically terminates after sixty days.) The Council notes that supplemental emergency proclamations would re-start the sixty-day count and extend the time that an action has to reach substantial commencement. This provision does not explicitly reference the possibility for extension because the extension is provided for under section 127A-14(d) and the Council does not have rulemaking authority under chapter 127A, HRS. The term "substantially commenced" is not defined here because the intent is to provide direction to agencies to timely implement the action but not define the standard for all agencies in all situations.

§ 11-200.1-9 Applicability of Chapter 343, HRS to Applicant Actions

Formerly section 11-200-6, HAR (1996), this section has been reorganized and is intended to clarify that there are two essential elements necessitating chapter 343, HRS review for applicant actions: a discretionary consent and a statutory trigger under section 343-5, HRS. This section further recognizes that an applicant action may require multiple approvals. These should be considered as part of the whole action and not as creating discrete actions. By incorporating reference to section 343-5(a), HRS in proposed subsection (a)(2), much of what was included in section 11-200-6(b), HAR (1996) becomes unnecessary and was thus removed. In the event that section 345-5(a), HRS is amended, the incorporation of the statutory triggers by reference allows the rules to remain aligned with section 345-5(a), HRS without also requiring an amendment to the rules. This helps to ensure consistency between the rules and the statute over time.

This section explicitly includes an exception to the general requirements of chapter 343, HRS for agricultural tourism as provided under section 343-5(a)(1), HRS and chapter 205, HRS (which allow the counties to require an EA under chapter 343, HRS for any agricultural tourism use and activity in certain circumstances).

Additionally, this section includes the exclusion to chapter 343, HRS environmental review as provided for in section 343-5.5, HRS. That provision was added to chapter 343, HRS through the 2012 legislative amendments (L 2012, c 312 § 1).

This section includes definitions of four terms that apply only to subsection (b) of this section 11-200.1-10: "discretionary consent", "infrastructure", "primary action", and "secondary action".

§ 11-200.1-10 Multiple or Phased Actions

The language in this section comes from section 11-200-7, HAR (1996). The revised language replaces "project" with "action". This section is meant to assist with clarifying the scope of an action in order to reduce the potential for segmentation. This section also clarifies that multiple or phased actions may be reviewed in an EA or EIS and do not necessarily require an EA prior to preparing an EIS.

§ 11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, and Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities

This is a new section drawing from section 11-200-13, HAR (1996). Section 11-200-13, HAR (1996) allowed the use of prior determinations and accepted EISs to satisfy chapter 343, HRS for proposed actions if the prior determination or accepted EIS was pertinent and relevant to the proposed action. The 1996 Rules admonished agencies to take a hard look before allowing use of prior determinations and accepted EISs in place of additional chapter 343, HRS environmental review. That section also included the concepts of tiering and incorporating portions of an existing determination or accepted EIS into environmental review of proposed actions, such as EAs and EISs.

Proposed section 11-200.1-11 separates out and clarifies how and when an agency may determine that a prior exemption, final EA or accepted EIS satisfies chapter 343, HRS for a proposed activity. In order for a proposed activity to use a prior exemption, final EA, or accepted EIS, the proposed activity must have been considered a component of or be substantially similar to the action that received the exemption, FONSI, or acceptance; the proposed activity must be anticipated to have similar direct, indirect, and cumulative effects as those analyzed in a prior exemption, final EA, or accepted EIS; and in the case of a final EA or accepted EIS, the proposed activity must have been analyzed within the range of alternatives. In essence, the agency must be able to determine that the proposed activity was covered under the prior exemption, FONSI, or accepted EIS.

This section particularly applies to situations where a programmatic EIS, and later in time a component of that programmatic EIS that was analyzed in detail is ready to be implemented. The component may on its own be considered an action for purposes of chapter 343, HRS, but because it was a component of an accepted EIS, is anticipated to have similar direct, indirect, and cumulative effects as those analyzed in the accepted EIS, and the proposed activity was analyzed in the range of alternatives in the accepted EIS, an approving agency may determine that chapter 343, HRS is already satisfied. The proposing agency or applicant may then proceed with other permitting requirements outside of chapter 343, HRS. An agency determining whether a prior accepted EIS satisfies chapter 343, HRS review for a proposed activity should also consider whether the accepted EIS was accepted at a time when environmental conditions and information were similar. If there have been significant changes since the time the accepted EIS was prepared, the proposed activity cannot be considered to be "similar" because the environmental impacts could be different than those analyzed in the accepted EIS.

This rationale for determining whether chapter 343, HRS review is necessary is an existing practice for many agencies when they are considering whether to undergo chapter 343, HRS environmental review or deciding whether an applicant must undergo chapter 343, HRS environmental review. The Proposed Rule intends to create a consistent process and provide

agencies with direction on what to consider when determining if a proposed activity is covered under a prior exemption, final EA, or accepted EIS. The rules also create a mechanism for agencies to publish a determination and brief rationale that a prior exemption, final EA, or accepted EIS satisfies the chapter 343, HRS requirements for a proposed activity.

The proposed rule also provides that when an agency determines that a prior exemption, final EA, or accepted EIS does not satisfy chapter 343, HRS environmental review for a proposed activity, then the proposing agency or applicant should proceed to subchapter 7 to determine the level of environmental review necessary.

Subchapter 7 Determination of Significance

Subchapter 7 (Determination of Significance) creates a distinct subchapter to provide direction to agencies in deciding the level of review necessary to satisfy chapter 343, HRS. This subchapter logically follows subchapter 6 (Applicability) because it is the next step that agencies will take upon determining that chapter 343, HRS environmental review is applicable. This subchapter reorganizes the previous determination of significance subchapter from the 1996 Rules to show the chronological process that an agency will follow when determining the appropriate level of review, which may be an exemption, preparation of an EA, or direct preparation of an EIS.

Section 11-200.1-12 addresses circumstances in which an agency may consider previous determinations and previously accepted EISs when deciding the appropriate level of review for a new action and introduces the evaluation tool informally called the "green sheet" based on the City and County of Honolulu Department of Planning and Permitting worksheet. Section 11-200.1-13 provides that the proposing or approving agency use its judgment and experience to initially determine whether the appropriate level of environmental review is an exemption, preparation of an EA, or direct preparation of an EIS. Section 11-200.1-14 presents the significance criteria that agencies use as a basis for determining the appropriate level of review.

§ 11-200.1-12 Consideration of Previous Determinations and Accepted Statements

This section is former section 11-200-13, HAR (1996). The 1996 Rules section included three concepts: (1) the use of prior determinations and accepted EISs in place of chapter 343, HRS review for a proposed action; (2) tiering an exemption, EA, or EIS for a proposed action off of a prior determination or accepted EIS; and (3) incorporation of information from a prior determination or accepted EIS into an exemption, EA, or EIS for a proposed action. Proposed section 11-200.1-12 addresses the first concept—the use of prior determinations and accepted EISs in place of further chapter 343, HRS review. Accordingly, the revised rule retains only the remaining concepts: tiering and incorporation by reference. The revised rule also makes explicit the language in section 343-5(g), HRS about which kinds of previous determinations may be used, including exemption notices, EAs, EISPNs, and previously accepted EISs.

Proposed section 11-200.1-12 also precedes this section, and it is assumed that an agency or applicant will consider the applicability of section 11-200.1-12 to a proposed activity prior to considering whether previous determinations or accepted EISs could be used in preparation of an exemption, EA, or EIS. Therefore, the subsection emphasizing that prior determinations and accepted statements must receive a hard look when used in place of chapter 343, HRS review has been deleted.

§ 11-200.1-13 Significance Criteria

Formerly section 11-200-12, HAR (1996), all language in this section comes from section 11-200-12, HAR (1996) or is in addition to it. This section presents the criteria that an agency is to use for determining whether an exemption, FONSI, EISPN, or acceptance is appropriate.

This section replaces the word "consequences" with "impacts" because both "primary impact" and "secondary impact" are defined, but the use of "consequences" introduced a new, undefined term that had been understood as a synonym for "impact".

While section 345-5, HRS provides that an EIS is required for an action that "may" have a significant effect, the Hawaii Supreme Court has interpreted the word "may" to mean "likely". For example, in *Kepoo v. Kane*, 103 P.3d 939, 958 (Haw. 2005) the Court held that the proper inquiry for determining the necessity of an EIS is whether the proposed action will "likely" have a significant effect on the environment. The Proposed Rules adopt this language to make it clearer to stakeholders what the court's interpretation of the statutory language means. Each of the specific criteria following this phrase are revised to align syntax with the revised language "is likely to".

The Proposed Rules add the word "adverse" to each of the specific criteria (where applicable). This language more closely matches the definition of "significant effect" in section 343-2, HRS, including mirroring the emphasis on "adverse" effects. The definition of "significant effect" in section 343-2, HRS:

> 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. (emphasis added)

The Proposed Rules retain the word "substantial" from the 1996 Rules.

Combining "substantial" and "adverse" is meant to set a standard that is higher than just having an effect and emphasizes that the focus is on negative effects rather than positive ones.

This change addresses the question of whether an action having substantial beneficial effects would require the preparation of an EIS or make an action ineligible for an exemption. The introductory language of the section still requires agencies to consider the sum of effects on the quality of the environment and the overall and cumulative effects of an action. For example, a proposed renewable energy project may have substantial beneficial effects with respect to energy and greenhouse gases but may also irrevocably commit to loss or destruction of a natural or cultural resource. In this case, an agency must still consider the sum of effects and the overall and cumulative effects, which could warrant the preparation of an EIS instead of issuing a FONSI, depending on the specific facts of the proposed action.

In addition to the above changes to the significance criteria, the following changes are also in the Proposed Rules. Criteria (2), (5), (6), (7), (8), (9), (10) have only the above grammatical and/or "substantial adverse" changes proposed.

Criterion (1): Rephrases the language to match the statutory phrasing while retaining the inclusion of "cultural" from the 1996 Rules and inserting "historic", reflecting the requirement that historic sites are a trigger in chapter 343, HRS and are given prominent consideration in the environmental review process. While NEPA may consider historic properties as a subset of cultural resources, the Proposed Rules use the "historic" and "cultural" in sequence in the definitions for "environment" and "effect".

Criterion (3): Includes other laws because the statutory definition of "significant effect" is not narrowed to chapter 344, HRS and many other statutes set forth environmental policies or goals. This language acknowledges other laws with environmental goals such as the State Planning Act or section 269-92, Renewable Portfolio Standards, HRS. "Laws" may be broadly understood to include common law and executive orders so long as they establish long-term environmental policies or goals, but not to encompass all statutes, administrative rules, and court decisions.

Criterion (4): Revises language to match the definition of "significance" in section 343-2, HRS. Statutory language was amended by Act 50 (2000) to include cultural practices as part of the definition of significance.

Act 50, Session Laws of Hawaii 2000 requires the consideration of impacts on cultural practices when making a determination of significance effect. It amended the definition of "significant effect" in section 343-2, HRS to mean "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."

Act 50 also amended the definition of "environmental impact statement" or "statement" in section 343-2, HRS to include the disclosure of effects of a proposed action on cultural practices, as follows:

> "environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

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

Per Act 50, cultural practices are an integral component of the significance criteria and must be considered in making a significance determination.

Criterion (11): Adds the sea level rise exposure area to the list of example areas that could be considered environmentally sensitive.

The included language incorporates sea level rise exposure area from the December 2017 Climate Change Mitigation and Adaptation Commission report. This criterion addresses concerns related to climate change adaptation such as impacts from sea level rise, increased hurricane frequency and/or intensity, and endangered species migration. Note that the list is not exhaustive and other areas not listed here may be considered environmentally sensitive, including areas likely to experience wave inundation, increased exposure to hurricanes, or flooding (including inland) outside of a designated flood plain.

Criterion (12): Clarifies that both the daytime and nighttime effects on scenic vistas and viewplanes must be considered when determining if an action is likely to have a significant effect. Bright lighting around a site at night, for example, may disrupt scenic vistas or viewplanes even though the site is not conspicuous and does not otherwise have a substantial adverse effect on the scenic vista or viewplane during the day.

Criterion (13): This criterion addresses concerns related to energy and implicitly climate change mitigation. The Proposed Rules make this explicit by adding greenhouse gas emissions to this criterion. This criterion was the only addition to the significance criteria when the 1996 Rules were promulgated. Since then, the best available science indicates that greenhouse gas emissions have cumulative impact and have more sources than fossil fuel burning. A proposed action having substantial emissions (relative to Hawaii) may not be the result of energy use, especially as Hawaii progresses toward its 100% renewable energy goal.

§ 11-200.1-14 Determination of Level of Environmental Review

This is a new section that describes the pathways of chapter 343, HRS environmental review: exemption, EA resulting in a FONSI or EISPN, and EIS resulting in an acceptance or nonacceptance. Once an agency concludes that the proposed action is not covered by a previous determination or accepted statement (via the "green sheet"), the agency must then determine the appropriate review using its judgment and experience: exemption, EA, or EIS.

This section modifies language from sections 11-200-5(a) and 11-200-9(b)(3), HAR (1996) and from section 343-5(b), HRS, and section 343-5(e), HRS. This section requires agencies to

inform applicants within 30 days of request for an approval of what level of environmental review the applicant must undertake. This section also sets forth the standard for an exemption using language from section 11-200-8, HAR (1996) and drawn from section 343-6(a)(2), HRS ("actions [that] will probably have minimal or no significant effects on the environment").

Where an exemption is not appropriate and an action requires chapter 343, HRS environmental review, preparation of an EA beginning with a draft EA is required unless one of two situations exist. The first is that a proposing agency may begin with a final EA or an approving agency may authorize an applicant to begin with a final EA when it is anticipated that an EIS will be required, but more information is required to substantiate that determination (this was the process prior to the "direct-to-EIS" statutory change and agencies have expressed value in keeping it). The second is that an agency may follow the "direct-to-EIS" route as provided for in section 343-5, HRS.

Subchapter 8 Exempt Actions, List, and Notice Requirements

Subchapter 8 (Exempt Actions, List, and Notice Requirements) creates a distinct subchapter addressing the matter of exemptions. This subchapter divides the section 11-200-8, HAR (1996) regarding exemptions into three distinct sections.

Section 200.1-15 establishes the general types of actions under which an exemption may be declared. Section 200.1-16 provides direction to agencies for the creation of an exemption list. Section 200.1-17 provides direction to agencies on how to prepare an exemption notice, including when an agency is required to consult on the exemption and when the exemption notice must be published in the bulletin.

§ 11-200.1-15 General Types of Actions Eligible for Exemption

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it. This section sets forth the general types of actions eligible for exemption. It adds statutory language directly from section 343-6(2), HRS on the standard for declaring actions exempt: because they will probably individually and cumulatively have minimal or no significant effects.

The Proposed Rules remove the 1996 language regarding "classes of actions" as the statute does not use the term "classes" and the word has caused confusion. In its place, the Proposed Rules use "general types" to mirror the statute and frame the "types" of exemptions on agency exemption lists so that the hierarchy is clearer: general types (in rules), types (in agency-specific exemption lists), and exemptions (exemption notices).

The Proposed Rules do not include the "classes" 6 and 7 in the 1996 Rules as they are now included as a *de minimis* level of routine activities and ordinary functions in the Proposed Rules. They are addressed further in section 11-200.1-16, Exemption Lists.

The Proposed Rules make no changes to the language incorporated from the 1996 Rules for general types (2), (4), and (7), based on numbering in the Proposed Rules.

The remaining general types are revised as follows (numbering based on the Proposed Rules).

General Type (1): Replaces "negligible" with "minor" and removes "or no" before "expansion or change" because activities that are "negligible" and require "no expansion" and "no change" are now captured in the *de minimis* category and should be reflected in Part 1 of an agency's exemption list.

General Type (3): Agencies, including different agencies within the same county, measure residence area differently. This language acknowledges the difference and directs the proposing agency or approving agency to use its own method of measuring for 3,500 square

feet. The language also replaces "persons" with "individuals" because "person" is a defined term in chapter 343, HRS and the Proposed Rules and that meaning is not used in this context.

General Type (5): Incorporates infrastructure testing such as temporary interventions on roadways to test new designs or effects on traffic patterns.

General Type (6): The Proposed Rules revise the general type for demolition of structures to better balance the concerns of historic preservation. The 1996 Rules did not allow for the use of the exemption if the structure was designated on the state or federal registers. This meant that structures that might be eligible for designation could still be demolished under an exemption (barring the standard exception to exemptions). However, stakeholders expressed concern that eligible buildings of potential significance were being demolished while others expressed concern that any building more than fifty years old was too broad of a standard. To balance these concerns, the Proposed Rules use the phrase "meet the criteria" for listing because the criteria for listing on either the national register or Hawaii Register of Historic Places include more than just being fifty years old. Section 13-198-8, HAR states the criteria for listing on the Hawaii Register of Historic Places:

> ...The property meets or possesses, individually or in combination, the following criteria or characteristics:
>
> (1) The quality of significance in Hawaiian history, architecture, archaeology, and culture, which is present in districts, sites, buildings, structures and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, AND:
>
> (A) That are associated with events that have made a significant contribution to broad patterns of our American or Hawaiian history;
>
> (B) That are associated with the lives of persons significant in our past;
>
> (C) That embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; OR
>
> (D) That have yielded, or may be likely to yield, information important in prehistory or history;
>
> (2) Environmental impact, i.e., whether the preservation of the building, site, structure, district, or object significantly enhances the environmental quality of the State;
>
> (3) The social, cultural, educational, and recreational value of the building, site, structure, district, or object, when preserved, presented, or interpreted, contributes significantly to the understanding and enjoyment of the history and culture of Hawaii, the pacific area, or the nation.

This means that structures that are more than fifty years old but otherwise lack any historic significance or integrity could still use this exemption (assuming the standard caveats for any exemption). This language also better aligns the exemption standard with the helicopter facilities trigger in section 343-5(a)(8)(C) regarding any historic site as designated or under

consideration for designation. The Proposed Rules also remove redundant citations of the federal and state statutes.

General Type (8): The Proposed Rules retain the general type for continuing administrative activities but delete the reference to purchase of supplies and personnel-related activities because those two items are captured in the *de minimis* category and should be reflected in Part 1 of an agency's exemption list.

General Type (9): The Proposed Rules incorporate an amendment to the 1996 Rules that was never compiled and promulgated. In 2007, the Environmental Council formally amended section 11-200-8, HAR to add the eleventh exemption category for affordable housing. Note that the term "affordable housing" was not defined at that time. Affordable housing should be understood in the same way as proposed under Proposed General Type (11).

General Type (10): The Proposed Rules add a new general type for affordable housing that meets certain criteria. The purpose of this proposed general type of exemption would be to support the orderly development of affordable housing in urbanized areas where affordable housing is a designated and zoned use. Per section 11-200-8(b), HAR (1996) and proposed section 11-200.1-15(d), HAR, exemptions are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment. That is, this exemption is not automatic.

Agencies define affordable housing differently. The Council considered multiple approaches to affordable housing, ranging from requiring 100% affordable housing at various mixtures of area median income (AMI) percentages to the language as proposed. Setting a specific mixture or requiring 100% affordable housing would set a standard unlikely to be met. Creating a standard for an exemption under chapter 343, HRS separate and distinct from a standard set by a proposing agency or approving agency but not grounded in a specific statute or policy goal would be difficult to justify. Because chapter 343, HRS is about disclosure by agencies to the public prior to making a decision or implementing an action, the Council believes that the public is best served by the agency using its own standard when considering whether a proposed action meets the meaning of "affordable housing". This is also consistent with General Type (10), acquisition of affordable housing, which is not defined, and with the Council's direction in section 11-200.1-2 to agencies to use their own statutes and rules for understanding terms that are not defined in chapter 343, HRS or the Proposed Rules.

In addition, the potential to integrate mixed-use (e.g., offices, retail) with affordable housing is an explicit goal of some state and county agencies. Allowing for the potential of mixed use while keeping the agency to its own criteria for affordable housing could promote better urban communities that are multi-income and multi-use. Therefore, this exemption directs agencies to use their respective affordable housing law.

For example, section 201H-36(a)(4), HRS sets forth one standard:

> affordable rental housing where at least fifty per cent of the available units are for households with incomes at or below eighty per cent of the area median family income as determined by the United States Department of Housing and Urban Development, of which at least twenty per cent of the available units are for households with incomes at or below sixty per cent of the area median family income as determined by the United States Department of Housing and Urban Development.

This would apply when the Hawaii Housing Finance and Development Corporation is approving a proposal related to that standard, whereas each county has its own county ordinance that would be the controlling law for the respective county agency making decisions about whether to use county lands or funds. Note that chapter 343, HRS applies before chapter 201H, HRS and the Proposed Rules would not alter that order.

To reinforce the purpose of this exemption, several additional criteria are included.

This exemption would be applicable only when one or both of two possible triggers apply: the use of state or county lands or funds and Waikiki. The limitation to these two triggers is to keep the focus on the involvement of the state or county to support affordable housing development where the only reason someone would undergo environmental review is because government is subsidizing funding or leasing out land to assist the production of affordable housing. The Waikiki trigger is included because it is a developed, urbanized area that meets the other criteria of being classified state urban land and zoned to allow housing. The presence of other triggers such as use within a shoreline (including a Waikiki shoreline) or occurring within a designated historic site would mean this exemption would not be applicable.

The exemption would only be eligible for actions on land that has already been classified by the State Land Use Commission as urban. If the proposed action involves land classified as agriculture, conservation, or rural, or includes a boundary amendment to change the classification to urban, then the exemption would not be applicable.

The exemption would be eligible for land that has already been zoned by the county for housing. Each county organizes its zoning differently (or has distinct features) so this language is meant to acknowledge this variability. If the existing zoning for the proposed parcels do not allow housing, then this exemption would not be applicable. For example, Maui County has pyramid zoning, so industrial is not allowed in residential but residential is allowed in industrial. This language would account for this variability.

The exemption would not be eligible if a variance for shoreline setback is included. This acknowledges General Type (9), which states that zoning variances may be exempted except for shoreline setback variances. This also reinforces the significance criteria that identify the sea level rise exposure area and erosion-prone areas as environmentally sensitive areas.

In (d), reference to "subchapter 4" is added to capture both general types under section 200.1-15 and activities in the *de minimis* category to the provision specifying that an exemption may not be granted when the cumulative impact of planned successive actions is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment. For example, it may be routine groundwork to remove a small ailing tree outside an agency building, but if the tree is designated as an Exceptional Tree pursuant to chapter 58, HRS, then the normally routine activity may be significant and an exemption would be inapplicable.

§ 11-200.1-16 Exemption Lists

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it.

The Proposed Rules acknowledge that agencies are not required to create exemption lists and some agencies may not regularly conduct activities that rise to the level of requiring chapter 343, HRS environmental review. An agency without an exemption list may still apply an exemption by meeting the other requirements of this subchapter. To capture the discretionary nature of developing an exemption list, the Proposed Rules use the word "may" in subsection 11-200.1-16(a).

The Proposed Rules update the 1996 Rules language to reflect the other changes made to the exemption process in sections 15 and 17, such as renaming the "classes" to "general types".

This section revises the exemption list to consist of two parts. The first part would be those types of actions that the agency considers to be the equivalent of *de minimis*; that is, they are routine operations and maintenance, ongoing administrative activities, and other similar items. This category of activities was proposed under section 11-200.1-8, General Applicability, in Version 0.3. The Proposed Rules removed that section and now require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include those in Part 1 of the agency's exemption list. By including them in the exemption list, the agency is able to make staff aware of occasions where an activity might be in the gray area of a project or program for the purposes of chapter 343, HRS but perhaps not rising to the level of requiring environmental review as explained by the Hawaii Supreme Court in several of its decisions. Activities that are included in the first part of the exemption list would be presumed to not require documentation (i.e., an exemption notice) or consultation. In effect, these are the everyday things that government does, from repainting buildings to fixing plumbing and purchasing office supplies. Many of these items already exist on agency lists because they fall under one or more of the classes in the 1996 Rules. After adoption of the Proposed Rules, the agency would have seven years to reorganize and update its exemption list to comply with the Proposed Rules (see section 11-200.1-32, Retroactivity for more).

The second part of the exemption list consists of the general types identified in section 11-200.1-15 and what types of actions the agency regularly undertakes which it considers to be exempt but for which documentation of the exemption is appropriate. Individual actions would be recorded in exemption notices as set forth in 11-200.1-17.

The Proposed Rules also clarify that both applicant and agency actions may be exempt. An approving agency may determine that a proposed activity does not rise to the level of an action that requires an exemption notice because the proposed activity likely will have no or negligible environmental impact (Part 1 of the agency's exemption list). The agency may also exempt a proposed action based on either part two of the approving agency's exemption list, or in accordance with a general type under section 11-200.1-15.

Agencies are required to submit their exemption lists for review and concurrence by the Council.

§ 11-200.1-17 Exemption Notices

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it. This section requires an agency to: create exemption notices for actions exempted under Part 2 of its exemption list or that the agency determines to be included within a general type of activity according to section 11-200.1-15; to maintain the exemption notices on file; and to provide a list of all exemption determinations created since the previous publication submittal deadline to the OEQC for publication in the periodic bulletin. This ensures timely notification to the public about unpublished exemption notices. Agencies are also required to produce their exemption notices to the public upon request. Exemption notices should be prepared prior to undertaking an action, except in the case of an emergency action under section 11-200.1-8.

The Proposed Rules generally require consultation with outside agencies or individuals that have jurisdiction or expertise as to the propriety of the exemption, documentation of that consultation in the exemption notice, and publication of the exemption notice unless: (1) the agency has created an exemption list in accordance with the enacted rules; (2) the agency received Council concurrence within seven years of the proposed implementation of the proposed action; and (3) the action is consistent with the letter and intent of the agency's exemption list. Unpublished exemption notices must still be included in the list of exemption notices that the agency routinely provides to the office for publication in the bulletin pursuant to section 11-200.1-17(d).

This provision allows for agencies that do not have exemption lists to exempt an activity or action as the need arises. Not all agencies regularly interact with chapter 343, HRS and therefore, the Proposed Rules do not require all agencies to create exemption lists. When the occasion arises that an agency without an exemption list must comply with chapter 343, HRS and an exemption is the applicable level of environmental review, then consultation, documentation, and publication of the exemption in the bulletin are required.

On the other hand, agencies that regularly interact with chapter 343, HRS already have exemption lists. However, many agency exemption lists are decades old. The proposed consultation and publication exception is intended to create an efficiency incentive for agencies to create or update existing exemption lists and have those lists reviewed and concurred with by the Council on a consistent basis. The public has an opportunity to comment on the propriety of exemption lists during Council review and concurrence.

Subchapter 9 Preparation of Environmental Assessments

Subchapter 9 (Preparation of Environmental Assessments) creates a distinct subchapter addressing EAs. This subchapter provides direction to an agency when it has decided that preparation of an EA is the appropriate level of chapter 343, HRS environmental review. The sections are ordered chronologically to show the process that will be followed, starting with the consultation requirement prior to beginning a draft EA, and ending with the determination to issue an EISPN or a FONSI.

Section 11-200.1-18 describes the requirement of early consultation, addresses the scope of analysis and level of detail required in a draft EA, and the content requirements for a draft EA. Section 11-200.1-19 describes the process and content requirements for issuing a notice of an anticipated FONSI based on a draft EA. Section 11-200.1-20 describes the requirements for public review and response to comments for a draft EA. Section 11-200.1-21 describes the contents of a final EA. Section 11-200.1-22 describes the determination to issue an EISPN or FONSI and the FONSI content requirements.

§ 11-200.1-18 Preparation and Contents of a Draft Environmental Assessment

This section was formerly section 11-200-10 of the 1996 Rules, which addressed the contents of both a draft and final EA. The provisions related to the contents of a draft EA are retained here, but in line with the effort of the Proposed Rules to order the environmental review steps chronologically, the provisions related to the contents of a final EA were moved into a separate section in this subchapter, section 11-200.1-21.

The revised rule sources language from former section 11-200-9 of the 1996 Rules Version 0.3 proposed definitions for "project" and "program", and this section describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

Subsection (b) is a modification of the former section 11-200-19 of the 1996 Rules applying the style guidelines for an EIS to an EA. It mirrors the language included in the proposed 11-200.1-24 for the contents of a draft EIS, and provides that the scope and specificity within an EA will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation. Because a final EA is a draft EA revised to incorporate responses to comments, this section also applies to the style, breadth and specificity of analysis and information contained in a final EA.

This section clarifies that a programmatic EA may omit issues that are not ripe for discussion on a more narrow scale. In the case of such an omission, a subsequent project may require its

own chapter 343, HRS determination. Subchapter 7 of the Proposed Rules assists with understanding this situation.

Because most environmental review focuses on site-specific and discrete projects, the revised rule distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature, and that for projects, which are site-specific and discrete. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction regarding how to address projects or programs at risk of segmentation and acknowledges the tension between the requirement to conduct environmental review at the earliest practicable time with the desire for project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-24 regarding the contents of a draft EIS.

The revised rule also focuses on analyzing instead of summarizing impacts. The use of the word "analyze" should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide enough information to support a conclusion. In some cases, summaries tend to be assertions of impact and the degree of significance without presenting a supporting argument.

This section also requires applicants to identify which approval, when combined with a trigger, necessitated chapter 343, HRS environmental review.

This section also requires an indication of when individuals, organizations, or agencies were "consulted with" but had "no comment" if those persons or agencies are included as "consulted" entities in the draft EA. "No comment" can occur in at least two instances. First, when a person or agency responds to a written request for comments that it has "no comment", and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations that they were listed in EAs as having been "consulted with" when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The proposed rules clarify that if the proponent desires to include attendees at informational meetings as those "consulted with" then it should be indicated whether those individuals or organizations gave "no comment." This also protects individuals and organizations who wish to gather more information through an informational session but who would not be prepared to also provide informed feedback at such a preliminary session from being listed as a "consulted" entity who spoke with the proponent on behalf of oneself or a particular community or interest group.

Lastly, this section incorporates language from former sections 11-200-10(8) and -10(9) requiring a draft EA to include specific agency or approving agency findings in the draft EA supporting agency determinations, including a FONSI.

§ 11-200.1-19 Notice of Determination for Draft Environmental Assessments

This section was formerly section 11-200-11.1 of the 1996 Rules. It aligns the EA process with changes to chapter 343, HRS that enable applicants to prepare their own EAs, as opposed to agencies preparing EAs on behalf of applicants. It separates language from the 1996 Rules into subsections to increase clarity.

Notably, this section simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted electronically. This section also incorporates the filing requirements set forth in subchapter 4, and clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is also acceptable).

The rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided in the document. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

§ 11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments

This section was formerly section 11-200-9.1 of the 1996 Rules. If an agency does not anticipate a FONSI, then it will likely move to or authorize an applicant to directly move to prepare an EIS. This determination requires the approving agency to use its judgment and expertise. In some cases, although an agency may anticipate a FONSI, the FONSI may not be issued until an EA is completed.

The revised rule reflects the practice that the applicant, rather than the approving agency, prepares the EA.

This rule further acknowledges that the public review period may differ from the standard 30 days provided under chapter 343, HRS and these rules for certain actions by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EAs (and EISs), per sections 334-2.7 and 353-16.35, HRS, respectively.

The Council found that the requirement to send a response to every individual person commenting on an environmental review document can be extremely burdensome for agencies and applicants, and was not justified by any real benefit to interested stakeholders and the public that could not be satisfied by notifying the commenter via publication of the final EA. The

revised rule allows agencies and applicants to respond to issues raised by comments received on the draft EA within the final EA and deletes the former requirement to send individual responses directly to each commenter. This is intended to modernize and simplify the environmental review process. Commenters must still be identified in the response within the EA. The widespread availability of electronic documents to commenters and interested stakeholders relieves the necessity of sending individual written responses but still ensures that commenters receive notice (through the publication of the draft and final EAs) that their comment has been received, considered, and responded to. These changes reduce the burden on proposing agencies and applicants in responding to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately, particularly in the wake of the electronic age and the increasing number of form letters and petitions used in this process.

The language proposed in this rule is drawn from the United States Council on Environmental Quality's (CEQ) "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations", #29a and aligns with NEPA practice, which allows grouping of identical or similar comments and providing one response that covers the issues raised in identical or similar comments. Because individual responses would no longer be sent, the requirement for the OEQC to receive a copy of the responses to comments is no longer relevant and has been deleted.

This section also incorporates language from the comment response requirements for EISs in section 11-200.1-26 providing guidance on how to discern substantive from non-substantive comments, and the level of detail a proposing agency or applicant should include at a minimum in responses.

This section is also modified to reflect that applicants prepare their own documents. Accordingly, the timely preparation of an EA or EIS by the approving agency is no longer applicable and is deleted.

Lastly, the Proposed Rules update references to filing and publication of addenda to a draft EA and public review of draft environmental assessments.

§11-200.1-21 Contents of a Final Environmental Assessment

This section is taken from the former section 11-200-10 of the 1996 Rules and lists the specific content requirements for a final EA. Changes to this section focus on analyzing instead of summarizing impacts. The rule also clarifies that the use of the word "analysis" should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide a discussion detailed enough to support a conclusion. Summaries, in some cases, tend to be assertions of impact and the degree of significance without presenting a supporting argument or evidence. This rule also explicitly requires

agencies to identify for applicants which discretionary permit necessitates environmental review under chapter 343, HRS.

§ 11-200.1-22 Notice of Determination for Final Environmental Assessments

Formerly section 11-200-11.2 of the 1996 Rules, this section sources language from section 11-200-9(b)(8) of the 1996 Rules. The revised rule aligns the process with Act 172 (2012), Direct-to-EIS, which requires the applicant to prepare documents instead of the approving agency. It also updates reference to subchapter 9, which encompasses the process and requirements for preparation of an environmental assessment previously included in sections 11-200-9(a) and 11-200-9(b) of the 1996 Rules.

The revised rule simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted to the OEQC electronically. The specific filing and publication requirements are set forth in subchapter 4.

The rule clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is sufficient). For applicant actions, the rule also explicitly requires the agency to issue its determination within 30 days of receiving the final EA.

The revised rule adds language regarding the approving agency for the case of applicants because the accepting authority is applicable only for EISs and, in the case of applicant EISs, the accepting authority and approving agency are the same.

The revisions modernize the requirements to include email as a requirement for contact information. Most written communication today is done by email so providing that is just as important as a physical mail address.

The rule clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

The revised rule further creates a standard set of content requirements for an EISPN regardless of whether the EISPN is a result of a final EA or a direct-to-EIS determination.

Subchapter 10 Preparation of Environmental Impact Statements

Subchapter 10 (Preparation of Environmental Impact Statements) creates a distinct subchapter that addresses EISs. This subchapter provides direction to an agency when it has decided that an EIS is the appropriate level of review, whether by the direct-to-EIS pathway as addressed in subchapter 7 (Determination of Significance) or by the issuance of an EISPN after a final EA, as addressed in subchapter 9 (Preparation of Environmental Assessments). The sections in this subchapter are ordered chronologically to show the process that will be followed, starting with the publication of an EISPN, and ending with the matter of supplemental EISs.

Section 11-200.1-23 describes the contents of an EISPN, as well as the requirement of full and complete consultation, the EIS public scoping meeting, and the comment period following the publication of an EISPN. Section 11-200.1-24 describes the content requirements for a draft EIS, the scope of analysis and level of detail required in a draft EIS, and the response requirements to comments received during the 30-day scoping period. Section 11-200.1-25 describes the public review requirements for a draft EIS. Section 11-200.1-26 sets forth the requirements for responding to comments received on a draft EIS.

Section 11-200.1-27 describes the content requirements for a final EIS. Section 11-200.1-28 specifies the criteria for deeming a final EIS an acceptable document and outlines the steps following an acceptance or nonacceptance determination. Section 11-200.1-29 describes how an applicant may appeal an agency determination of non-acceptance to the Council. Section 11-200.1-30 addresses circumstances when a supplemental EIS may be required after acceptance of an EIS.

§ 11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement

This section was formerly section 11-200-15 in the 1996 Rules and governs the content requirements for an EISPN. As discussed in the rationale for section 11-200.1-10, this section retains the 1996 Rules requirement for the identification of all permits and approvals expected for the project, and adds for applicants the identification of which specific discretionary approval that, combined with a trigger from section 343-5, HRS, necessitated the applicant to undergo environmental review. This is a requirement in preparation of an EA and included here as a content requirement of an EISPN to ensure that the public and decision makers are provided this information because an agency may begin with, or authorize an applicant to begin with, an EISPN without preparation of an EA where that information would have been disclosed. The content requirements for the EISPN are standard regardless of how one arrives at conducting an EIS (*e.g.*, resulting from an EA or directly preparing an EIS).

The revised rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its

environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

The revised rule removes the requirement for an individual to become a consulted party in order to engage directly in providing and receiving public documents and determinations related to the proposed action. All documents and determinations are now published online and available through the OEQC's website: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/

Most notably, this section makes the public scoping meeting a requirement and emphasizes that the meeting is about what the scope of the draft EIS should be. Proposing agencies and applicants acting within the spirit of chapter 343, HRS should engage meaningfully with individuals, organizations, and agencies early and often throughout the environmental review process.

The revised rule also shifts the focus to written comments submitted during the EISPN comment period and public scoping meeting and removes the requirement for the EIS preparer to transcribe individual oral comments. Instead, the revised rule provides that oral comments must be recorded, and a summary of the oral comments must be included as a separate section in the draft EIS. Written comments require responses to the comments in the draft EIS pursuant to section 11-200.1-24.

While the 1996 Rules allowed for a public scoping meeting, it was not required. The Council received comments both in favor of and opposed to requiring a public scoping meeting. The changes to the oral and written comments treatment were made after extensive consultation with interested stakeholders on this provision and as an effort to balance this new requirement for public scoping meetings and increased consultation, with the burden on the agencies and applicants preparing statements.

This section also allows the approving agency or accepting authority, with good cause, to extend the comment period on its own initiative or at the request of another party.

The draft EIS content requirements that were formerly in this section were relocated to section 11-200.1-24.

§ 11-200.1-24 Content Requirements; Draft Environmental Impact Statement

This section was formerly section 11-200-17 in the 1996 Rules and sets forth the content requirements for draft EISs. Other language in this section is sourced from sections 11-200-16 and 11-200-19 of the 1996 Rules.

A number of language edits in this section were made to bring it in line with NEPA language. This rule also provides that the scope and specificity within an EIS will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation.

Some new concepts are introduced in the Proposed Rules:

Project Specific and Programmatic EISs. Version 0.3 proposed definitions for "project" and "program", and this section describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

This section clarifies that the programmatic EIS may omit issues that are not ripe for discussion on a more narrow, project-specific level. In the case of such an omission, a subsequent project may require its own chapter 343, HRS determination or environmental review. Proposed subchapter 7A assists with understanding this situation.

The revised rule also distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature and that for projects, which are site-specific and discrete. Most environmental review focuses on site-specific and discrete projects. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction regarding how to address projects or programs at risk of being viewed as segmented and acknowledges the trade-off between earliest practicable time to begin environmental review and project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-18 regarding contents of a draft EA.

Response to Comments. This section emphasizes that the comments are written comments that are submitted during the consultation period. Revised language in this section aligns with language in section 11-200.1-26 that changes the requirement to respond to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately. It further clarifies that responses shall be made and included within the draft EIS itself. Responses no longer need to be sent separately to each commenter.

The rule requires that when batching comments and responses, the preparer must include the names of the individual commenters who provided comments on that topic and who have been

grouped, so that those commenters can see whether their comment was addressed and what the response is.

The general summary of oral comments from the public scoping meeting does not need to be an exhaustive or verbatim transcript, but does need to be a written summary included in the draft EIS. It is intended to capture generally the comments made at the scoping meeting. Oral comments are not required to be responded to directly in the EIS, but must be taken into consideration in identifying likely effects. A court reporter or transcriber is not required at the public scoping meeting.

The revised rule also requires that a representative sample of the handouts prepared for and distributed at any public scoping meeting, including the agenda, must be included in the draft EIS. Handouts not related to the action need not be included. For example, general promotional materials for the applicant need not be included, but a fact sheet outlining the proposed action should be included.

The revised rule also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. The revised rule includes requirements for when individuals, organizations, or agencies were "consulted with" but had "no comment." This can occur in at least two instances. First, when an agency responds to a written request for comments that it has "no comment", and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to the concerns by individuals and organizations whose names were listed in EISs as having been "consulted with" when they merely attended a public informational meeting and received information from the action proponent, but were not invited to share feedback on the action. The Proposed Rules clarify that if the proponent desires to include attendees at informational meetings as those "consulted with" then it should indicate whether those individuals or organizations gave "no comment." This also protects individuals and organizations who wish to gather more information through an informational session but are not be prepared to provide informed feedback at such a preliminary session from being listed as a "consulted" entity who spoke with the proponent on behalf of oneself or a particular community or interest group.

The rule makes explicit that only one representative copy of the agency consultation letter is required, similar to requiring only one reproduction of identical comments, such as form letters.

Public Scoping Meeting Location: The Council discussed where public scoping meetings would be required to be held. The Council sought to balance community input and engagement with reducing the burden on proposing agencies and applicants. Different options were considered, including requiring a public scoping meeting in the "county," or "island" or on the "islands" where the action will have the greatest effect. The Council noted the importance of holding the scoping meeting closest to where there will be an effect and should be held on the island of

those likely impacts. Therefore, the word "county" was inappropriate because public scoping meetings for actions proposed in Maui County could be held on an island different than that of the action. The Council also considered but left for future guidance documents that accessibility must be taken into account when planning the scoping meeting. For example, an action that will have an impact on individuals in the Hilo area of the Island of Hawaii should hold a meeting in the vicinity of Hilo, not Kona. The Council also considered that there may be instances where an action could adversely affect multiple communities on more than one island and accounts for this by pluralizing "island" in parenthesis: island(s).

Other Changes:
The revised rule also clarifies that the list of relevant documents means documents other than chapter 343, HRS, environmental review documents. The documents may be used to identify potential segmentation or cumulative impacts of a proposed action, or for other purposes in preparation of the EIS.

The revised rule also clarifies that not all alternatives to the action must be considered--only those that are considered by the proposing agency or applicant to be "reasonable" need to be rigorously explored and objectively evaluated. This qualification is drawn from NEPA's 40 CFR 1502.14(a): "Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." The revised rule also requires discussion of the reasons for omitting detailed study of alternatives.

The revised rule also updates the subsection listing laws containing environmental goals and guidelines that the draft EIS must address adverse effects on, as applicable. In considering which environmental laws and policies to address, include the ones listed in paragraph (o) as applicable and any laws relevant to the significance criteria or criterion under section 11-200.1-13 that required preparation of the EIS.

Subsections (i) and (j) explicitly include "cultural" resources as part of the impacts to be analyzed in line with Act 50 (2000).

§ 11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements

This section was formerly section 11-200-22, HAR (1996). The rule encourages open and early consultation with interested stakeholders, and for an applicant EIS, that the approving authority and accepting agency are the same. This section also ties back to section 11-200.1-1, which provides the spirit in which consultation should be conducted to align with the purpose of the chapter.

The rule provides that the standard comment period for a draft EIS is forty-five days, and also acknowledges that the public review period may be something other than forty-five days for certain actions by statute. For example, the development or expansion of forensic facilities of

the department of health or in-state correctional facilities have 60-day comment periods for draft EISs (and EAs), per sections 334-2.7 and 353-16.35, HRS, respectively.

§ 11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements

This rule was formerly section 11-200-22 in the 1996 Rules, which has been divided into two sections including this section and the preceding section 11-200.1-25. This section more specifically addresses response requirements for written comments received during the 45-day public review and comment period.

The comment response requirements for an EIS mirror those for an EA, found in subchapter 9. This section similarly explicitly allows for batching comments, akin to what is allowed under NEPA, and in doing so, changes the requirements for responding to voluminous and nearly identical comments individually. The rule also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately. If the batching option is used, the individuals, agencies, and organizations who commented on the specific topic to which the response is directed must be identified as part of the response. This rule clarifies that responses to substantive comments must be made and included as part of the draft EIS. The revised language gives guidance regarding which factors are to be considered when determining whether a comment is substantive, and also requires that comments deemed non-substantive and to which a response was not given must be clearly indicated (§ 11-200.1-27).

§ 11-200.1-27 Content Requirements; Final Environmental Impact Statement

Formerly section 11-200-18 of the 1996 Rules, this section sets forth the content requirements for a final EIS. The revised rule incorporates the content requirements for a draft EIS set forth in section 11-200.1-24 and requires that the reproduction and response to comments on the draft EIS within the final EIS conform with the requirements set forth in section 11-200.1-26.

In subsection (a), this section amends the requirement for a final EIS to discuss all "relevant and feasible consequences" to "all reasonably foreseeable consequences." The Council proposed this revision because the phrase "reasonably foreseeable" is a phrase line from NEPA. Therefore, there is more case law history and federal guidance to assist in its interpretation and application to various circumstances.

Like section 11-200.1-24 for draft EISs, this section lists the specific content requirements for the final EIS. This section also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. It requires an indication of when an

IV. New Business

C. Discussion and Action on Proposed Repeal of HAR Title 11, Chapter 200, and Proposed New Chapter 200.1, **Environmental Impact Statement Rules,** promulgated by DOH

Version 0.4 Ramseyer

Proposed Revisions to Hawaii Administrative Rules
Title 11 Department of Health Chapter 200
Environmental Impact Statement Rules

February 20, 2018

Prepared with the assistance of the Office of Environmental Quality Control (OEQC).

How to Read Version 0.4

Version 0.4 presents proposed amendments to the Hawaii Administrative Rules (HAR) Chapter 11-200, Environmental Impact Statements (EISs), which this document refers to as the "1996 Rules". Because the proposed reorganization and various revisions, the Environmental Council ("Council") intends to repeal Chapter 11-200, HAR and promulgate a new chapter. The new chapter would be numbered Chapter 11-200.1, HAR, which is reflected in this version. The proposed chapter is referred to as the "Proposed Rules" in Version 0.4.

Version 0.4 presents a similar organization and formatting as Version 0.3. It does not carry forward all proposed additions and deletions considered in versions 0.1, 0.2, or 0.3. Version 0.4 only shows changes with respect to the existing 1996 Rules, including those changes proposed in and retained from versions 0.1, 0.2, and 0.3 and those newly proposed in Version 0.4.

Unlike the previous versions, Version 0.4 does not have footnotes. Instead, it has a companion document providing the rationale for changes between the 1996 Rules and Version 0.4.

Version 0.4 provides a "Ramseyer-like" style of formatting to enhance understanding of the proposed changes from the 1996 Rules. The style adapts the Legislative Reference Bureau format, while enhancing readability.

- Defined terms are bolded throughout the text to draw the reader's attention to the fact that the term has a particular meaning within the context of the Proposed Rules.
- Pursuant to Ramseyer style, underlining indicates language that is moved between sections (i.e.,1996 language from a section other than the one that the proposed section correlates to) and new language introduced in Version 0.4 of the Council's proposed rules working draft.
- Highlighting, in addition to underlining, distinguishes new language introduced in Version 0.4 of the council's proposed rules working draft from 1996 rules language that has been moved. To help contrast with Version 0.3, Version 0.4 uses a magenta highlight color.
- Pursuant to Ramseyer style, deletions of 1996 rules language are bracketed and struck-through.
- Deletions of language that was newly inserted in versions 0.1, 0.2, or 0.3 have been completely removed to present a clean document that captures the language retained to-date in the working drafts. In some cases, the new language in Version 0.4 may be identical or revised language considered in previous working drafts.

Examples of Formatting

Original 1996 rules language that is in a proposed section that correlates with an existing 1996 rules section.	The original 1996 language looks like this without any formatting.
Original 1996 rules language that has been moved from a section of the 1996 Rules that does not specifically correlate with the section it is now in, or is part of a new proposed section combining provisions from existing sections of the 1996 Rules. This is referred to as "moved" language.	Moved original 1996 language looks like this.
New language in Version 0.4, including language that was introduced and retained from versions 0.1, 0.2, or 0.3.	New language from Version 0.4 is underlined and highlighted in a light orange.
Original 1996 rules language that is proposed to be deleted is bracketed and struck-through.	1996 Rules language that is to be deleted [~~looks like this~~].
Example #1: Original 1996 rules language that includes defined terms ("agencies", "persons", "environmental assessments", "environmental impact statements"), proposed language to be deleted ("of"), and new language ("(EAs)", "(EISs)").	The purpose of this chapter is to provide **agencies** and **persons** with procedures, specifications [~~of~~] regarding the contents of **environmental assessments (EAs)** and **environmental impact statements (EISs)**, and criteria and definitions of statewide application.
Example #2: Moved 1996 rules language that includes a defined term ("office"), proposed words to be deleted ("agency" and "section 11-200-3") and new language inserted ("and the rationale" and "this subchapter").	The **office** shall publish notice of [~~agency~~] withdrawals and the rationale in accordance with [~~section 11-200-3~~] this subchapter.

Table of Contents

Subchapter 1 Purpose

§ 11-200.1-1 Purpose

(a) Chapter 343, Hawaii Revised Statutes, [HRS], establishes a system of environmental review at the state and county levels [~~which~~] that shall ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. The purpose of this chapter is to provide **agencies** and **persons** with procedures, specifications [~~of~~] regarding the contents of **environmental assessments (EAs)** and **environmental impact statements (EISs)**, and criteria and definitions of statewide application.

(b) [~~An EIS~~] **EAs** and **EISs** [~~is~~] are meaningless without the conscientious application of the [~~EIS~~] environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed **action**. **Agencies** and **applicants** shall ensure that [~~statements~~] **EAs** and **EISs** are prepared at the earliest opportunity in the planning and decision-making process. This shall assure an early open forum for discussion of adverse **effects** and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed **action** prior to decision making.

(c) In preparing any document, **proposing agencies** and **applicants** shall:

(1) [~~make~~] Make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by government decision-makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, of the document;

(2) [~~care shall be taken~~] Take care to concentrate on important issues and to ensure that the document remains an essentially self-contained document, capable of being understood by the reader without the need for undue cross-reference; and

(3) Conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of **agencies** and the public in the environmental review process.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-1, 343-6)

Subchapter 2 Definitions

§ 11-200.1-2 Definitions

As used in this chapter:

"**Acceptance**" means a formal determination [~~of acceptability~~] that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an **environmental impact statement (EIS)**, [~~adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement~~] as prescribed by section 11-200.1-28. **Acceptance** does not mean that the **action** is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of **acceptance** is required prior to implementing or approving the **action**.

"**Accepting authority**" means the [~~final~~] official who, or **agency** that, [~~determines the acceptability of the EIS document~~] makes the determination that a final **EIS** is required to be filed, pursuant to chapter 343, HRS, and that the final **EIS** fulfills the definitions and requirements of an **EIS**.

"**Action**" means any program or project to be initiated by an **agency** or **applicant**.

"**Addendum**" means an attachment to a **draft** [~~environmental assessment~~] **EA** or draft [~~environmental impact statement~~] **EIS**, prepared at the discretion of the **proposing agency**, [~~or~~] **applicant**, or **approving agency**, and distinct from a **supplemental EIS** [~~statement~~], for the purpose of disclosing and addressing clerical errors such as inadvertent omissions, corrections, or clarifications to information already contained in the **draft** [~~environmental assessment~~] **EA** or the draft [~~environmental impact statement~~] **EIS** already filed with the **office**.

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

"**Applicant**" means any **person** [~~who~~] that, pursuant to statute, ordinance, or rule, officially requests **approval** from an **agency** for a proposed **action**.

"**Approval**" means a **discretionary consent** required from an **agency** prior to [~~actual~~] implementation of an **action**. [~~Discretionary consent means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion.~~]

"**Approving agency**" means an **agency** that issues an **approval** prior to [~~actual~~] implementation of an **applicant action**.

"**Council**" [~~or "**EC**"~~] means the environmental **council**.

"**Cumulative impact**" means the **impact** on the **environment** [~~which~~] that results from the incremental **impact** of the **action** when added to other past, present, and reasonably foreseeable future **actions** regardless of what **agency** or **person** undertakes such other **actions**. **Cumulative impacts** can result from individually minor but collectively significant **actions** taking place over a period of time.

"**Discretionary consent**" means a consent, sanction, or recommendation from an **agency** for which judgment and free will may be exercised by the issuing **agency**, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an **agency** upon a given set of facts, as prescribed by law without the use of judgment or discretion.

"**Draft environmental assessment**" means the [~~environmental assessment~~] **EA** submitted by a **proposing agency** or an **approving agency** for public review and comment when that **agency** anticipates a [~~negative declaration~~] **finding of no significant impact (FONSI)** [~~determination~~].

"**Effects**" or "**impacts**" as used in this chapter are synonymous. **Effects** may include ecological **effects** (such as the **effects** on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic **effects**, historic **effects**, cultural **effects**, economic **effects**, social **effects**, or health **effects**, whether **primary**, **secondary**, or **cumulative**, immediate or delayed. **Effects** may also include those **effects** resulting from **actions** [~~which~~] that may have both beneficial and detrimental **effects**, even if on balance the **agency** believes that the **effect** will be beneficial.

"**EIS preparation notice**[~~,~~]", [~~or~~] "**EISPN**", or "**preparation notice**" means a determination [~~based on an environmental assessment that the subject~~] that an **action** may have a **significant effect** on the **environment** and, therefore, will require the preparation of an [~~environmental impact statement~~] **EIS**, based on either an **EA** or an **agency's** judgment and experience that the proposed **action** may have a **significant effect** on the **environment**.

"**EIS public scoping meeting**" means a meeting in which **agencies**, citizen groups, and the general public are notified of the opportunity to assist the **proposing agency** or **applicant** in determining the range of **actions**, alternatives, **impacts**, and proposed mitigation measures to be considered in the draft **EIS** and the **significant** issues to be analyzed in depth in the draft EIS".

"**Emergency action**" means an **action** to prevent or mitigate loss or damage to life, health, property, or essential public services in response to a sudden unexpected occurrence demanding such immediate **action**.

"**Environment**" means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed **action**, including land,

human and animal communities, health, air, water, minerals, flora, fauna, ambient noise, and objects of historic, cultural, or aesthetic significance.

"Environmental assessment" or **"EA"** means a written evaluation [~~to determine whether an action may have a significant environmental effect~~] that serves to provide sufficient evidence and analysis to determine whether an **action** may have a **significant effect.**

[~~"Environmental impact" means an effect of any kind, whether immediate or delayed, on any component of the environment.~~]

"Environmental impact statement~~,~~", **"statement~~,~~"**, or **"EIS"** means an informational document prepared in compliance with chapter 343, HRS[~~, and this chapter and which fully complies with subchapter 7 of this chapter~~]. The initial [~~statement~~] **EIS** filed for public review shall be referred to as the draft [~~environmental impact statement~~] **EIS** and shall be distinguished from the final [~~environmental impact statement~~] **EIS**, which is the document that has incorporated the public's comments and the responses to those comments. The final [~~environmental impact statement~~] **EIS** is the document that shall be evaluated for acceptability by the [~~respective~~] **accepting authority**.

[~~"Exempt classes of action" means exceptions from the requirements of chapter 343, HRS, to prepare environmental assessments, for a class of actions, based on a determination by the proposing agency or approving agency that the class of actions will probably have a minimal or no significant effect on the environment.~~]

"Exemption list" means a list prepared by an **agency** pursuant to subchapter 8. The list may contain in part one the types of routine activities and ordinary functions within the jurisdiction or expertise of the **agency** that by their nature do not have the potential to individually or **cumulatively** adversely affect the **environment** more than negligibly and that the **agency** considers to not rise to the level of requiring chapter 343, HRS environmental review. In part two, the list may contain the types of **actions** the **agency** finds fit into the general types of **action** enumerated in section 11-200.1-15. An **agency** may exempt activities in part one and actions in part two, subject to the conditions of this chapter and chapter 343, HRS, from preparation of an **EA**.

"Exemption notice" means a [~~brief notice kept on file by the proposing agency, in the case of a [public action, or the agency with the power of approval, in the case of a private action, when it has determined that the proposed project is an exempt or emergency project~~] notice produced in accordance with subchapter 8 for an **action** that a proposing **agency** or **approving agency** on behalf of an **applicant** determines to be exempt from preparation of an EA.

"Final environmental assessment" means either the [~~environmental assessment~~] **EA** submitted by a **proposing agency** or an **approving agency** following the public review and comment period for the **draft** [~~environmental assessment~~] **EA** and in support of either a **FONSI** or [~~a preparation notice~~] an **EISPN**. [~~determination; or the environmental assessment submitted by a~~

~~proposing agency or an approving agency subject to a public consultation period when such an agency clearly determines at the outset that the proposed action may have a significant effect and hence will require the preparation of a statement.~~]

"**Finding of no significant impact**" or "**FONSI**" means a determination by an **agency** based on an **EA** that an **action** not otherwise exempt will not have a **significant effect** on the **environment** and therefore does not require the preparation of an **EIS**. A **FONSI** is required prior to implementing or approving the **action**.

"**Impacts**" means the same as "**effects**".

"**Issue date**" means the date imprinted on the **periodic bulletin** required by section 343-3, HRS.

"**National Environmental Policy Act**" or "**NEPA**" means the **National Environmental Policy Act** of 1969, Public Law 91-190, 42 U.S.C. [§] sections 4321-4347, as amended.

[~~"Negative declaration" or "finding of no significant impact" means a determination by an agency based on an environmental assessment that a given action not otherwise exempt does not have a significant effect on the environment and therefore does not require the preparation of an EIS. A negative declaration is required prior to implementing or approving the action.~~]

"**Office**" means the **Office** of Environmental Quality Control.

"**Periodic bulletin**" or "**bulletin**" means the document required by section 343-3, HRS, and published by the **office**.

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

[~~"Preparation notice" or "EIS preparation notice" means a determination based on an environmental assessment that the subject action may have a significant effect on the environment and, therefore, will require the preparation of an environmental impact statement.~~]

"**Primary impact**~~s~~", ~~or~~ "**primary effect**~~s~~", ~~or~~ "**direct impact**~~s~~", or "**direct effect**" means **effects** [~~which~~] that are caused by the **action** and occur at the same time and place.

"**Project**" means a discrete, planned undertaking that has a defined beginning and end time, is site specific, and has a specific goal or purpose.

"**Program**" means a series of one of more **projects** to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A **program** may include: a number of separate **projects** in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have **significant impacts**; separate **projects** having generic or common **impacts**; an entire

plan having wide application or restricting the range of future alternative policies or **actions**, including new significant changes to existing land use plans, development plans, zoning regulations, or **agency** comprehensive resource management plans; implementation of a single **project** or multiple **projects** over a long timeframe; or implementation of a single **project** over a large geographic area.

"**Proposing agency**" means any state or county **agency** that proposes an **action** under chapter 343, HRS.

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

"**Significant effect**" or "**significant impact**" means the sum of **effects** on the quality of the **environment**, including **actions** that irrevocably commit a natural resource, curtail the range of beneficial uses of the **environment**, are contrary to the [~~state's~~] State's environmental policies or long-term environmental goals and guidelines as established by law, [~~or~~] adversely affect the economic welfare, [~~or~~] social welfare, or cultural practices of the community and State, or are otherwise set forth in section [~~11-200-12~~] 11-200.1-14 [~~of this chapter~~].

"**Supplemental** [~~statement~~] **EIS**" means an [~~additional environmental impact statement~~] updated **EIS** prepared for an **action** for which [~~a statement~~] an **EIS** was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things.

A "**trigger**" means any use or activity listed in section 343-5(a), HRS, requiring preparation of an environmental assessment.

Unless defined above, elsewhere within this chapter, or in chapter 343, HRS, a **proposing agency** or **approving agency** may use its administrative rules or statutes that they implement to interpret undefined terms.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-2, 343-6)

Subchapter 3 Computation of Time

§ 11-200.1-3 Computation of Time

In computing any period of time prescribed or allowed by this chapter, order of the **council**, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Sunday or legal holiday.

[Eff] (Auth: HRS §§ 1-29, 8-1, 343-6) (Imp: HRS §§ 1-29, 8,-1, 343-6)

Subchapter 4 Filing and Publication in the Periodic Bulletin

§ 11-200.1-4 Periodic Bulletin

(a) The **periodic bulletin** shall be issued on the eighth and twenty-third days of each month.

(b) [~~The office shall inform the public through the publication of a periodic bulletin of the following:~~] When filed in accordance with section 11-200.1-5, the **office** shall publish the following in the **periodic bulletin** to inform the public of **actions** undergoing chapter 343, HRS environmental review and the associated public comment periods provided here or elsewhere by statute:

(1) Determinations that an existing exemption, **FONSI**, or accepted **EIS** satisfies chapter 343, HRS for a proposed activity;

(2) **Exemption notices** and lists of actions an agency has determined to be exempt;

(3) [~~Notices filed by agencies of the availability of environmental assessments~~] Draft **EAs** and appropriate **addendum** documents for public review and [~~comments~~] thirty-day comment period, including notice of an anticipated **FONSI**;

(4) Final **EAs**, including notice of a **FONSI**, or an **EISPN** with thirty-day comment period and notice of **EIS public scoping meeting**, and appropriate **addendum** documents;

(5) Notice of an **EISPN** with thirty-day comment period and notice of **EIS public scoping meeting**, and appropriate **addendum** documents;

(6) [~~Notices filed by agencies of~~] Evaluations and determinations that supplemental [~~statements~~] **EISs** are required or not required;

(7) [~~The availability of statements~~] Draft **EISs**, including draft **supplemental** [~~statements~~] **EISs**, and appropriate **addendum** documents for public review and forty-five day comment period;

(8) Final **EISs**, including final **supplemental EISs**, and appropriate **addendum** documents;

(9) [~~The~~] Notice of **acceptance** or non-acceptance of [~~statements~~] **EISs**, including **supplemental EISs**;

(10) Republication of any chapter 343, HRS notices, documents, or determinations;

(11) Notices of withdrawal of any chapter 343, HRS notices, documents, or determinations;

(12) Other notices required by the rules of the **council**.

(c) When filed in accordance with this subchapter, the **office** shall publish other notices required by statute or rules, including those not specifically related to chapter 343, HRS.

(d) The **office** may, on a space or time available basis, publish other notices not specifically related to chapter 343, HRS.

[Eff] (Auth: HRS §§ 341-3, 343-5, 343-6) (Imp: HRS §§ 341-3, 343-3, 343-6)

§ 11-200.1-5 Filing Requirements for Publication and Withdrawal

(a) Anything required to be published in the **bulletin** shall be submitted to the **office** before the close of business four business days prior to the **issue date**.

(b) All submittals to the **office** for publication in the **bulletin** shall be accompanied by a completed informational form [~~which~~] that provides whatever information the **office** needs to properly notify the public. The information requested may include the following: the title of the **action**; the islands affected by the proposed **action**; tax map key numbers; street addresses; nearest geographical landmarks; latitudinal and longitudinal coordinates or other geographic data; applicable permits, including for applicants, the **approval** requiring chapter 343, HRS environmental review; whether the proposed **action** is an **agency** or an **applicant action**; a citation of the applicable federal or state statutes requiring preparation of the document; the type of document prepared; the names, addresses, email addresses, phone numbers and contact persons as applicable of the **accepting authority**, the **proposing agency**, the **approving agency**, the **applicant**, and the consultant; and a brief narrative summary of the proposed **action** [~~which~~] that provides sufficient detail to convey the full impact of the proposed **action** to the public.

(c) The **office** shall not accept untimely submittals or revisions thereto after the **issue date deadline** for which the submittal was originally filed has passed.

(d) In accordance with the **agency**'s rules or, in the case of an **applicant EIS**, the **applicant**'s judgment, anything filed with the **office** may be withdrawn by the **agency** or **applicant** that filed the submittal with the **office**. To withdraw a submittal, the **agency** or **applicant** shall submit to the **office** a written letter informing the **office** of the withdrawal. The **office** shall publish notice of [~~agency~~] withdrawals and the withdrawal rationale in accordance with [~~section 11-200-3~~] this subchapter.

(e) To be published in the **bulletin**, all submittals to the **office** shall meet the filing requirements in subsections (a)-(c) and be prepared in accordance with this chapter and chapter 343, HRS, as appropriate. The following shall meet additional filing requirements:

(1) When the document is a draft **EA** with an anticipated **FONSI**, the **proposing agency** or **approving agency** shall:

(A) File the document and determination with the **office**;

(B) Deposit, or require the **applicant** to deposit, concurrently with the filing [~~paragraph (5)~~] to the **office**, one paper copy of the draft [~~environmental assessment~~] **EA** at the nearest state library in each county in which the

proposed **action** is to occur and one paper copy at the Hawaii Documents Center; and

(C) Distribute, concurrently [~~with the filing in paragraph (5),~~] the draft [~~environmental assessment~~] **EA** to other agencies having jurisdiction or expertise as well as citizen groups and individuals which the **proposing agency** reasonably believes to be affected;

(2) When the document is a **final EA** with a **FONSI**, the **proposing agency** or **approving agency** shall:

(A) Incorporate, or require the **applicant** to incorporate, the **FONSI** into the contents of the **final EA**, as prescribed in section 11-200.1-21, section 11-200.1-22, and section 11-200.1-23;

(B) File the **final EA** and the incorporated **FONSI** with the **office**; and

(C) Deposit, or require the **applicant** to deposit, concurrently with the filing to the **office**, one paper copy of the **final EA** with the Hawaii Documents Center;

(3) When the document is a **final EA** with an **EISPN**, the **proposing agency** or **approving agency** shall:

(A) Incorporate, or require the **applicant** to incorporate, the **EISPN** into the contents of the **final EA**, as prescribed in section 11-200.1-21, section 11-200-22, and section 11-200.1-23A;

(B) File the incorporated **EISPN** with the **final EA**; and

(C) Deposit, or require the **applicant** to deposit, concurrently with the filing to the **office**, one paper copy of the **final EA** with the Hawaii Documents Center;

(4) When the notice is an **EISPN** without the preparation of an **EA**, the **proposing agency** or **approving agency** shall:

(A) File the **EISPN** with the **office**; and

(B) Deposit, or require the applicant to deposit, concurrently with the filing to the **office**, one paper copy of the **EISPN** at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center;

(5) When the document is a draft **EIS**, the **proposing agency** or **applicant** shall:

(A) [~~sign~~] Sign and date [~~the original copy of~~] the draft [~~or final~~] **EIS** [~~and shall~~];

(B) Indicate that the draft [~~statement~~] EIS and all ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in [~~sections 11-200-17 and 11-200-18, as appropriate~~] subchapter 10;

(C) File the draft **EIS** with the **accepting authority** and the **office** simultaneously; ~~and~~

(D) Deposit, or require the **applicant** to deposit, concurrently with the filing to the **office**, one paper copy of the draft **EIS** at the nearest state library in each county in which the proposed **action** is to occur and one paper copy at the Hawaii Documents Center~~.~~; and

(E) Submit to the office one true and correct copy of the original audio file, at standard quality, of all oral comments received at the time designated within the EIS public scoping meeting(s) for receiving oral comments;

(6) When the document is a final **EIS**, the **proposing agency** or **applicant** shall:

(A) [~~sign~~] Sign and date [~~the original copy of~~] the [~~draft or~~] final **EIS** [~~and shall~~];

(B) Indicate that the final [~~statement~~] EIS and all ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in [~~sections 11-200-17 and 11-200-18, as appropriate~~] subchapter 10; and

(C) File the final **EIS** with the **accepting authority** and the **office** simultaneously;

(7) When the notice is an **acceptance** or non-acceptance of a final **EIS**, the **accepting authority** shall:

(A) File the notice of **acceptance** or non-acceptance of a final **EIS** with the **office**; and

(B) Simultaneously transmit the notice to the **proposing agency** or **applicant**;

(8) When the notice is of the withdrawal of an anticipated **FONSI**, **FONSI**, or **EISPN** the **proposing agency** or **approving agency** shall include a rationale of the withdrawal specifying any associated documents to be withdrawn;

(9) When the notice is of the withdrawal of a draft **EIS** or final **EIS**, the **proposing agency** or **applicant** shall simultaneously file the notice with the **office** and submit the notice with **accepting authority**; and

(10) When the submittal is a changed version of a notice, document, or determination previously published and withdrawn, the submittal shall be filed as the "second" submittal, or "third" or "fourth", as appropriate. (Example: A draft **EIS** is withdrawn and changed. It is then filed with the **office** for publication as the "second draft **EIS**" for the particular **action**.)

[Eff] (Auth: HRS §§ 343-3, 343-5, 343-6) (Imp: HRS §§ 341-3, 343-3, 343-6)

§ 11-200.1-6 Republication of Notices, Documents, and Determinations

(a) An **agency** or **applicant** responsible for filing a chapter 343, HRS notice, document, or determination may file an unchanged, previously published submittal in the **bulletin** provided that the filing requirements of this subchapter and any other publication requirements set forth in this chapter or chapter 343, HRS are satisfied.

(b) When the publication of a previously published chapter 343, HRS notice, document, or determination involves a public comment period under this chapter or chapter 343, HRS:

(1) The public comment period shall be as required for that notice, document, or determination pursuant to this chapter or chapter 343, HRS or as otherwise

statutorily mandated. (For example, publication of an unchanged draft **EIS** initiates a forty-five day public comment period upon publication in the bulletin.); and

(2) Any comments received during the comment period must be considered in the same manner as set forth in this chapter and chapter 343, HRS, for that notice, document, or determination type, in addition to comments received in any other comment period associated with the publication of the notice, document, or determination.

[Eff] (Auth: HRS §§ 341-3, 343-5, 343-6) (Imp: HRS §§ 341-3, 343-3, 343-5, 343-6)

Subchapter 5 Responsibilities

§ 11-200.1-7 Identification of Approving Agency and Accepting Authority

(a) Whenever an **agency** proposes an **action**, the [~~final~~] authority to accept [~~a statement~~] an **EIS** shall rest with:

(1) The governor, or [~~an~~] 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~~] under section [~~11-200-6(b)~~] 11-200.1-9; or

(2) The mayor, or [~~an~~] the mayor's authorized representative, of the respective county whenever an **action** proposes only the use of county lands or county funds.

In the event that an **action** involves state and county lands, state and county funds, or both state and county lands and funds, the governor or the governor's authorized representative shall have authority to accept the **EIS**.

(b) Whenever an **applicant** proposes an **action**, the authority for requiring an **EA** or [~~statements~~] **EIS**, [~~and for~~] making a determination regarding any required **EA**, and accepting any required [~~statements~~] **EIS** [~~that have been prepared~~] shall rest with the **approving agency** [~~initially receiving and agreeing~~] that initially received and agreed to process the request for an **approval**. With respect to **EISs**, this **approving agency** is also called the **accepting authority**.

(c) In the event that [~~there is~~] more than one **agency** [~~that~~] is proposing the **action** or, in the case of **applicants**, more than one **agency** has jurisdiction over the **action**, and these **agencies** are unable to agree as to which **agency** has the responsibility for complying with [~~section 343-5(c)~~] chapter 343, HRS, [~~the office, after consultation with~~] the **agencies** involved, shall consult with one another to determine which **agency** is responsible for compliance. In making the [~~determination~~] decision, the [~~office~~] **agencies** shall take into consideration, including, but not limited to, the following factors:

(1) [~~The~~] Which **agency** [~~with the~~] has the greatest responsibility for supervising or approving the **action** as a whole;

(2) [~~The~~] Which **agency** [~~that~~] can most adequately fulfill the requirements of chapter 343, HRS, and this chapter;

(3) [~~The~~] Which **agency** [~~that~~] has special expertise or greatest access to information relevant to the **action's** implementation and **impacts**; [~~and~~]

(4) The extent of participation of each **agency** in the **action**[~~,~~]; and

(5) In the case of an **action** with proposed use of state or county lands or funds, which **agency** has the most land or funds involved in the **action**.

(d) In the event that there is more than one **agency** that is proposing the **action**, or in the case of **applicants**, more than one **agency** has jurisdiction over the **action**, and after applying the criteria in subsection (c) these **agencies** are unable to agree as to which **agency** has the responsibility for complying with chapter 343, HRS, the **office**, after consultation with the **agencies** involved, shall apply the same considerations in subsection (c) to decide which **agency** is responsible for compliance.

(e) The **office** shall not serve as the **accepting authority** for any **proposed agency** or **applicant action**.

(f) The **office** may provide recommendations to the **agency** or **applicant** responsible for the ~~[environmental assessment]~~ **EA** or **EIS** regarding any applicable administrative content requirements set forth in this chapter.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

Subchapter 6 Applicability

§ 11-200.1-8 Applicability of Chapter 343, HRS to Agency Actions

(a) Chapter 343, HRS, environmental review shall be required for any **agency action** that includes one or more **triggers** as identified in section 343-5(a), HRS.

(1) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands.

(2) [~~For agency actions, chapter 343, HRS, exempts from applicability~~] Under section 343-5(a), HRS, any feasibility or planning study for possible future programs or projects [~~which~~] that the agency has not approved, adopted, or funded are exempted from chapter 343, HRS, environmental review. Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose these in any future [~~assessment~~] **EA** or subsequent [~~statement~~] **EIS**. If [~~, however,~~] the planning and feasibility studies involve testing or other actions [~~which~~] that may have a significant impact on the environment, [~~then~~] an [~~environmental assessment~~] **EA** or **EIS** shall be prepared.

(3) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) When an **agency** proposes an **action** during a governor-declared state of emergency, the **proposing agency** shall document in its records that the **emergency action** was undertaken pursuant to a specific emergency proclamation. If the **emergency action** has not **substantially commenced** within sixty days of the emergency proclamation, the **action** will be subject to chapter 343, HRS.

(c) In the event of a sudden unexpected emergency causing or likely to cause loss or damage to life, health, property, or essential public service, but for which a declaration of a state of emergency has not been made, a **proposing agency** undertaking an **emergency action** shall document in its records that the **emergency action** was undertaken pursuant to a specific emergency and shall include the **emergency action** on its list of **exemption notices** for publication by the **office** in the **bulletin** pursuant to section 11-200.1-17(d) and subchapter 4.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-9 Applicability of Chapter 343, HRS to Applicant Actions

(a) Chapter 343, HRS, environmental review shall be required for any **applicant action** that:
  (1) Requires one or more ~~[agency]~~ **approvals** prior to implementation; and
  (2) Includes one or more **triggers** identified in section 343-5(a), HRS.
    (A) Under Chapter 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands.
    (B) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) Chapter 343, HRS does not require environmental review for **applicant actions** when:
  (1) Notwithstanding any other law to the contrary, for any primary action that requires a permit or approval that is not subject to a discretionary consent and that involves a secondary action that is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter; provided that the **applicant** for the primary action shall submit documentation from the appropriate **agency** confirming that no further discretionary approvals are required.
  (2) As used in this subsection:
    (A) "Discretionary consent" means an **action** as defined in section 343-2; or an approval from a decision-making authority in an agency, which approval is subject to a public hearing.
    (B) "Infrastructure" includes waterlines and water facilities, wastewater lines and wastewater facilities, gas lines and gas facilities, drainage facilities, electrical, communications, telephone, and cable television utilities, and highway, roadway, and driveway improvements.
    (C) "Primary action" means an **action** outside of the highway or public right-of-way that is on private property.
    (D) "Secondary action" means an **action** involving infrastructure within the highway or public right-of-way.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS § §343-5, 343-6)

§ 11-200.1-10 Multiple or Phased Actions

A group of **actions** proposed by an **agency** or an **applicant** shall be treated as a single **action** when:

(1) The component **actions** are phases or increments of a larger total undertaking;

(2) An individual [~~project~~] **action** is a necessary precedent [~~for~~] to a larger [~~project~~] **action**;

(3) An individual [~~project~~] **action** represents a commitment to a larger [~~project~~] **action**; or

(4) The **actions** in question are essentially identical and a single **EA** or [~~statement~~] **EIS** will adequately address the **impacts** of each individual **action** and those of the group of **actions** as a whole.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS § 343-6)

§ 11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities

(a) When an **agency** is considering whether a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS for a proposed activity, the **agency** may determine that additional environmental review is not required because:

(1) The proposed activity was a component of, or is substantially similar to, an action that received an exemption, **FONSI**, or an accepted **EIS** (for example, a **project** that was analyzed in a programmatic **EIS**);

(2) The proposed activity is anticipated to have **direct**, **indirect**, and **cumulative effects** similar to those analyzed in a prior exemption, **final EA**, or accepted **EIS**; and

(3) In the case of a **final EA** or an accepted **EIS**, the proposed activity was analyzed within the range of alternatives.

(b) When an **agency** determines that a prior exemption, **FONSI**, or an accepted **EIS** satisfies chapter 343, HRS for a proposed activity, the **agency** may submit a brief written rationale to the **office** for publication pursuant to section 11-200.1-4 and the proposed activity may proceed without further chapter 343, HRS environmental review.

(c) When an **agency** determines that the proposed activity warrants environmental review, the **agency** may submit a brief written rationale to the **office** for publication pursuant to section 11-200.1-4 and the **agency** shall proceed to comply with subchapter 7.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS § 343-6)

Subchapter 7 Determination of Significance

§ 11-200.1-12 Consideration of Previous Determinations and Accepted Statements

[~~(a)~~] [~~Chapter 343, HRS, provides that whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, when applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required, and previously accepted statements.~~]

[~~(b)~~] A **proposing agency** or **applicant** may incorporate information or analysis from a relevant [~~Previous~~] prior [~~determinations~~] **exemption notice, final EA,** [~~and previously accepted statements may be incorporated~~] or accepted **EIS** into an **exemption notice, EA, EISPN,** or **EIS,** [~~by applicants and **agencies**~~] for a proposed **action** whenever the information or analysis [~~contained therein~~] is pertinent [~~to the decision at hand~~] and has logical relevancy and bearing to the proposed **action** [~~being considered~~]. (For example, a **project** that was broadly considered as part of an accepted programmatic **EIS** may incorporate relevant portions from the accepted programmatic **EIS** by reference.)

[~~(c)~~] [~~Agencies shall not, without considerable pre-examination and comparison, use past determinations, and previous statement to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered.~~]

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-13 Significance Criteria

(a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment[~~,~~] and shall evaluate the overall and cumulative effects of an action.

(b) In determining whether an **action** may have a **significant effect** on the **environment**, the **agency** shall consider every phase of a proposed **action**, the expected [~~consequences~~] **impacts**, both **primary** and **secondary**, and the **cumulative** as well as the short-term and long-term **effects** of the **action**. In most instances, an **action** shall be determined to have a **significant effect** on the **environment** if it is likely to:

(1) [~~Involves an irrevocable commitment to loss or destruction of any natural or cultural resource~~] Irrevocably commit a natural, cultural, or historic resource;

(2) [~~Curtails~~] Curtail the range of beneficial uses of the **environment**;

(3) [~~Conflicts~~] Conflict with the [~~state's~~] State's [~~long-term~~] environmental policies or long-term environmental goals [~~and guidelines as expressed in chapter 344, HRS, or other laws,~~] as established by law [~~and any revisions thereof and amendments thereto, court decisions, or executive orders~~];

(4) [~~Substantially affects~~] Have a substantial adverse **effect** on the economic welfare, [~~or~~] social welfare, or cultural practices of the community or State;

(5) [~~Substantially affects~~] Have a substantial adverse **effect** on public health;

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

(7) [~~Involves~~] Involve a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has [~~considerable~~] substantial adverse **effect** upon the environment or involves a commitment for larger actions;

(9) [~~Substantially affects~~] Have a substantial adverse **effect** on a rare, threatened, or endangered species, or its habitat;

(10) [~~Detrimentally affects~~] Have a substantial adverse **effect** on air or water quality or ambient noise levels;

(11) [~~Affects~~] Have a substantial adverse **effect** on or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) [~~Substantially affects~~] Have a substantial adverse **effect** on scenic vistas and viewplanes, during day or night, identified in county or state plans or studies; or,

(13) [~~Requires~~] Require substantial energy consumption or emit substantial greenhouse gases.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-2, 343-6)

§ 11-200.1-14 Determination of Level of Environmental Review

(a) For an **agency action**, through its judgment and experience, ~~[an **agency** proposing an **action**]~~ a **proposing agency** shall assess the significance of the potential **impacts** of the **action**, including the overall **cumulative impact** in light of related past, present, and reasonably foreseeable **actions** in the area affected, to determine the level of environmental review necessary for the **action**.

(b) For an applicant **action**, within thirty days from the receipt of the **applicant's** request for **approval** to the **approving agency**, through its judgment and experience, an **approving agency** shall assess the significance of the potential **impacts** of the **action**, including the overall **cumulative impact** in light of related past, present, and reasonably foreseeable **actions** in the area affected, to determine the level of environmental review necessary for the **action**.

(c) If the **proposing agency** or **approving agency** determines, through its judgment and experience, that the **action** will individually and cumulatively probably have minimal or no **significant effects**, and the **action** is one that is eligible for exemption under subchapter 8, then the **agency** or the **approving agency** in the case of an **applicant** may prepare an **exemption notice** in accordance with subchapter 8.

(d) If the **proposing agency** or **approving agency** determines, through its judgment and experience, that the **action** is not eligible for an exemption, then the **proposing agency** shall prepare or the **approving agency** shall require the **applicant** to prepare an **EA** beginning with a **draft EA** in accordance with subchapter 9, unless:

(1) In the course of preparing the **draft EA**, the **proposing agency** or **approving agency** determines, through its judgment and experience, that the **action** may have a **significant effect** and therefore require preparation of an **EIS**, then the **proposing agency** may prepare, or the **approving agency** may authorize the **applicant** to prepare an **EA** as a **final EA** to support the determination prior to preparing or requiring preparation of an **EIS** in accordance with subchapter 10; or

(2) The **proposing agency** or **approving agency** determines, through its judgment and experience that an **EIS** is likely to be required, then the **proposing agency** may choose, or an **approving agency** may authorize an **applicant** to prepare an **EIS** in accordance with subchapter 10, beginning with preparation of an **EISPN**.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

Subchapter 8 Exempt Actions, List, and Notice Requirements

§ 11-200.1-15 General Types of Actions Eligible for Exemption

(a) ~~[Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption.]~~ Some **actions**, because they will individually and cumulatively probably have minimal or no **significant effects**, can be declared exempt from the preparation of an **EA**.

(b) **Actions** declared exempt from the preparation of an [~~environmental assessment~~] **EA** under this [~~section~~] subchapter are not exempt from complying with any other applicable statute or rule.

(c) The following [~~list represents exempt classes of action~~] general types of **actions** are eligible for exemption:

(1) Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving [~~negligible or no~~] minor expansion or minor change of use beyond that previously existing;

(2) Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;

(3) Construction and location of single, new, small facilities or structures and the alteration and modification of the same and installation of new, small, equipment and facilities and the alteration and modification of same, including, but not limited to:

(A) Single-family residences less than 3,500 square feet, as measured by the controlling law under which the proposed **action** is being considered, if not in conjunction with the building of two or more such units;

(B) Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures;

(C) Stores, offices, and restaurants designed for total occupant load of twenty [~~persons~~] individuals or [~~less~~] fewer per structure, if not in conjunction with the building of two or more such structures; and

(D) Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; accessory or

appurtenant structures including garages, carports, patios, swimming pools, and fences; and, acquisition of utility easements;

(4) Minor alterations in the conditions of land, water, or vegetation;

(5) Basic data collection, research, experimental management, and resource and infrastructure testing and evaluation activities [~~which~~] that do not result in a serious or major disturbance to an environmental resource;

[~~(6)~~] ~~Construction or placement of minor structures accessory to existing facilities;~~

[~~(7)~~] ~~Interior alterations involving things such as partitions, plumbing, and electrical conveyances;~~

([~~8~~]6) Demolition of structures, except those structures [~~located on any historic site as designated in~~] that are listed on or that meet the criteria for listing on the national register or Hawaii [~~register as provided for in the National Historic Preservation Act of 1966, Public Law 89-665, 16 U.S.C. §470, as amended, or chapter 6E, HRS~~] Register of Historic Places;

([~~9~~]7) Zoning variances except shoreline set-back variances; [~~and~~]

([~~10~~]8) Continuing administrative activities ~~including, but not limited to purchase of supplies and personnel-related actions~~;

([~~11~~]9) Acquisition of land and existing structures, including single or multi-unit dwelling units, for the provision of affordable housing, involving no material change of use beyond [~~that~~] previously existing uses, and for which the legislature has appropriated or otherwise authorized funding [~~.~~]; and

(10) New construction of affordable housing, where affordable housing is defined by the controlling law applicable for the state or county **proposing agency** or **approving agency**, that meets the following:

(A) Has the use of state or county lands or funds or is within Waikiki as the sole **triggers** for compliance with chapter 343, HRS;

(B) As proposed conforms with the existing state urban land classification;

(C) As proposed is consistent with the existing county zoning classification provided that allows housing; and

(D) As proposed does not require variances for shoreline setbacks or siting in an environmentally sensitive area.

(d) All exemptions under [~~the classes in this section~~] subchapter 8 are inapplicable when the **cumulative impact** of planned successive **actions** in the same place, over time, is significant, or when an **action** that is normally insignificant in its **impact** on the **environment** may be **significant** in a particularly sensitive **environment**.

(e) Any **agency**, at any time, may request that a new exemption [~~class~~] type be added, or that an existing one be amended or deleted. The request shall be submitted to the **council**, in writing, and contain detailed information to support the request as set forth in section 11-201-16, HAR, environmental **council** rules.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-16 Exemption Lists

(a) Each **agency**, through time and experience, [~~shall~~] may develop its own **exemption list** consistent with both the letter and intent expressed in this subchapter and in chapter 343, HRS, of

(1) Routine activities and ordinary functions within the jurisdiction or expertise of the agency that by their nature do not have the potential to individually or **cumulatively** adversely affect the **environment** more than negligibly and that the agency considers to not rise to the level of requiring chapter 343, HRS environmental review. Examples of routine activities and ordinary functions may include, among others: routine repair, routine maintenance, purchase of supplies, and continuing administrative activities involving personnel only, nondestructive data collection, installation of routine signs and markers, financial transactions, personnel-related matters, construction or placement of minor structures accessory to existing facilities; interior alterations involving things such as partitions, plumbing, and electrical conveyances; and

(2) [~~specific types of actions which fall within the exempt classes as long as these lists are consistent with both the letter and intent expressed in these exempt classes and chapter 343, HRS~~] Types of actions that the **agency** considers to be included within the exempt general types listed in section 11-200.1-15.

(b) An **agency** may use part one of its **exemption list**, developed pursuant to (a)(1), to exempt a specific activity from preparation of an **EA** and the requirements of section 11-200.1-17 because the agency considers the specific activity to be de minimis.

(c) An **agency** may use part two if its **exemption list**, developed pursuant to (a)(2), to exempt from preparation of an **EA** a specific **action** that the **agency** determines to be included under the types of **actions** in its **exemption list**, provided that the **agency** fulfills the **exemption notice** requirements set forth in section 11-200.1-17 of this subchapter and chapter 343, HRS.

(d) These **exemption lists** and any amendments to the **exemption lists** shall be submitted to the **council** for review and **concurrence** no later than seven years after the previous **concurrence**, provided that, in the event the **council** is unable to meet due to quorum when a **concurrence** for an **agency exemption list** is seven years or older, the **agency** may submit a letter to the **council** acknowledging that the existing **exemption list** is still valid. Upon attaining quorum, the **council** shall review the **exemption list** for **concurrence**. [~~The lists shall be reviewed periodically by the **council**.~~] The **council** may review **agency exemption lists** periodically.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-17 Exemption Notices

(a) Each **agency** shall [~~maintain records of~~] create an **exemption notice** for an **action** that it has found to be exempt from the requirements for preparation of an [~~environmental assessment~~] **EA** pursuant to section 11-200.1-16(a)(2) or that an **agency** considers to be included within a general type of action pursuant to section 11-200.1-15. [~~and each agency shall produce the exemption notices for review upon request~~]. An **agency** may create an **exemption notice** for an activity that is has found to be exempt from the requirements for preparation of an **EA** pursuant to section 11-200.1-16(a)(1) or that an **agency** considers to be a routine activity and ordinary function within the jurisdiction or expertise of the **agency** that by its nature does not have the potential to individually or **cumulatively** adversely affect the environment more than negligibly.

(b) To declare an exemption prior to implementing an **action**, an **agency** shall undertake an analysis to determine whether the **action** merits exemption pursuant to section 11-200.1-15 and is consistent with one or several of the general types listed in section 11-200.1-15 or the agency's **exemption list** produced in accordance with section 11-200.1-16, and whether significant **cumulative impacts** or particularly sensitive environments would make the exemption inapplicable. An **agency** shall obtain the advice of other outside **agencies** or individuals having jurisdiction or expertise on the propriety of the exemption. This analysis and consultation shall be documented in an **exemption notice**. Unless consultation and publication are not required under subsection (c), the **agency** shall publish the **exemption notice** with the **office** through the filing process set forth in subchapter 4.

(c) Consultation regarding and publication of an **exemption notice** is not required when:

(1) The **agency** has created an **exemption list** pursuant to section 11-200.1-16;

(2) The **council** has concurred with the **agency's exemption list** no more than seven years before the **agency** implements the **action** or authorizes an **applicant** to implement the **action**;

(3) The **action** is consistent with the letter and intent of the **agency's exemption list**; and

(4) The **action** does not have any potential, individually or **cumulatively**, to produce **significant impacts**.

(d) Each **agency** shall produce [~~the~~] its **exemption notices** for review upon request by the public or an **agency**, and shall submit a list of **exemption notices** that the **agency** has created since the previous publication submittal deadline to the **office** for publication in the **bulletin** pursuant to subchapter 4.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

Subchapter 9 Preparation of Environmental Assessments

§ 11-200.1-18 Preparation and Contents of a Draft Environmental Assessment

(a) A **proposing agency** shall, or an **approving agency** shall require an **applicant** to [~~Seek~~] seek, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county's general plan for each county in which the proposed **action** is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals [~~which~~] that the **proposing agency** or **applicant** reasonably believes [~~to~~] may be affected.

(b) The scope of the **draft EA** may vary with the scope of the proposed **action** and its **impact**, taking into consideration whether the **action** is a **project** or a **program**. Data and analyses in a **draft EA** shall be commensurate with the importance of the **impact**, and less important material may be summarized, consolidated, or simply referenced. A **draft EA** shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the **draft EA**, including cost benefit analyses and reports required under other legal authorities.

(c) The level of detail in a **draft EA** may be more broad for **programs** or components of a **program** for which site-specific impacts are not discernible, and shall be more specific for components of the **program** for which site-specific, **project**-level impacts are discernible. A **draft EA** for a **program** may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the **program** may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) A draft **EA** shall contain, but not be limited to, the following information:

(1) Identification of the **applicant** or **proposing agency**;

(2) For **applicant actions**, [~~Identification~~] identification of the **approving agency** [~~, if applicable~~];

(3) List of all required permits and **approvals** (State, federal, county) [~~required~~] and, for **applicants**, identification of which **approval** necessitates chapter 343, HRS, environmental review;

(4) Identification of **agencies**, citizen groups, and individuals consulted in [~~making~~] preparing the **draft** [~~assessment~~] **EA**;

(5) General description of the **action's** technical, economic, social, cultural and environmental characteristics;

(6) Summary description of the affected **environment**, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;
(7) Identification and [~~summary~~] analysis of **impacts** and alternatives considered;
(8) Proposed mitigation measures;
(9) **Agency** or **approving agency** [~~determination or, for draft environmental assessments only an~~] anticipated determination, including findings and reasons supporting the anticipated **FONSI**, if applicable; and
(10) Written comments and responses to the comments [~~under~~] received and made pursuant to the early consultation provisions of [~~sections 11-200-9(a)(1), 11-200-9(b)(1), or 11-200-15,~~] subsection (a) and statutorily prescribed public review periods.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-19 Notice of Determination for Draft Environmental Assessments

(a) After:
(1) [~~preparing~~] Preparing, or causing to be prepared, [~~an environmental assessment~~] a **draft EA**; [~~and~~]
(2) [~~reviewing~~] Reviewing any public and **agency** comments, [~~if any,~~] and
(3) [~~applying~~] Applying the significance criteria in section [~~11-200-12~~] 11-200.1-13[~~,~~]; if the **proposing agency** or the **approving agency** anticipates that the proposed **action** is not likely to have a **significant effect**, [~~it~~] the **proposing agency** or **approving agency** shall issue a notice of [~~determination which shall be~~] an anticipated [~~negative declaration~~] **FONSI** subject to the public review provisions of section [~~11-200-9.1~~] 11-200.1-20.

(b) The proposing **agency** or **approving agency** shall [~~also~~] file [~~such~~] the notice of anticipated determination when applicable and supporting **draft EA** with the **office** as early as possible in accordance with subchapter 4 after the determination is made pursuant to and in accordance with [~~section 11-200-9~~] this subchapter and the requirements in subsection (c) of this section. [~~along with four copies of the supporting environmental assessment. In addition to the above, the anticipated negative declaration determination for any applicant action shall be mailed to the requesting applicant by the approving agency.~~] For **applicant actions**, the **approving agency** shall also send the anticipated **FONSI** to the **applicant**.

(c) The notice of an anticipated **FONSI** ~~determination~~ shall [~~indicate~~] include in a concise manner:
(1) Identification of the [~~applicant or~~] **proposing agency** or **applicant**;
(2) Identification of the **approving agency** or **accepting authority**;
(3) [~~Brief~~] A brief description of the [~~proposed~~] **action**;

(4) [~~Determination~~] The anticipated **FONSI**;
(5) Reasons supporting the anticipated **FONSI** [~~determination~~]; and
(6) [~~Name~~] The name, title email address, physical address, and phone number of [~~a contact person~~] an individual representative of the **proposing agency** or **applicant** who may be contacted for further information.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments [~~for Anticipated Negative Declaration Determinations & Addenda to Draft Environmental Assessments~~]

(a) This section shall apply only if a **proposing agency** or an **approving agency** anticipates a [~~negative declaration~~] **FONSI** determination for a proposed **action** and [~~that~~] the **proposing agency** or the **applicant** proposing the **action** has completed the **draft EA** requirements of [~~section 11-200-7(a) paragraphs (1), (2), (3), (4), (5), (6) and (7), or section 11-200-9(b), paragraphs (1), (2), (3), (4), (5) and (6), as appropriate~~] sections 11-200.1-18 and 11-200-19.

(b) [~~The period for public review and for submitting written comments for both agency actions and applicant actions shall begin as of the initial issue date that notice of availability of the draft environmental assessment was published in the periodic bulletin and shall continue for a period of thirty days.~~] Unless mandated otherwise by statute, the period for public review and for submitting written comments shall be thirty days from the date of publication of the **draft EA** in the **bulletin**. Written comments [~~to the proposing agency or approving agency, whichever is applicable, with a copy of the comments to the applicant or proposing agency~~] shall be received by or postmarked to the **proposing agency** or **approving agency** and **applicant**[~~,~~] within the thirty-day period. Any comments outside of the thirty-day period need not be [~~considered or~~] responded to nor considered in the final **EA**.

(c) For **agency actions**, the **proposing agency** shall, and for **applicant actions**, the **applicant** shall: respond in [~~writing~~] in the **final EA** in the manner prescribed in this section to all substantive comments received or postmarked during the [~~thirty-day~~] statutorily mandated review period, incorporate comments into the final **EA** as appropriate[~~,~~]and [~~append~~] include the comments and responses in the **final** [~~environmental assessment~~] **EA**. [~~Each response shall be sent directly to the person commenting, with copies of the response also sent to the office.~~] [~~if a number of comments are identical or very similar, the **proposing agency** or **applicant** may group the comments and prepare a single standard response for each group. When grouping comments, the name of each commenter, when known, shall be included along with the~~

~~grouped response. One representative copy of comments that are identical or very similar may be included in the final **EA** with a list of the names of each commenter, when known, that submitted the identical comments rather than reproducing each individual comment. All individual comments and representative copies of identical or very similar comments must be included in the final **EA** regardless of whether the **agency** or **applicant** believes the comments merit individual discussion in the body of the final **EA**.]~~ In deciding whether a written comment is substantive, the **proposing agency** or **applicant** shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EA, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the **proposing agency** or **applicant** as non-substantive and to which no response was provided shall be clearly indicated.

[~~(d)~~] [~~For **applicant actions**, the **applicant** shall respond in writing to all comments received or postmarked during the thirty-day review period and the approving agency shall incorporate or append the comments and responses in the **final** environmental assessment. Each response shall be sent directly to the person commenting with a copy to the office. A copy of each response shall be sent to the approving agency for its timely preparation of a determination and notice thereof pursuant to sections 11-200-9(b) and 11-200-11.1 or 11-200-11.2.~~]

(d) **Proposing agencies** and **applicants** shall respond in the **final EA** to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commentor under that topic heading by issue. When grouping comments by topic and issue, the names of commentors who raised an issue under a topic heading shall be clearly identified in a distinctly labelled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable topic areas with the commentor identified in each applicable topic area. All comments, except those described in subsection (e), must be appended in full to the final document; or

(2) By providing a separate and distinct response to each comment clearly identifying the commentor and the comment receiving a response for each comment letter submitted. All comments, except those described in (e), must either be included with the response or appended in full to the final document.

(e) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under (d)(1) with the response to other comments under the same topic and issue with all commentors identified in the distinctly labelled section identifying commentors by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the

individual commentors who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document; and

(3) Provided that, if a commentor adds a distinct substantive comment to a form letter or petition, that comment must be responded to pursuant to subsection (d).

(f) In responding to substantive written comments, **proposing agencies** and **applicants** shall endeavor to resolve conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. The response shall indicate changes that have been made to the text of the draft **EA**. The response shall describe the disposition of significant environmental issues raised. For example, the response may point to revisions to the proposed **action** to mitigate anticipated **impacts** or objections raised in the comment. In particular, the issues raised when the **proposing agency's** or **applicant's** position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions.

([e] g) An **addendum** document to a **draft** [~~environmental assessment~~] **EA** shall reference the original **draft** [~~environmental assessment~~] **EA** it attaches to and shall comply with all applicable filing, public review and comment requirements set forth in [~~sections 11-200-3 and 11-200-9~~] subchapters 4 and 9.

[Eff] (Auth: HRS §§ 343-3, 343-5, 343-6) (Imp: HRS §§ 343-3, 343-5, 343-6)

§11-200.1-21 Contents of a Final Environmental Assessment

[~~The proposing agency or approving agency shall prepare any draft or final environmental assessment of each proposed action and determine whether the anticipated effects constitute a significant effect in the context of chapter 343, HRS, and section 11-200-12. The environmental assessment~~] A final **EA** shall contain, but not be limited to, the following information:

(1) Identification of **applicant** or **proposing agency**;
(2) Identification of **approving agency**, if applicable;
(3) Identification of agencies, citizen groups, and individuals consulted in [~~making~~] preparing the [~~assessment~~] **EA**;
(4) General description of the **action's** technical, economic, social, cultural and environmental characteristics;
(5) Summary description of the affected **environment**, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;
(6) Identification and [~~summary~~] analysis of **impacts** and alternatives considered;
(7) Proposed mitigation measures;

(8) The [~~Agency~~] **agency** determination and the findings and reasons supporting the determination [~~or, for draft environmental assessments only, an anticipated determination~~];

[~~(9)~~] [~~Findings and reasons supporting the agency determination or anticipated determination;~~]

[~~(10)~~] [~~Agencies to be consulted in the preparation of the EIS, if an EIS is to be prepared~~];

(9) List of all required permits and **approvals** (State, federal, county) [~~required~~] and, for **applicants**, identification of which **approval** necessitates chapter 343, HRS, environmental review; and

(10) Written comments and responses to the comments [~~under~~] received pursuant to the early consultation provisions [~~of sections 11-200-9(a)(1), 11-200-9(b)(1), or 11-200-15~~] of subsection 11-200.1-18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-22 Notice of Determination for Final Environmental Assessments

(a) After:

(1) [~~preparing~~] Preparing, or causing to be prepared, a **final** [~~environmental assessment~~] **EA**,

(2) [~~reviewing~~] Reviewing any public and **agency** comments, [~~if any,~~] and

(3) [~~applying~~] Applying the significance criteria in section [~~11-200-12~~] 11-200.1-13,

the **proposing agency** or the **approving agency** shall issue [~~one of the following notices~~] a notice of [~~determination~~] a **FONSI** or **EISPN** in accordance with [~~section 11-200-9(a) or 11-200-9(b)~~] subchapter 9, and file the notice with the **office** in accordance with subchapter 4. [~~addressing the requirements in subsection (c), along with four copies of the supporting final environmental assessment, provided that in addition to the above, all notices of determination for any applicant action shall be mailed to the requesting applicant by the approving agency:~~] For **applicant actions**, the **approving agency** shall issue a determination within thirty days of receiving the final EA.

(b) [~~Negative declaration~~] **FONSI**. If the **proposing agency** or **approving agency** determines that a proposed **action** is not likely to have a **significant effect**, it shall issue a notice of [~~determination which shall be~~] a [~~negative declaration,~~] **FONSI**. [~~and the proposing agency or approving agency shall file such notice with the office as early as possible after the determination is made pursuant to and in accordance with section 11-200-9~~.

(c) [~~Environmental impact statement preparation notice~~] **EISPN**. If the **proposing agency** or **approving agency** determines that a proposed **action** may have a **significant effect**, it

shall issue [~~a notice of~~] [~~determination which shall be~~] an [~~environmental impact statement preparation notice~~] **EISPN** [~~and such notice shall be filed as early as possible after the determination is made pursuant to and in accordance with section 11-200-9~~].

(d) The **proposing agency** or **approving agency** shall file in accordance with subchapter 4 the notice and the supporting final **EA** with the **office** as early as possible after the determination is made, addressing the requirements in subsection (e). For **applicant actions**, the **approving agency** shall send the notice of determination for an **EISPN** or **FONSI** to the **applicant**.

(e) [~~The **office** shall publish the appropriate notice of determination in the **periodic bulletin** following receipt of the documents in subsection (a) by the **office** in accordance with section 11-200-3.~~]

(e) The notice of [~~determination~~] a **FONSI** shall indicate in a concise manner:

(1) Identification of the **applicant** or **proposing agency**;
(2) Identification of the **approving agency** or **accepting authority**;
(3) [~~Brief~~] A brief description of the proposed **action**;
(4) [~~Determination~~] The determination;
(5) Reasons supporting the determination; and
(6) [~~Name~~] The name, title, contact information, including the email address, physical address, and phone number of [~~a contact person~~] an individual representative of the **proposing agency** or **applicant** who may be contacted for further information.

(e) The notice of determination for an EISPN shall be prepared pursuant to section 11-200.1-23.

[~~(d)~~] [~~When an **agency** withdraws a determination pursuant to its rules, the **agency** shall submit to the **office** a written letter informing the **office** of its withdrawal. The **office** shall publish notice of **agency** withdrawals in accordance with section 11-200-3.~~]

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

Subchapter 10 Preparation of Environmental Impact Statements

§ 11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement

(a) An **EISPN**, including one resulting from an **agency** authorizing the preparation of an **EIS** without first requiring an **EA**, shall indicate in a concise manner:

(1) Identification of the **proposing agency** or **applicant**;

(2) Identification of the **accepting authority**;

(3) List of all required permits and **approvals** (State, federal, county) and, for **applicants**, identification of which **approval** necessitates chapter 343, HRS, environmental review;

(3) The determination to prepare an **EIS**;

(4) Reasons supporting the determination to prepare an **EIS**;

(5) A description of the proposed **action** and its location;

(6) A description of the affected **environment** and include regional, location, and site maps;

(7) Possible alternatives to the proposed **action**;

(8) The **proposing agency's** or **applicant's** proposed scoping process, including when and where the **EIS public scoping meeting** or meetings will be held; and

(9) The name, title, contact information, including the email address, physical address, and phone number of an individual representative of the **proposing agency** or **applicant** who may be contacted for further information.

(b) In the preparation of a draft **EIS**, **proposing agencies** and **applicants** shall consult all appropriate **agencies**, [~~noted in section 11-200-10(10), and other~~] including the county agency responsible for implementing the county's general plan for each county in which the proposed **action** is to occur and agencies having jurisdiction or expertise, as well as those citizen groups, and concerned individuals [~~as noted in sections 11-200-9 and 11-200-9.1~~] that the proposing agency reasonably believes to be affected. To this end, **agencies** and **applicants** shall endeavor to develop a fully acceptable draft **EIS** prior to the time the draft **EIS** is filed with the **office**, through a full and complete consultation process, and shall not rely solely upon the review process to expose environmental concerns.

(c) Upon publication of [~~a preparation notice~~] an **EISPN** in the **periodic bulletin**, agencies, groups, or individuals shall have a period of thirty days from the initial [~~issue~~] publication date [~~in which to request to become a consulted party and~~] to make written comments regarding the environmental **effects** of the proposed **action**. [~~Upon written request by the consulted party and upon good cause shown,~~] With good cause, the **approving**

agency or **accepting authority** may extend the period for comments for a period not to exceed thirty additional days. Written comments and responses to the substantive comments shall be included in the draft EIS pursuant to section 11-200.1-24. For purposes of the scoping meeting, substantive comments shall be those pertaining to the scope of the EIS.

(d) [~~At the discretion of the proposing agency or an applicant, a~~] No fewer than one [~~An~~] **EIS public scoping meeting** [~~to receive comments on the final environmental assessment (for the EIS preparation notice determination) setting forth~~] addressing the scope of the draft **EIS** [~~may~~] shall be held on the island(s) most affected by the proposed action, within the public review and comment period in subsection [~~(b)~~] (c) [, ~~provided that the proposing agency or applicant shall treat oral and written comments received at such a meeting as indicated in subsection (d)~~]. The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded.

[~~(c)~~] [~~Upon receipt of the request, the proposing agency or applicant shall provide the consulted party with a copy of the environmental assessment or requested portions thereof and the environmental impact statement preparation notice Additionally, the proposing agency or applicant may provide any other information it deems necessary. The proposing agency or applicant may also contact other agencies, groups, or individuals which it feels may provide pertinent additional information.~~]

[~~(d)~~] [~~Any substantive comments received by the proposing agency or applicant pursuant to this section shall be responded to in writing and as appropriate, incorporated into the draft EIS by the proposing agency or applicant prior to the filing of the draft EIS with the approving agency or accepting authority. Letters submitted which contain no comments on the projects but only serve to acknowledge receipt of the document do not require a written response. Acknowledgement of receipt of these items must be included in the final environmental assessment or final statement.~~]

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS § 343-6)

§ 11-200.1-24 Content Requirements; Draft Environmental Impact Statement

(a) The draft **EIS**, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed **action** and shall discuss all [~~relevant and feasible~~] reasonably foreseeable consequences of the **action**. In order that the public can be fully informed and that the **accepting authority** can make a sound decision based upon the full range of responsible opinion on environmental effects, [~~a statement~~] an **EIS** shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) [~~In the developing the EIS preparers shall make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decision-makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement.~~] The scope of the [~~statement~~] draft **EIS** may vary with the scope of the proposed **action** and its **impact**, taking into consideration whether the **action** is a **project** or a **program**. Data and analyses in a [~~statement~~] draft **EIS** shall be commensurate with the importance of the **impact**, and less important material may be summarized, consolidated, or simply referenced. [~~Statements~~] A draft **EIS** shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the [~~statement~~] draft **EIS**, including cost benefit analyses and reports required under other legal authorities.

(c) The level of detail in a draft **EIS** may be more broad for **programs** or components of a **program** for which site-specific impacts are not discernible, and shall be more specific for components of the **program** for which site-specific, **project**-level impacts are discernible. A draft **EIS** for a **program** may, where necessary, omit evaluating issues that are not yet ready for decision at the [~~planning~~] **project** level. Analysis of the **program** may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) The draft **EIS** shall contain a summary sheet [~~which~~] that concisely discusses the following:

(1) Brief description of the **action**;
(2) Significant beneficial and adverse **impacts** (including **cumulative impacts** and **secondary impacts**);
(3) Proposed mitigation measures;
(4) Alternatives considered;
(5) Unresolved issues; ~~and~~
(6) Compatibility with land use plans and policies, and listing of permits or **approvals**[~~.~~]; and
(7) A list of relevant documents for **actions** considered in the analysis of the preparation of the **EIS**.

(e) The draft **EIS** shall contain a table of contents.

(f) The draft **EIS** shall contain a separate and distinct section that includes [~~a statement of~~] the purpose and need for the proposed **action**.

(g) The draft **EIS** shall contain a [~~project~~] description of the **action** [~~which~~] that shall include the following information, but need not supply extensive detail beyond that needed for evaluation and review of the environmental **impact**:

(1) A detailed map (preferably a United States Geological Survey topographic map, Flood Insurance Rate Maps, or Floodway Boundary Maps as applicable) and a related regional map;
(2) [~~Statement of objectives~~] Objectives of the proposed **action**;
(3) General description of the **action's** technical, economic, social, cultural, and environmental characteristics;
(4) Use of [~~public~~] state or county funds or lands for the **action**;
(5) Phasing and timing of the **action**;
(6) Summary technical data, diagrams, and other information necessary to [~~permit~~] enable an evaluation of potential environmental **impact** by commenting agencies and the public; and
(7) Historic perspective.

(h) The draft **EIS** shall describe in a separate and distinct section reasonable alternatives [~~which~~] that could attain the objectives of the **action** [~~regardless of cost, in sufficient detail to explain why they were rejected~~]. The section shall include a rigorous exploration and objective evaluation of the environmental **impacts** of all such alternative **actions**. Particular attention shall be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental **effects**, costs, and risks of the **action**. Examples of alternatives include:
(1) The alternative of no **action**;
(2) Alternatives requiring **actions** of a significantly different nature [~~which~~] that would provide similar benefits with different environmental **impacts**;
(3) Alternatives related to different designs or details of the proposed **actions** [~~which~~] that would present different environmental **impacts**;
(4) The alternative of postponing **action** pending further study; and,
(5) Alternative locations for the proposed [~~project~~] **action**.
In each case, the analysis shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed **action** and each reasonable alternative. For alternatives that were eliminated from detailed study, the section shall contain a brief discussion of the reasons for not studying those alternatives in detail. For any **agency actions**, the discussion of alternatives shall include, where relevant, those alternatives not within the existing authority of the **agency**.

(i) The draft **EIS** shall include a description of the environmental setting, including a description of the **environment** in the vicinity of the **action**, as it exists before commencement of the **action**, from both a local and regional perspective. Special emphasis shall be placed on environmental resources that are rare or unique to the region and the **action** site (including natural or human-made resources of historic, cultural, archaeological, or aesthetic significance); specific reference to related **actions**, public and private, existent or planned in the region shall also be included for purposes of examining the possible overall **cumulative impacts** of such **actions**. **Proposing agencies** and **applicants** shall also identify, where appropriate, population and growth characteristics of the affected area,[~~and~~] any population and growth assumptions used to

justify the proposed **action**, and [~~determine~~] any secondary population and growth **impacts** resulting from the proposed **action** and its alternatives. In any event, it is essential that the sources of data used to identify, qualify, or evaluate any and all environmental consequences be expressly noted in the draft **EIS**.

(j) The draft **EIS** shall include a [~~statement~~] description of the relationship of the proposed **action** to land use and natural or cultural resource plans, policies, and controls for the affected area. Discussion of how the proposed **action** may conform or conflict with objectives and specific terms of approved or proposed land use and resource plans, policies, and controls, if any, for the area affected shall be included. Where a conflict or inconsistency exists, the [~~statement~~] draft **EIS** shall describe the extent to which the **agency** or **applicant** has reconciled its proposed **action** with the plan, policy, or control, and the reasons why the **agency** or **applicant** has decided to proceed, notwithstanding the absence of full reconciliation.

(k) The draft **EIS** shall also contain a list of necessary **approvals**, required for the **action**, from governmental agencies, boards, or commissions or other similar groups having jurisdiction. The status of each identified **approval** shall also be described.

(l) The draft **EIS** shall include [~~a statement~~] an analysis of the probable **impact** of the proposed **action** on the **environment**, and **impacts** of the natural or human **environment** on the [~~project~~] **action**. [~~, which~~] This analysis shall include consideration of all phases of the **action** and consideration of all consequences on the **environment**[~~;~~], including **direct** and **indirect effects** [~~shall be included~~]. The interrelationships and cumulative environmental **impacts** of the proposed **action** and other related [~~projects~~] **actions** shall be discussed in the draft **EIS**. [~~It should be realized~~] The draft **EIS** should recognize that several **actions**, in particular those that involve the construction of public facilities or structures (e.g., highways, airports, sewer systems, water resource [~~projects~~] **actions**, etc.) may well stimulate or induce **secondary effects**. These **secondary effects** may be equally important as, or more important than, **primary effects**, and shall be thoroughly discussed to fully describe the probable **impact** of the proposed **action** on the **environment**. The population and growth **impacts** of an **action** shall be estimated if expected to be significant, and an evaluation shall be made of the **effects** of any possible change in population patterns or growth upon the resource base, including but not limited to land use, water, and public services, of the area in question. Also, if the proposed **action** constitutes a direct or indirect source of pollution as determined by any governmental **agency**, necessary data regarding these **impacts** shall be incorporated into the **EIS**. The significance of the **impacts** shall be discussed in terms of subsections [~~(j), (k), (l), and (m)~~] (m), (n), (o), and (p).

(m) The draft **EIS** shall include in a separate and distinct section a description of the relationship between local short-term uses of humanity's **environment** and the maintenance and enhancement of long-term productivity. The extent to which the proposed **action** involves trade-offs among short-term and long-term gains and losses

shall be discussed. The discussion shall include the extent to which the proposed **action** forecloses future options, narrows the range of beneficial uses of the **environment**, or poses long-term risks to health or safety. In this context, short-term and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed **action**.

(n) The draft **EIS** shall include in a separate and distinct section a description of all irreversible and irretrievable commitments of resources that would be involved in the proposed **action** should it be implemented. Identification of unavoidable **impacts** and the extent to which the **action** makes use of non-renewable resources during the phases of the **action**, or irreversibly curtails the range of potential uses of the **environment** shall also be included. The possibility of environmental accidents resulting from any phase of the **action** shall also be considered. [~~Agencies shall avoid construing the term "resources" to mean only the labor and materials devoted to an action. "Resources" also means the natural and cultural resources committed to loss or destruction by the action.~~]

(o) The draft **EIS** shall address all probable adverse environmental **effects** [~~which~~] that cannot be avoided. Any adverse **effects** such as water or air pollution, urban congestion, threats to public health, or other consequences adverse to environmental goals and guidelines established by environmental response laws, coastal zone management laws, pollution control and abatement laws, and environmental policy [~~such as that~~] including those found in chapters 128D (Environmental Response Law), 205A (Coastal Zone Management), 342B (Air Pollution Control), 342C (Ozone Layer Protection), 342D (Water Pollution), 342E (Nonpoint Source Pollution Management and Control), 342F (Noise Pollution), 342G (Integrated Solid Waste Management), 342H (Solid Waste Recycling), 342I (Special Wastes Recycling), 342J (Hazardous Waste, including Used Oil), 342L (Underground Storage Tanks),[~~342N,~~] 342P (Asbestos and Lead), and 344 (State Environmental Policy), HRS, [~~shall be included, including~~] and those **effects** discussed in other [~~actions~~] subsections of this [~~paragraph~~] section [~~which~~] that are adverse and unavoidable under the proposed **action** must be addressed in the draft **EIS**. Also, the rationale for proceeding with a proposed **action**, notwithstanding unavoidable **effects**, shall be clearly set forth in this section. The draft **EIS** shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental **effects** of the proposed **action**. The draft [~~statement~~] **EIS** shall also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed **action** that would avoid some or all of the adverse environmental **effects**.

(p) The draft **EIS** shall consider mitigation measures proposed to avoid, minimize, rectify, or reduce [~~impact~~] **impacts**, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein. Description of any mitigation measures included in the **action** plan to reduce significant, unavoidable, adverse **impacts** to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a

particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made. [~~Included~~] The draft **EIS** shall include, where possible [~~and appropriate~~], [~~should be~~] specific reference to the timing of each step proposed to be taken in [~~the~~] any mitigation process, what performance bonds, if any, may be posted, and what other provisions are proposed to assure that the mitigation measures will in fact be taken.

(q) The draft **EIS** shall include a separate and distinct section that summarizes unresolved issues and contains either a discussion of how such issues will be resolved prior to commencement of the **action**, or what overriding reasons there are for proceeding without resolving the [~~problems~~] issues.

(r) The draft **EIS** shall include a separate and distinct section that contains a list identifying all governmental agencies, other organizations and private individuals consulted in preparing the **statement**, and shall disclose the identity of the **persons**, firms, or **agency** preparing the **statement**, by contract or other authorization[~~, shall be disclosed~~].

(s) The draft **EIS** shall include a separate and distinct section that contains:

(1) [~~reproductions~~] Reproductions of all [~~substantive~~] written comments [~~and responses made~~] submitted during the [~~consultation process~~] consultation period required in section 11-200.1-23;

(2) Responses to all substantive written comments made during the consultation period required in section 11-200.1-23. **Proposing agencies** and **applicants** shall respond in the **draft EIS** to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(A) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commentor under that topic heading by issue. When grouping comments by topic and issue, the names of commentors who raised an issue under a topic heading shall be clearly identified in a distinctly labelled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable different topic areas with the commentor identified in each applicable topic area. All comments, except those described in subsection (3), must be appended in full to the final document; or

(B) By providing a separate and distinct response to each comment clearly identifying the commentor and the comment receiving a response being responded to for each comment letter submitted. All comments, except those described in (3), must either be included with the response, or appended in full to the final document;

(3) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(A) The response may be grouped under (2)(A) with the response to other comments under the same topic and issue with all commentors identified in the distinctly labelled section identifying commentors by topic; or

(B) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commentors who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document; and

(C) Provided that, if a commentor adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to subsection (2);

(4) A summary of **any EIS public scoping meetings**, including a written general summary of the oral comments made, and a representative sample of any handout related to the **action** provided at the **EIS public scoping meeting(s);**

(5) A list of those **persons** or **agencies** who were consulted and had no comment [~~shall be included in the draft **EIS**~~] in a manner indicating that no comment was provided; and

(6) A representative sample of the **agency** consultation request letter.

(t) An **addendum** [~~document~~] to a draft ~~environmental impact statement~~ **EIS** shall reference the original draft [~~environmental impact statement~~] **EIS** to which it attaches [~~to~~] and comply with all applicable filing, public review, and comment requirements set forth in subchapter [~~7~~] 10.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-2, 343-5, 343-6)

§ 11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements

(a) Public review shall not substitute for early and open discussion with interested **persons** and **agencies**[~~,~~] concerning the environmental **impacts** of a proposed **action**. Review of the draft **EIS**, shall serve to provide the public and other agencies an opportunity to discover the extent to which a **proposing agency** or **applicant** has examined environmental concerns and available alternatives.

(b) The period for public review and for submitting written comments shall commence [~~as of~~] from the date that notice of availability of the draft **EIS** is initially issued in the **periodic bulletin** and shall continue for a period of forty-five days, unless mandated otherwise by statute. Written comments to the [~~approving agency or~~] **accepting authority**[~~, whichever is applicable,~~] with a copy of the comments to the [~~applicant or~~] **proposing agency** or **applicant**, shall be received by or postmarked to the **approving agency** or **accepting authority**, within [~~said~~] the forty-five-day comment period. Any comments outside of the forty-five day comment period need not be [~~considered or~~] responded to nor considered.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements

(a) In accordance with the content requirements of section 11-200.1-27, [~~The~~] the **proposing agency** or **applicant** shall respond [~~in writing~~] within the **final EIS** to [~~the~~] all substantive written comments received by or postmarked to the approving agency during the forty-five-day review period. [~~and incorporate the comments and responses in the final EIS~~].[~~The response to comments shall include:~~] In deciding whether a written comment is substantive, the **proposing agency** or **applicant** shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EIS, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the **proposing agency** or **applicant** as non-substantive and to which no response was provided shall be clearly indicated.

(b) **Proposing agencies** and **applicants** shall respond in the final EIS to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commentor under that topic heading by issue. When grouping comments by topic and issue, the names of commentors who raised an issue under a topic heading shall be clearly identified in a distinctly labelled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed

throughout the applicable topic areas with the commentor identified in each applicable topic area. All comments, except those described in subsection (c), must be appended in full to the final document; or

(2) By providing a separate and distinct response to each comment clearly identifying the commentor and the comment receiving a response for each comment letter submitted. All comments, except those described in (c), must either be included with the response or appended in full to the final document.

(c) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under (b)(i) with the response to other comments under the same topic and issue with all commentors identified in the distinctly labelled section identifying commentors by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commentors who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document; and

(3) Provided that if a commentor adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to subsection (d).

(d) In responding to substantive written comments, **proposing agencies** and **applicants** [~~Responses~~] shall endeavor to resolve conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. [~~Response letters reproduced in the text of the final EIS~~] The response shall indicate [~~verbatim~~] changes that have been made to the text of the draft **EIS**. The response shall describe the disposition of significant environmental issues raised. [(~~e.g.,~~] For example, the response may point to revisions to the proposed [~~project~~] **action** to mitigate anticipated **impacts** or objections raised in the comment[~~, etc.~~].). In particular, the issues raised when the [~~applicant's or~~] **proposing agency's** or **applicant's** position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

§ 11-200.1-27 Content Requirements; Final Environmental Impact Statement

(a) The final **EIS**, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed **action** and shall discuss all [~~relevant and feasible~~] reasonably foreseeable consequences of the **action**. In order that the public can be fully informed and that the **accepting authority** can make a sound decision based upon the full range of responsible opinion on environmental effects, [~~a statement~~] an **EIS** shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) The final **EIS** shall consist of:

(1) The draft **EIS** prepared in compliance with this subchapter, as revised to incorporate substantive comments received during the [~~consultation and~~] review processes in conformity with section 11-200.1-26, including reproduction of all comments and responses to substantive written comments;

[~~(2)~~] [~~Reproductions of all letters received containing substantive questions, comments, or recommendations and, as applicable, summaries of any scoping meetings held~~;]

[~~(3)~~](2) A list of **persons**, organizations, and public **agencies** commenting on the draft **EIS**;

(3) A list of those **persons** or **agencies** who were consulted with in preparing the final **EIS** and had no comment shall be included in a manner indicating that no comment was provided;

(4) [~~The responses of the applicant or **proposing agency** to each substantive question, comment, or recommendation received in the review and consultation processes,~~] A written general summary of oral comments made at any public meetings; and

(5) The text of the final **EIS** [~~which shall be~~] written in a format [~~which~~] that allows the reader to easily distinguish changes made to the text of the draft **EIS**.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-2, 343-5, 343-6)

§ 11-200.1-28 Acceptability

(a) Acceptability of [~~a statement~~] a final **EIS** shall be evaluated on the basis of whether the [~~statement~~] final **EIS**, in its completed form, represents an informational instrument [~~which~~] that fulfills the [~~definition of an EIS~~] intent and provisions of chapter 343, HRS, and adequately discloses and describes all identifiable environmental **impacts** and satisfactorily responds to review comments.

(b) A [~~statement~~] final **EIS** shall be deemed to be an acceptable document by the **accepting authority** or **approving agency** only if all of the following criteria are satisfied:

(1) The procedures for assessment, consultation process, review, and the preparation and submission of the [~~statement~~] **EIS**, from proposal of the **action** to publication of the final **EIS**, have all been completed satisfactorily as specified in this chapter;

(2) The content requirements described in this chapter have been satisfied; and

(3) Comments submitted during the review process have received responses satisfactory to the **accepting authority**, or **approving agency**, including properly identifying comments as substantive and responding in a way commensurate to the comment, and have been appropriately incorporated [~~in~~] into the [~~statement~~] final **EIS**.

(c) For **actions** proposed by **agencies**, the **proposing agency** may request the **office** to make a recommendation regarding the acceptability or non-acceptability of the **EIS**. If the **office** decides to make a recommendation, it shall submit the recommendation to the **accepting authority** and **proposing agency**. In all cases involving state funds or lands, the governor or [~~an~~] the governor's authorized representative shall have final authority to accept the **EIS**. In cases involving only county funds or lands, the mayor of the respective county or [~~an~~] the mayor's authorized representative shall have final authority to accept the **EIS**. The **accepting authority** shall take prompt measures to determine the acceptability or non-acceptability of the **proposing agency's** [~~statement~~] **EIS**. In the event that the **action** involves [~~both~~] state and county lands [~~or~~], state or county funds, or both state and county lands and state and county funds, the governor or [~~an~~] the governor's authorized representative shall have final authority to accept the **EIS**.

(d) Upon **acceptance** or non-acceptance of the **EIS**, a notice shall be filed by the appropriate **accepting authority** with both the **proposing agency** and the **office**. For any non-accepted **EIS**, the notice shall contain specific findings and reasons for non-acceptance. The **office** shall publish notice of the determination of **acceptance** or non-acceptance in the **periodic bulletin** in accordance with [~~section 11-200-3~~] subchapter 4. **Acceptance** of a required **statement** shall be a condition precedent to the use of state or county lands or funds in implementing the proposed **action**.

(e) For **actions** proposed by **applicants** requiring **approval** from an **agency**, the **applicant** or **accepting authority**, which is the **approving agency**, may request the **office** to make a recommendation regarding the acceptability or non-acceptability of the [~~statement~~] **EIS**.

If the **office** decides to make a recommendation, it shall submit the recommendation to the **applicant** and the **approving agency** within the [~~thirty-day~~] period requiring an **approving agency** to determine the acceptability of the final **EIS** [~~and described in section 343-5(c), HRS~~]. Upon **acceptance** or non-acceptance by the **approving agency**, the **agency** shall notify the **applicant** of its determination, and provide specific findings and reasons. The **agency** shall also provide a copy of this determination to the **office** for publication [~~of a notice~~] in the **periodic bulletin**. **Acceptance** of the required **EIS** shall be a condition precedent to **approval** of the request and commencement of the proposed **action**. [~~An approving agency shall take prompt measures to determine the acceptability or non-acceptability of the applicant's statement.~~] The **agency** shall notify the **applicant** and the **office** of the **acceptance** or non-acceptance of the final **EIS** within thirty days of the final **EIS** submission to the **agency** [~~,~~]; provided that the thirty-day period may, at the request of the **applicant**, be extended [~~at the request of the applicant~~] for a period not to exceed fifteen days. The request shall be made to the **accepting authority** in writing. Upon receipt of an **applicant's** written request for an extension of the thirty-day **acceptance** period, the **accepting authority** shall notify the **office** and **applicant** in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the **applicant's** request. An extension of the thirty-day **acceptance** period shall not be [~~allowed~~] granted merely for the convenience of the **accepting authority**. In the event that the **agency** fails to make a determination of **acceptance** or non-acceptance [~~for~~] of the [~~statement~~] **EIS** within thirty days of the receipt of the final **EIS**, then the **statement** shall be deemed accepted.

(f) A non-accepted **EIS** may be revised by a **proposing agency** or **applicant**. The revision shall take the form of a revised draft **EIS** [~~document~~] which shall fully address the inadequacies of the non-accepted **EIS** and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, **acceptance** or non-acceptance, and notification and publication of acceptability shall be the same as the requirements prescribed by [~~sections 11-200-20, 11-200-21, 11-200-22, and 11-200-23~~] subchapters 4 and 10 for an **EIS** submitted for **acceptance**. In addition, the [~~revised draft EIS~~] subsequent revised final **EIS** shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

(g) A **proposing agency** or **applicant** may withdraw an **EIS** by simultaneously sending a [~~letter~~] written notification to the **office** and to the **accepting authority** informing the **office** of the **proposing agency's** or **applicant's** withdrawal. Subsequent resubmittal of the **EIS** shall meet all requirements for filing, distribution, publication, review, **acceptance**, and notification as a [~~new~~] draft **EIS**.

[Eff] (Auth: HRS § 343-5, 343-6) (Imp: HRS § 343-5, 343-6)

§ 11-200.1-29 Appeals to the Council

An **applicant**, within sixty days after a non-acceptance determination by the **approving agency** under section 11-200.1-28 of [~~a statement~~] a final **EIS** [~~by an agency~~], may appeal the non-acceptance to the **council**, which within thirty days of receipt of the appeal, shall notify the **applicant** appealing of its determination to affirm the **approving agency's** non-acceptance or to reverse it. The **council** chairperson shall include the appeal on the agenda of the next **council** meeting following receipt of the appeal. In any affirmation or reversal of an appealed non-acceptance, the **council** shall provide the **applicant** and the **agency** with specific findings and reasons for its determination. The **agency** shall abide by the **council's** decision.

[Eff] (Auth: HRS § 343-5, 343-6) (Imp: HRS § 343-5, 343-6)

§ 11-200.1-30 Supplemental Environmental Impact Statements

(a) [~~A statement~~] An **EIS** that is accepted with respect to a particular **action** is usually qualified by the size, scope, location, intensity, use, and timing of the **action**, among other things. [~~A statement~~] An **EIS** that is accepted with respect to a particular **action** shall satisfy the requirements of this chapter and no [~~other~~] **supplemental** [~~statement~~] **EIS** for that proposed **action** shall be required, to the extent that the **action** has not changed substantively in size, scope, intensity, use, location or timing, among other things. If there is any change in any of these characteristics which may have a **significant effect**, the original **statement** that was changed shall no longer be valid because an essentially different **action** would be under consideration and a **supplemental** [~~statement~~] **EIS** shall be prepared and reviewed as provided by this chapter. As long as there is no change in a proposed **action** resulting in individual or **cumulative impacts** not originally disclosed, the [~~statement~~] **EIS** associated with that **action** shall be deemed to comply with this chapter.

(b) The **accepting authority** or **approving agency** in coordination with the original **accepting authority** shall be responsible for determining whether a **supplemental** [~~statement~~] **EIS** is required. This determination will be submitted to the **office** for publication in the **periodic bulletin**. **Proposing agencies** or **applicants** shall prepare for public review **supplemental** [~~statements~~] **EISs** whenever the proposed **action** for which [~~a~~] an [~~statement~~] **EIS** was accepted has been modified to the extent that new or different environmental **impacts** are anticipated. A **supplemental** [~~statement~~] **EIS** shall be warranted when the scope of an **action** has been substantially increased, when the intensity of environmental **impacts** will be increased, when the mitigating measures originally planned [~~are~~] will not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental **impacts** not previously dealt with.

(c) The contents of the **supplemental** [~~statement~~] **EIS** shall be the same as required by this chapter for the **EIS** and may incorporate by reference unchanged material from the same;

however, in addition, it shall fully document the proposed changes from the original **EIS**, including changes in ambient conditions or available information that have a bearing on a proposed **action** or its **impacts**, the positive and negative aspects of these changes, and shall comply with the content requirements of ~~[section 11-200-16]~~ subchapter 10 as they relate to the changes.

(d) The requirements of the thirty-day consultation, ~~[filing]~~ public notice filing, distribution, the forty-five-day public review, comments and response, and **acceptance** procedures, shall be the same for the **supplemental** ~~[statement]~~ **EIS** as is prescribed by this chapter for an **EIS**.

[Eff] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-5, 343-6)

Subchapter 11 National Environmental Policy Act

§ 11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS

When [~~the situation occurs where~~] a certain **action** will be subject both to the **National Environmental Policy Act** of 1969 (Public Law 91-190, as amended by Public Law 94-52 and Public Law 94-83; 42 U.S.C. [~~§~~] sections 4321-4347) and chapter 343, HRS, the following shall occur:

(1) The **applicant** or **agency**, upon discovery of its proposed **action** being subject to both chapter 343, HRS, and the [~~National Environmental Policy Act~~] **NEPA**, shall notify the responsible federal [~~agency~~] entity, the **office**, and any **agency** with a definite interest in the **action** (as prescribed by chapter 343, HRS) [~~of the situation~~].

(2) When a federal entity determines that the proposed **action** is exempt from review under the **NEPA**, this determination does not automatically constitute an exemption for the purposes of this chapter. In such cases, state and county agencies remain responsible for compliance with this chapter. However, the federal exemption may be considered in the state or county **agency** determination.

(3) When a federal entity issues a **FONSI** and concludes that an **EIS** is not required under the **NEPA**, this determination does not automatically constitute compliance with this chapter. In such cases, state and county agencies remain responsible for compliance with this chapter. However, the federal **FONSI** may be considered in the state or county **agency** determination.

(4) The [~~National Environmental Policy Act~~] **NEPA** requires that [~~draft statements~~] **EISs** be prepared by the responsible federal [~~agency~~] entity. In the case of **actions** for which an **EIS** pursuant to the **NEPA** has been prepared by the responsible federal entity, the draft and final federal **EIS** may be submitted to comply with this chapter, so long as the federal **EIS** satisfies the **EIS** content requirements of this chapter and is not found to be inadequate under the **NEPA**: by a court; by the Council on Environmental Quality (or is at issue in pre-decision referral to Council on Environmental Quality) under the **NEPA** regulations; or by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, 41 U.S.C. 1857.

(5) When the responsibility of preparing an **EIS** is delegated to a state or county **agency**, this chapter shall apply in addition to federal requirements under the [~~National Environmental Policy Act~~] **NEPA**. The **office** and state or county

agencies shall cooperate with federal [~~agencies~~] entities to the fullest extent possible to reduce duplication between federal and state requirements. This cooperation, to the fullest extent possible, shall include joint [~~environmental impact statements~~] **EISs** with concurrent public review and processing at both levels of government. Where federal law has [~~environmental impact statement~~] **EIS** requirements in addition to but not in conflict with this chapter, the **office** and **agencies** shall cooperate in fulfilling the requirements so that one document shall comply with all applicable laws.

(6) Where the **NEPA** process requires earlier or more stringent public review,[~~and processing~~] filing, and distribution than under this chapter, then that **NEPA** process shall satisfy this chapter so that duplicative consultation or review do not occur. The responsible federal entity's **supplemental EIS** requirements shall apply in these cases in place of this chapter's **supplemental EIS** requirements.

(7) In all **actions** where the use of state land or funds is proposed, the final [~~statement~~] **EIS** shall be submitted to the governor or an authorized representative. In all **actions** when the use of county land or funds is proposed and no use of state land or funds is proposed, the final [~~statement~~] **EIS** shall be submitted to the mayor, or an authorized representative. The final [~~statement~~] **EIS** in these instances shall first be accepted by the governor or mayor (or an authorized representative), prior to the submission of the same to the [~~Environmental Protection Agency or~~] responsible federal [~~agency~~] entity.

(8) Any **acceptance** obtained pursuant to [~~paragraphs (1) to (3)~~] this section shall satisfy chapter 343, HRS, and no other [~~statement~~] **EIS** for the proposed **action** shall be required.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-5, 343-6)

Subchapter 12 Retroactivity and Severability

§ 11-200.1-32 Retroactivity

(a) The rules shall apply immediately upon taking effect, except as otherwise provided below.

(b) Hawaii Administrative Rules (HAR) chapter 11-200 shall continue to apply to environmental review of **agency** and **applicant actions** which began prior to the adoption of HAR chapter 11-200.1, provided that:

(1) For **EAs**, if the **draft EA** was published by the **office** prior to the adoption of HAR chapter 11-200.1 and has not received a determination within a period of five years from the implementation of HAR chapter 11-200.1, then the **proposing agency** or **applicant** must comply with the requirements of HAR chapter 11-200.1. All subsequent environmental review, including an **EISPN** must comply with HAR chapter 11-200.1.

(2) For **EISs**, if the **EISPN** was published by the **office** prior to the adoption of HAR chapter 11-200.1 and the final **EIS** has not been accepted within five years from the implementation of HAR chapter 11-200.1, then the **proposing agency** or **applicant** must comply with the requirements of HAR chapter 11-200.1.

(3) A judicial proceeding regarding the proposed **action** shall not count towards the five-year time period.

(c) Exemption lists that have received concurrence under HAR chapter 11-200 may be used for a period of seven years after the adoption of HAR chapter 11-200.1, during which time the agency must revise its list and obtain concurrence from the council in conformance with HAR chapter 11-200.1.

[Eff] (Auth: HRS § 343-6) (Imp: HRS § 343-6)

§ 11-200.1-33 Severability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable.

[Eff] (Auth: HRS §§ 343-5, 343-6) (Imp: HRS §§ 343-6, 343-8)

Note

Historical Note: Chapter 11-200, HAR, is based substantially on the **Environmental Impact Statement** Regulations of the Environmental Quality Commission. [Eff 6/2/75; R 12/6/85] Amendments to and compilation of chapter 200, title 11, Hawaii Administrative Rules, and the repeal of § 11-200-11, Hawaii Administrative Rules were adopted on March 27, 1996 following public hearings held on November 14, 1995, November 16, 1995, November 17, 1995, November 20, 1995 and November 21, 1995 after public notice was given in the Honolulu Advertiser, Honolulu Star-Bulletin, Maui News, The Garden Island, West Hawaii Today, Hawaii Tribune-Herald and Molokai Dispatch on October 12, 1995.

Amendment in 2007 to section 11-200-8 to include an exemption class for affordable housing. It has not been compiled.

This note will be updated pending adoption of the Proposed Rules.

Version 0.4a Rationale

Proposed Revisions to Hawaii Administrative Rules
Title 11 Department of Health Chapter 200
Environmental Impact Statement Rules

February 28, 2018 for March 6, 2018 Environmental Council Meeting

Prepared with the assistance of the Office of Environmental Quality Control (OEQC).

Table of Contents

I. Introduction

A. Historical Background on the Rules

The current Hawaii Administrative Rules (HAR) Title 11, Chapter 200 rules were promulgated and compiled in 1996 (the "1996 Rules"). An amendment to add an exemption class for the acquisition of land for affordable housing was added in 2007, although it has not been compiled with the rest of the rules.

B. Historical Background on the Rules Update (2012-2014)

In 2011, the public formally petitioned the Environmental Council (the "Council") to update chapter 11-200, HAR. The Council initiated consultation with state and county agencies for recommendations on issues to address and language revisions. In 2012, the Council released a preliminary draft of revisions to chapter 11-200, HAR (referred to as "Version 1") that incorporated proposed revisions from previous Council efforts and issues raised by agencies and the public. The Council also distributed an Excel file called a "comment matrix" to receive feedback on Version 1. Agencies and the public (including individuals, applicants, consultants, and nonprofit organizations) submitted comments via the comment matrix. The Council organized the feedback into a master comment matrix and tasked the Rules Committee with addressing the feedback and making revisions to the rules language. The Rules Committee met regularly over the course of 2012-2014 to revise Version 1. However, due to various administrative challenges, including maintaining quorum, the Council was not able to complete its work.

C. Current Efforts (2016-present)

In February 2016, following Governor Ige's appointment of seven members to the Council, the Council resumed moving forward on revisions to chapter 11-200, HAR. As part of this effort, the Council wanted to recognize the extensive outreach and drafting that the 2012 Council conducted. Multiple discussion drafts, as described below, were made available to agencies, interested stakeholders, and the general public throughout the pre-consultation period and comments were sought at every stage of the process.

i. Drafting Process; Public Input Process, Pre- and Post- Permitted Interaction Group

At the February 23, 2016 Council meeting, the Council established a Permitted Interaction Group (PIG) to draft revisions to chapter 11-200, HAR. The PIG was tasked with investigating and considering specific language for inclusion in the revisions to chapter 11-200, HAR. The PIG's work was not for the purpose of decision-making and was limited to work that would be proposed to the Rules Committee for its consideration and decision-making to make recommendations to the Council.

Permitted Interaction Group Principles

The PIG drafted language within the following principles established by the Council:

- Be consistent with the intent and language of chapter 343, Hawaii Revised Statutes (HRS).
- Align statutes, case law, and practice wherever feasible.
- Increase clarity of the process and legal requirements.
- Align with the National Environmental Policy Act (NEPA) where applicable.

Permitted Interaction Group Process

Following the Council's establishment of the PIG, the PIG met monthly or biweekly to review the previous Council's work. The PIG reviewed the 2012 draft rules language, the 2012 comment matrix produced by the prior Rules Committee, and the responses to the public comments that the Rules Committee developed over 2012-2014. The PIG categorized the comment matrix into two groups: (1) comments resolved and direction provided/draft language, and (2) outstanding comments still needing policy direction or draft language. For the former group, the PIG integrated the resolved language into a draft called Version 1.1.

For the second group, the PIG developed language in consultation with the Rules Committee and the Office of Environmental Quality Control (OEQC). Further, the PIG developed language in response to requests from the Rules Committee and OEQC for issues that arose since 2012. At the July 11, 2017 meeting, the Council agreed that the PIG could present its report directly to the Council at its meeting on July 27, 2017.

ii. Version 0.1

On July 27, 2017, the PIG presented its report and submitted Version 0.1 of the draft revisions to the 1996 Rules to the Council for its consideration in rulemaking to update the 1996 Rules. (Refer to Version 0.1 for additional background information.) The Council approved Version 0.1 at its meeting on August 8, 2017 as the baseline document for further edits and to serve as a foundation for early consulting with affected agencies, interested stakeholders, and the general public. The Council's approval of Version 0.1 concluded the work of the PIG.

The PIG recommended the following revisions to the Council as a baseline starting point for discussion going forward. Among the themes addressed were:

- "Housekeeping" - revisions that modernize grammar and clarify language.
- Clarifying roles and responsibilities at various stages of environmental review.
- Modernizing submittals and deadlines to recognize electronic communication.
- Setting clearer thresholds for exemptions and the role of exemption lists.
- Clarifying when and how to proceed directly to preparing an environmental impact statement (EIS) instead of an environmental assessment (EA).
- Clarifying when and how to do programmatic EISs and supplemental EISs.
- Responding to comments in EAs and EISs.
- Conducting joint federal-state environmental review.

In August 2017, OEQC and the Council began working with a drafting team from the William S. Richardson School of Law to continue drafting language for the revisions to the 1996 Rules. OEQC also set up an online comment platform using CiviComment, allowing for an additional means of commenting on the rules update, as well as a webpage on the OEQC website tracking the rules update schedule, Council meetings on the rules update, and comment deadlines. See http://health.hawaii.gov/oeqc/rules-update/. Those who signed up with OEQC were sent notifications via email regarding changes to the rules update schedule and comment deadlines posted to the rules update webpage.

iii. Version 0.2

Version 0.2 was introduced to the Council on September 5, 2017 as a discussion document that incorporated public and agency comments, as well as comments received from Council members. The Council closed comments on Version 0.2 on October 20, 2017.

Version 0.2 proposed changes affecting almost every section of the 1996 Rules. In addition to the numerous "housekeeping" revisions, the following major topics were addressed in Version 0.2:

- Clarifying definitions and aligning them with statutory definitions.
- Explicitly incorporating cultural practices in accordance with Act 50 (2000).
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*).
- Aligning the "triggers" requiring environmental review for agencies and applicants with statutory language.
- Clarifying the environmental review process emergencies and emergency actions.
- Clarifying roles and responsibilities of proposing agencies and approving agencies.
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review.
- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication.
- Revising the comment and response requirements and procedures for EAs and EISs.
- Clarifying style standards for EAs and EISs, including when an action is a program or a project.
- Clarifying significance criteria thresholds for determining whether to issue an exemption notice, Finding of No Significant Impact (FONSI), or EIS Preparation Notice (EISPN).
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA.
- Revising requirements for conducting scoping meetings following an EISPN.
- Clarifying content requirements for draft and final EISs.
- Revising procedures for appealing non-acceptance to the Council.
- Revising procedures for joint federal-state environmental review.
- Revising the requirements and procedures for determining when to do a Supplemental EIS, including aligning the requirements with statute and case law.
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the Proposed Rules (as defined below) would be promulgated.

iv. Version 0.3

Version 0.3 made multiple changes to Version 0.2 based on agency and public comments and Council input. Most notably, Version 0.3 reorganized, added, and deleted sections of the 1996 Rules to create Chapter 11-200A, HAR. The purpose of the reorganization was to ensure that the structure of the rules more closely followed the sequence of steps in the environmental review process.

Because Version 0.3 reorganized the subchapters and sections, confusion could arise when referencing subchapters and sections. To ease discussion of differences between the 1996 Rules and changes proposed in Version 0.3, Version 0.3 called the proposed rules "HAR Chapter 11-200A" and appended an "A" to the end of each subchapter and section number. A reference to a section number without using "A" was understood to be a reference to the 1996 Rules.

For example, section 3 in the 1996 Rules applies to the periodic bulletin, whereas section 3A in Version 0.3 was about the computation of time. What was Section 3 in the 1996 Rules had been moved to subchapter 4A Filing and Publication in the Periodic Bulletin and the content that was in section 3 was divided into three sections: 4A, 5A, and 6A.

Version 0.3 did not carry forward all proposed additions and deletions considered in Versions 0.1 and 0.2. Rather, Version 0.3 only showed changes with respect to the existing 1996 Rules and 2007 amendment for consideration in that working draft.

Version 0.3 reorganized the 1996 Rules almost entirely and proposed changes affecting almost every section of the 1996 Rules. In addition to the reorganization and numerous "housekeeping" revisions, the following major topics were addressed in Version 0.3:

- Clarifying definitions and aligning them with statutory definitions.
- Incorporating cultural practices in accordance with Act 50 (2000).
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*), including for unusual situations involving publishing again.
- Aligning the "triggers" requiring environmental review for agencies and applicants with statutory language.
- Clarifying the environmental review process as it applies to states of emergency and emergency actions.
- Clarifying roles and responsibilities of proposing agencies and approving agencies in the environmental review process.
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review.
- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication.
- Revising the comment and response requirements and procedures for EAs and EISs.
- Clarifying style standards for EAs and EISs, including when an action is a program or a project.

- Clarifying significance criteria thresholds for determining whether to issue an exemption notice, FONSI, or EISPN.
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA.
- Revising requirements for conducting scoping meetings following an EISPN.
- Clarifying content requirements for draft and final EISs.
- Revising comment and response requirements.
- Clarifying acceptance criteria.
- Clarifying procedures for appealing non-acceptance to the Council.
- Revising procedures for joint federal-state environmental review.
- Consolidating into one section the requirements and procedures for determining when to do a Supplemental EIS, including aligning the requirements with statute and case law.
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the rules would be enacted.

v. Version 0.4

Version 0.4 was released to the public and the Council on February 20, 2018 for discussion at the Council's February 20, 2018 meeting. Version 0.4 made multiple changes to Version 0.3 based on agency and public comments and Council input. Most notably, Version 0.4 introduced the following new topics:

- Providing a new process, referred to as the "green sheet" for agencies to examine: (1) whether a proposed activity is covered by an existing environmental review document; (2) the level of review necessary for proposed action, and (3) whether a proposed action requires additional review.
- Exemptions - requiring agency exemption lists to be categorized into two parts: (1) allowing for agencies to designate certain activities as *de minimis* and therefore not requiring exemption documentation; and (2) those activities requiring exemption documentation and publication in the periodic bulletin.
- Explicitly requiring consideration of the impacts of sea level rise and greenhouse gases as significance criteria.
- Requiring submission to OEQC of an audio recording of oral comments received at the public scoping meeting(s) on an EIS.

The Council considered Version 0.4 for decision-making at its March 6, 2018 meeting and voted [INSERT VOTE COUNT] to approve Version 0.4 [, AS AMENDED] (hereinafter, the "Proposed Rules"). At this meeting, the Council also voted to approve the Public Notice of Rulemaking, this Rules Rationale, and the Changes from the 1996 Rules documents (the Proposed Rules, Public Notice of Rulemaking, Rules Rationale, and the Changes from the 1996 Rules documents are collectively referred to as the "Rules Package") and voted to recommend that Governor Ige approve the Rules Package for formal public hearing and to send the Rules Package to the Small Business Regulatory Review Board (SBRRB) for review. On March ___, 2018, the SBRRB reviewed the Rules Package and voted to recommend to that Governor Ige set the Rules Package for public hearing.

On _____, 2018, Governor Ige approved the Rules Package. On _____, 2018, the Director of the Department of Health published the notice of public hearing for the Proposed Rules.

D. Process Moving Forward

OEQC and the Council will take comments on the Proposed Rules during the 30-day comment period, which begins on _____, 2018 and ends on _____, 2018. During the 30-day comment period, OEQC will hold public hearings on the Proposed Rules on the following dates and times in the following locations:

- City & County of Honolulu: TBD
- Kaua'i County: TBD
- Maui County: TBD
- Hawaii County: TBD

In addition to comments received at the above listed public hearings, CiviComment will continue to be available for use during the 30-day public comment period.

At the close of the 30-day comment period, the Rules Committee will review all comments and revise the Proposed Rules, as needed. All revisions to the Proposed Rules will be presented to the Council for decision-making. If the Council approves the revisions and no substantive changes are made, the Department of Health will promulgate the final rules as chapter 11-200.1, HAR. (If substantive changes are made, additional public hearings may be required on the Proposed Rules.)

II. Global Discussion Points

A. Reorganization

The overall reorganization of the 1996 Rules is proposed to make the rules clearer and to reflect the sequence of going through environmental review.

The 1996 Rules repeat or cross-reference many steps in the process. For example, the 1996 Rules have Section 3 on publishing in *The Environmental Notice*, but has additional publication requirements in the following sections: 9, 15, and 20. The Proposed Rules consolidate directions on how to publish into one section.

The order of the sections in the 1996 Rules do not reflect the order of going through the environmental review process. For example, the significance criteria are found in Section 12, following the draft EA section, yet the significance criteria are part of the initial decision to prepare an exemption, EA, or EIS. The Proposed Rules move the significance criteria to earlier in the order prior to deciding the appropriate level of review.

Similarly, the 1996 Rules group the EA and EIS steps by content and then process. For example, the 1996 Rules organize the EIS sections in the following order: consultation prior to a draft EIS, general content requirements for EISs, content for a draft EIS, then content for a final EIS, followed by style, filing, distribution, review, and acceptability. The Proposed Rules reorganize these sections into the flow of the process: consultation prior to preparing a draft EIS, content requirements for a draft EIS, public review of a draft EIS, comment responses for a draft EIS, content requirements for a final EIS, and the acceptability of a final EIS. The Proposed Rules consolidate filing and distribution requirements into the subchapter on filing and publishing in the periodic bulletin.

While versions 0.1 and 0.2 retained the 1996 Rules sequence of sections but added some new sections, Version 0.3 introduced a complete reorganization of the sections. To make discussion of the rules in Version 0.3 easier, the organized rules were referred to as Chapter 11-200A and had "A" appended to the end of each section number.

For Version 0.4, the Proposed Rules are referred to as "Chapter 11-200.1" because the 1996 Rules would be repealed and in their place Chapter 11-200.1 would be promulgated.

The following table shows where sections from the 1996 Rules appear in the Proposed Rules for Version 0.4. In general, almost every section includes new and moved 1996 language. The 1996 Rules sections cited below are the primary sources for the corresponding Proposed Rules sections. "New" indicates that the section is almost entirely new or incorporates important points from a 1996 Rules section.

Note the sequence of sections have been modified from the order in Version 0.3.

Version 0.4 Chapter 11-200.1, HAR	1996 Section
Subchapter 1 Purpose	
§11-200.1-1 Purpose	1, 14, 19
Subchapter 2 Definitions	
§11-200.1-2 Definitions	2
Subchapter 3 Computation of Time	
§11-200.1-3 Computation of Time (new)	New
Subchapter 4 Filing and Publication in the Periodic Bulletin	
§11-200.1-4 Periodic Bulletin	3, 11.2, 21, 27
§11-200.1-5 Filing Requirements for Publication and Withdrawal	3, 9, 10, 11.1, 11.2, 20, 23
§11-200.1-6 Republication of Notices, Documents, and Determinations	New
Subchapter 5 Responsibilities	
§11-200.1-7 Identification of Approving Agency and Accepting Authority	3, 4, 23
Subchapter 6 Applicability	
§11-200.1-8 Applicability of Chapter 343, HRS to Agency Actions	New, 5, 8
§11-200.1-9 Applicability of Chapter 343, HRS to Applicant Actions	New, 5, 6
§11-200.1-10 Multiple or Phased Actions	7
§11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities	New
Subchapter 7 Determination of Significance	
§11-200.1-12 Consideration of Previous Determinations and Accepted Statements	13
§11-200.1-13 Significance Criteria	12
§11-200.1-14 Determination of Level of Environmental Review	New, 5, 8
Subchapter 8 Exempt Actions, List, and Notice Requirements	
§11-200.1-15 General Types of Actions Eligible for Exemption	8

Version 0.4 Chapter 11-200.1, HAR	1996 Section
§11-200.1-16 Exemption Lists	8
§11-200.1-17 Exemption Notices	8
Subchapter 9 Preparation of Environmental Assessments	
§11-200.1-18 Preparation and Contents of a Draft Environmental Assessment	9, 10, 19
§11-200.1-19 Notice of Determination for Draft Environmental Assessments	11.1
§11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments	9.1
§11-200.1-21 Contents of a Final Environmental Assessment	10
§11-200.1-22 Notice of Determination for Final Environmental Assessments	9, 11.2
Subchapter 10 Preparation of Environmental Impact Statements	
§11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement	9, 15
§11-200.1-24 Content Requirements; Draft Environmental Impact Statement	16, 17, 19, 22
§11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements	22
§11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements	22
§11-200.1-27 Content Requirements; Final Environmental Impact Statement	16, 17, 18
§11-200.1-28 Acceptability	23
§11-200.1-29 Appeals to the Council	24
§11-200.1-30 Supplemental Environmental Impact Statements	26, 27, 28, 29
Subchapter 12 National Environmental Policy Act	
§11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS	25, New
Subchapter 13 Retroactivity and Severability	
§11-200.1-32 Retroactivity	New
§11-200.1-33 Severability	30

B. General Changes

The Proposed Rules make numerous changes to the rules that enhance readability. In general, changes to grammar and spelling, breaking long paragraphs into lists, reordering paragraphs, deleting redundant language, or similar edits are considered housekeeping and are not discussed in the sections below.

The most frequent general change is editing "which" to "that". "Which" is appropriate where the following clause is not necessary to the meaning of the sentence and is descriptive of the clause that precedes it. "That" is appropriate when the preceding clause is dependent on the clause following "that"; the words after "that" are essential to the meaning of the sentence. Numerous instances of "which" in the 1996 Rules are changed to "that" in the Proposed Rules.

While the Legislative Reference Bureau (LRB) recommends to not use acronyms or abbreviations in rules, the LRB recognizes that in some cases their use is appropriate. For example, in Chapter 11-55, HAR, Water Pollution Control, "National Pollutant Discharge Elimination System" is abbreviated as "NPDES". This reflects the reality that most people interacting with these administrative rules use "NPDES" more than the full name and use of the abbreviation enhances readability of the rules.

Similarly, in the environmental review process, use of certain acronyms and abbreviations is integral to meaningfully participating in the process. In particular, the following are considered important and integral acronyms and abbreviations and therefore are used in the Proposed Rules to enhance readability:

- EA: environmental assessment
- EIS: environmental impact statement
- EISPN: environmental impact statement preparation notice
- FONSI: finding of no significant impact
- HAR: Hawaii Administrative Rules
- HRS: Hawaii Revised Statutes
- NEPA: National Environmental Policy Act

The Proposed Rules replace all instances of "assessment" with "EA" and clarify whether it is specifically referring to a draft or final EA. Also, the Proposed Rules replace all instances of "statement" with "EIS" and clarify whether it is specifically referring to a draft or final EIS.

C. Topical Changes

Digitizing the Process

When the 1996 Rules were promulgated, home use of computers was just beginning. Internet was still paid for by the minute and most communication still relied on physical mail. *The Environmental Notice* was physically mailed to subscribers. Proponents also physically mailed copies of EAs and EISs to parties requesting it.

Today, *The Environmental Notice* is distributed electronically and EAs, EISs, and other environmental review documents are freely available in OEQC's online database. Many of the mailing and print-copy requirements for environmental review documents were included in the 1996 Rules to ensure access. With widespread digital distribution, these concerns are no longer as prominent. The Proposed Rules, therefore, make modifications in a number of areas related to digitization. For example, proposing agencies and applicants are no longer required to mail individual responses to commenters because the responses are easily accessible in the document posted online. Some paper copies of EAs and EISs, however, are still required in the Proposed Rules. For example, a copy of a draft EA must be given to the library in the area most affected by the action and one filed with the State Library Document Center.

Programmatic Approaches and Defining Project and Program

The Proposed Rules weave in the concept of programmatic environmental review that may apply to an exemption, EA, or EIS. This approach has evolved from Version 0.1 to the current Proposed Rules. Programmatic environmental review is sometime referred to as being at the "planning-level," and project-based environmental review is sometimes referred to as "site-specific". Programmatic environmental review is most appropriate for evaluating the impacts of a wide range of individual projects; implementation over a long time-frame; or implementation across a wide geographic area. The level of detail in programmatic environmental review should be enough to make an informed choice among planning-level alternatives and broad mitigation strategies. This type of review allows for analysis of the interactions of a number of planned projects or phases in a plan. This broader level review may satisfy compliance with chapter 343, HRS as described in the new section on use of prior exemptions, FONSIs, and accepted EISs or may be followed by site- or component-specific exemptions, EAs, or EISs that are based off of the approved or accepted programmatic document, a process known as "tiering," as the elements of the program are proposed to be implemented.

Version 0.1 of the Proposed Rules proposed a distinct section covering "Programmatic EISs." The Council realized that setting forth a programmatic approach to EISs in a distinct section would require that same section to be replicated for exemptions, EAs, and potentially supplemental EISs as well. This approached also would have resulted in the default process becoming the "project" process and would have created a bifurcated process for projects and programs that raised questions about being within the authority set by chapter 343, HRS. It also raised questions about rights to action involving this bifurcated process; whether someone could sue to require someone to undergo the "project" versus the "program" pathway.

In Version 0.2, the proposed distinct section was deleted, and the concept of a preparation of a programmatic EA or EIS was inserted into a proposed "Environmental Assessment Style" section and the existing "Environmental Impact Statement Style" section. In general, those sections clarified that more detail was necessary for actions that had site-specific impacts and less detail was necessary for broader actions that were still in a more conceptual phase and intended to be implemented in multiple locations or in phases. Versions 0.1 and 0.2, however, did not define "project" or "program," which made discussion of "programmatic" environmental review more complicated.

While the Council was drafting Version 0.3, the Supreme Court of Hawaii issued its decision in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 284 (Haw. 2017). Because chapter 343, HRS and the 1996 Rules lacked a definition for project or program, the court looked to the Merriam-Webster Dictionary for the plain-meaning of those terms. The court provided: "'Program' is generally defined as 'a plan or system under which action may be taken toward a goal.' 'Project' is defined as 'a specific plan or design' or 'a planned undertaking'" (*Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017)). In drafting, the Council noted that the definition for "program" provided by the court included the word "action," which is defined in chapter 343, HRS as "a project or program." Therefore, the Council believed that further clarification was necessary.

In order to provide greater clarity and to be able to discuss the concept of "programmatics" more succinctly, in Version 0.3 the Council proposed definitions for "project" and "program". The Proposed Rules substantially retain these proposed definitions from Version 0.3. Using the definitions to distinguish between projects and programs, the Proposed Rules also allow for the preparation of programmatic exemptions, EAs, and EISs.

"Green Sheet"

The "green sheet" process is an adaptation of the City and County of Honolulu Department of Planning and Permitting's internal review process (referred to as the green sheet) for documenting chapter 343, HRS analysis. The Council has modified this concept to incorporate considerations that the U.S. Bureau of Land Management and U.S. DOT use in their own NEPA adequacy analysis.

During the Council's rules revision process, questions arose about standardizing how agencies conduct evaluations of the need to prepare a supplemental EIS. Other stakeholders raised questions about how an agency would resolve whether an action is covered by a previous determination or accepted EIS; a project is covered by a programmatic exemption, EA or EIS; or a federal NEPA EA or EIS meets the requirements of chapter 343, HRS. Others recommended incorporating the U.S. Department of Transportaion's (DOT) re-evaluation process for considering when a Supplemental EIS may be warranted.

For the supplemental EIS question, the 1996 Rules (Section 27) provide that an agency submit to OEQC for publication a determination of whether a Supplemental EIS is required or not required. The Proposed Rules retain this requirement. Note that the Proposed Rules group the Supplemental EIS section into the subchapter on EISs. The "green sheet" is a process proposed in section 11-200.1-11 that helps an agency with documenting its decision-making about whether a proposed action fits within an existing chapter 343, HRS document or determination or requires additional environmental review.

Section 11-200.1-11 is a new section that directs agencies on applying a new activity to an existing HEPA process but providing three criteria for determining when an activity is covered:

(1) The proposed activity was a component of, or is substantially similar to, an action that received an exemption, **FONSI**, or an accepted **EIS** (for example, a **project** that was analyzed in a programmatic **EIS**);

(2) The proposed activity is anticipated to have **direct**, **indirect**, and **cumulative effects** similar to those analyzed in a prior exemption, **final EA**, or accepted **EIS**; and

(3) In the case of a **final EA** or an accepted **EIS**, the proposed activity was analyzed within the range of alternatives.

Concluding "yes" to the three criteria means that the proposed action fits within one of the circumstances. Concluding "no" means that a separate chapter 343, HRS analysis is needed; that is, the agency needs to decide if an exemption, EA, or EIS is appropriate. In either case, the agency may choose to publish the determination with the OEQC for publication in the periodic bulletin.

For NEPA, an agency, in the act of issuing an exemption, FONSI, or acceptance, would in effect "certify" that the federal document and process meets the requirements of chapter 343, HRS. That is, if an agency were to issue a FONSI for a federal EA that was not published in the periodic bulletin, then the agency would be at fault for not fully complying with chapter 343, HRS. Similarly, an agency issuing an acceptance based on a federal EIS would be affirming by issuing the acceptance that the federal EIS meets the content and process requirements of chapter 343, HRS, including any particular provisions related to NEPA as set forth in section 11-200.1-31.

Following adoption of the Proposed Rules, the OEQC will develop guidance on creating a "green sheet" equivalent (i.e., a standardized form) that helps agencies with tracking determinations that an activity is covered by an existing chapter 343, HRS process, such as a programmatic EIS covering the action; whether a supplemental EIS is required; and whether NEPA is an aspect of the action.

Exemptions

One of the Council's goals was to update the exemption process. The overall proposed changes are intended to increase agency use of exemptions, provide incentives for updating exemption lists and obtain Council concurrence with the lists on a regular basis, and increase timely public access to information about exemptions. See the sections of this Rationale Document regarding subchapter 8, Exempt Actions, List, and Notice Requirements for a detailed discussion of the proposed changes to the exemptions subchapter. The following is the primary change in the Proposed Rules from Version 0.3.

Section 11-200.1-16 revises the exemption list to consist of two parts. The first part would be those types of actions that the agency considers to be the equivalent of *de minimis*; that is, they are routine operations and maintenance, ongoing administrative activities, and other similar items. This category of activities was proposed under section 11-200.1-8, General Applicability,

in Version 0.3. The Proposed Rules removed that section and now require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include those in Part 1 of the agency's exemption list. By including them in the exemption list, the agency is able to make staff aware of occasions where an activity might be in the gray area of a project or program for the purposes of chapter 343, HRS but perhaps not rising to the level of requiring environmental review as explained by the Hawaii Supreme Court in several of its decisions. Activities that are included in the first part of the exemption list would be presumed to not require documentation (i.e., an exemption notice) or consultation. In effect, these are the everyday things that government does, from repainting buildings to fixing plumbing and purchasing office supplies. Many of these items already exist on agency lists because they fall under one or more of the classes in the 1996 Rules. After adoption of the Proposed Rules, the agency would have seven years to reorganize and update its exemption list to comply with the Proposed Rules (see section 11-200.1-32, Retroactivity for more).

Affordable Housing

See the discussion in Section 11-200.1-15 General Types of Actions Eligible for Exemption for discussion about the exemptions regarding affordable housing.

Climate Change

The Proposed Rules incorporate sea level rise into significance criterion 11. Under the Proposed Rules, when determining whether preparation of an EIS is required approving agencies must consider whether a proposed action is likely to have a substantial adverse effect on a sea level rise exposure area, such as exacerbating coastal erosion. They must also consider whether the proposed action is likely to suffer damage if it is implemented due to being located in a sea level rise exposure area.

Additionally, the Proposed Rules amend criterion 13 to require approving agencies to consider in a significance determination whether a proposed project will emit substantial greenhouse gases at any stage or may emit substantial greenhouse gases as an indirect or cumulative impact.

The *Hawaii Sea Level Rise Vulnerability and Adaptability Report*, released in December 2017 by the Department of Land and Natural Resources, calls on the OEQC to develop guidance on addressing climate change in EAs and EISs. Guidance from the OEQC will be forthcoming after the rules update is completed. In developing the guidance, the OEQC will look to the Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, issued by the Council on Environmental Quality Control on August 5, 2016 (81 FR 51866).

"Direct-to-EIS"

In 2012 the Legislature amended chapter 343, HRS to allow for agencies and applicants to directly prepare an EIS when there was a clear potential for significant impact. The 1996 Rules

are written such that an EA that is prepared prior to an EIS is part of the definition of an EIS and is one of the steps in the process of developing an EIS. The Proposed Rules remove preparation of an EA from the definition of an EIS and allow for EISs to begin at the EIS preparation notice stage without first preparing an EA.

The 1996 Rules created confusion about the requirements for an EISPN when an applicant or proposing agency began with an EIS versus beginning with an EA and finding that an EIS is needed. To reduce this confusion, the Proposed Rules standardize the requirement of an EISPN regardless of how an applicant or proposing agency begins an EIS.

The Proposed Rules include a public scoping meeting requirement and incorporation of public feedback from the scoping meeting into the draft EIS. In the past, the preparation of an EA would provide the public an early opportunity to provide comments on an action. The scoping meeting requirement at the EISPN phase balances the increased efficiency of proceeding directly to an EIS with providing adequate opportunity for public engagement.

Because the 1996 Rules assumed that an EA would be done before an EISPN, the content requirements for an EISPN are few. In the Proposed Rules, those details are intended to be filled out with the preparation of the draft EIS and with incorporation of public feedback from the mandatory scoping meeting and any other public consultation.

Republication of EAs or EISs

On occasion, an agency or applicant would like to extend a public comment period for an EA or EIS. The statute is silent on extending public comment periods. However, it does allow for an applicant to request an agency to extend the acceptance period by 15 days (HRS § 343-5(e)).

In the past, agencies have offered extended comment periods to allow the public more time to engage in the process and provide additional feedback. While this is laudable, it creates complications for the environmental review process. If an agency does not announce this extension through *The Environmental Notice*, then not all stakeholders may be aware of the extension. In effect, this gives some members of the public more time than others. Also, an extension of time creates uncertainty in legal standing for individuals who submit comments after the statutory deadline of a comment. The statute sets clear limitations on rights to pursue legal remedies, one of which is having commented during the draft EIS comment period. Extending comment deadline creates questions of standing for the courts.

In order to meet the need of additional comment time while staying within the statute, the Proposed Rules add a new section on republishing EAs and EISs for additional comment time. This creates a second comment period of thirty days for draft EAs and EISPNs, and forty-five days for draft EISs.

For someone commenting during the republication period, their comment would be treated the same as having been submitted during the initial publication period. That is, the proponent would have to respond to the comment and the commenter would have legal standing. For

comments received in between publication periods, these would not have legal standing because they would not be submitted during a legal window.

The OEQC will publish guidance to agencies recommending that they contact any members of the public who submit comments between publication periods to recommend that the commenter resubmit the comment during the re-publication comment period.

Response to Comments

The Proposed Rules make several changes to how proposing agencies and applicants respond to comments. As discussed below, the Council also considered removing but ultimately retained the qualifying word "substantive" in the Proposed Rules as a threshold for the response requirement.

Individually Mailed Responses, Comment Grouping, and Form Letters/Petitions

When the 1996 Rules were promulgated, the main method of EA/EIS dissemination was through paper copies of the documents. It was also essential that hardcopies of responses be mailed to commenters so that they could access the response, which would otherwise predominantly be available only through a paper copy of the EA or EIS at the library or other certain physical locations.

Today, EAs, EISs, and other environmental review documents are easily accessible through the OEQC website. Accordingly, the Proposed Rules have introduced a number of changes based on the wide accessibility of EAs and EISs online.

First, the Proposed Rules no longer require a written response to be physically mailed to each commenter. Comments must still, however, be responded to and appended to the final EA or final EIS, with some minimal exceptions.

Second, because comments no longer must be mailed individually to commenters, the Proposed Rules allow proposing agencies and applicants to respond to comments based upon the "grouping" model that federal environmental review under NEPA allows. Proposing agencies and applicants may analyze the comment letters they receive, identify the topics and issues raised in those comment letters, and then prepare a single response for each issue raised by topic. This particularly increases efficiency when a number of comment letters are received that raise the same issues. Grouping also gives the approving or accepting agency, and the public, a comprehensive understanding of all the issues raised under a single topic.

The Council received and considered comments from the public that "grouping" may allow proposing agencies or applicants to side-step substantive comments by not addressing specific details raised within a comment on a particular topic. To prevent this, the Proposed Rules draw a distinction between "topic" and "issue." As an example, a number of comment letters may contain portions addressing endangered species. Some may be concerned about monk seals, while others may be concerned about hawksbill turtles. A proposing agency or applicant could

group all the comments related to endangered species under one topic, and then have two separate issues: monk seals and hawksbill turtles. Within those issue headings, the proposing agency or applicant must then address each substantive comment related to monk seals or hawksbill turtles. Although the comments may be grouped, the substance of each substantive comment must be addressed.

There were also concerns that without a physical letter, commenters would not be able to determine whether their comments received a response. To address this, when grouping comments, proposing agencies and applicants must include a list of the commenters whose comments are being addressed under each topic heading or section. Further, all comment letters containing substantive comments must be appended to the final document (e.g., FEIS).

The Proposed Rules also allow proposing agencies and applicants to continue the current practice of providing a separate response for each comment letter, wherein each substantive comment presented in the comment letter must be addressed. Under this practice, the response letter is usually included before or after the comment letter, and the commenter may clearly identify that a response has been provided. Although not required, proposing applicants and agencies may mail written responses to commenters.

The Proposed Rules additionally address the increasing use of form letters and petitions. The Proposed Rules attempt to ensure recognition of the commenters who submit identical or near-identical comments and to provide an efficient process to respond to the raised issues.

To do this, the Proposed Rules allow proposing agencies and applicants to respond to form letters and petitions with a single response or, if following the grouping procedure, to address the issues raised in the form letter in the appropriate topic areas. Only one representative sample of a form letter or petition must be appended to the document. However, all the commenters who submitted the form letter or signed the petition must be identified either in the single response, or in the topic response. If it is more efficient, instead of listing the names included on a petition, the proposing agency may simply include all copies of the petition, and similarly, may also include all copies of the form letter rather than including a sample and listing the names of those who provided the identical or near-identical comments.

The Council received feedback that the form letter process may allow proposing agencies or applicants to overlook form letter comments that add in additional substantive points. The Proposed Rules address this by requiring that form letters that have additional substantive points be appended in full to the document, and receive a response, either as a separate response, or as part of a grouped response.

"Substantive" Comments

In Version 0.2, the Council considered and received feedback on requiring a response to all comments, as opposed to requiring a response to "substantive" comments. Removing the word "substantive" ensures that all comments will receive a response, but created concerns about

increased burdens on the proposing agency and applicant to respond to statements within a comment letter that are clearly outside the scope of the action, that are inflammatory, or that are simply formalities or pleasantries. Taking these concerns into account, Version 0.3 reinserted the word "substantive" into the Proposed Rules to retain the qualification that only "substantive" comments require a response. Version 0.3 also emphasized that the accepting authority had to be satisfied that a comment was "substantive" or not and, if it was, had received a commensurate response.

The Proposed Rules retain the word "substantive" and include direction to the accepting authority. The Council also notes that in the NEPA context "substantive" generally means that a comment addresses some specific aspect of the proposed action or the document (e.g., draft EA or draft EIS).

Scoping Meetings

In the 1996 Rules, the EISPN is followed by a 30-day comment period to help scope the contents of the draft EIS. The proponent has the option to hold a scoping meeting. If the proponent chooses to hold a scoping meeting, then the proponent must treat oral and written comments the same; that is, oral and written comments from a scoping meeting have to be written down and responded to in the draft EIS. In practice, many proponents choose to either not hold scoping meetings, or hold meetings that are similar but do not meet the legal description of a scoping meeting, which in turn removes the legal requirement to respond to oral comments.

The direct-to-EIS change to the statute also resulted in the public expressing concerns that they now have less information when an EISPN is published. Prior to the statute change, an EA would be prepared as part of the EISPN, usually including a comment period from draft to final EA. Since the change in statute, most EISs begin with an EISPN and do not prepare an EA. Because the 1996 Rules assume an EA has been done before an EISPN, the content requirements for an EISPN are few. The public often requests a scoping meeting now as a way to get more information about a proposed action.

At the federal level, NEPA requires a scoping meeting for EISs. In Hawaii, given the statutory direct-to-EIS change and the importance of focusing the document on the important issues (scoping), the Council believes requiring a scoping meeting is appropriate and timely.

In the case of a proposed action occurring on multiple islands, a scoping meeting is required to be held on each island affected. Requiring a scoping meeting addresses the public's need to be better informed about a proposed action while giving applicants the opportunity to meaningfully engage the public.

The Council recognizes that requiring a scoping meeting will add a new cost to undertaking an EIS. To balance this additional cost, the Council is requiring written comments received at a scoping meeting be responded to in writing while oral comments be audio recorded and submitted to the OEQC and oral comments summarized in the draft EIS.

The Council reviewed the EISs prepared since 2012 and found that the number of EISs averaged about eleven per year, the majority of which agencies proposed. Only state agencies prepared statewide EISs over the past five years, which indicates that the requirement to hold scoping meetings on multiple islands would have limited relevance to applicants. Where it may happen to be relevant, multiple scoping meetings are unlikely to be cost prohibitive or the determining factor in a proposed action's process or implementation.

NEPA-HEPA

The Proposed Rules seek to increase efficiency and harmonization of federal and state environmental review where both are necessary. The Proposed Rules promote the use of a single document that satisfies both federal and state environmental review and goes through a single comment period for the purposes of both. The Proposed Rules encourage the use of the NEPA environmental review document, but require that each agency make an independent determination pursuant to chapter 343, HRS of the necessary level of environmental review. A NEPA document (such as an EA or EIS) cannot be used as a chapter 343, HRS document if it does not meet the requirements for chapter 343, HRS review (including required public comment periods). When a federally prepared EA or EIS meets all the process and content requirements, then a Hawaii decision-maker can use the federal document. This can be noted in the "green sheet."

The Proposed Rules contain provisions for agency decision-makers to make their own decision about the necessary level of environmental review under chapter 343, HRS while taking into account existing federal information. For example, NEPA could allow for a categorical exemption, while chapter 343, HRS may require an EA or even an EIS. Alternatively, NEPA could require a federal EA, while chapter 343, HRS may allow for an exemption.

Retroactivity

During the Council's rules update process, agencies and applicants expressed concerns regarding how the process requirements for actions that were undergoing environmental review when the Proposed Rules are promulgated into law would apply. Agencies and applicants also expressed concerns regarding actions that may have completed the environmental review process but after litigation are required to go through the process a second time as a result of the litigation. To reduce uncertainty about when the Proposed Rules would take effect relative to a proposed action going through the environmental review process, the Council proposed a new retroactivity section in Version 0.2 and modified the language in Version 0.3.

The principle underlying the retroactivity section is that proposed actions that have completed a formal public engagement step shall continue under the 1996 Rules for five years from the promulgation of the Proposed Rules. For EAs, this means once a draft EA has been published, the proposed action remains under the 1996 Rules until either it receives a determination (FONSI or EISPN) or five years have passed.

Similarly, for an EIS, publication of the EISPN would mean the proposed action stays under the 1996 Rules until either a determination is made (acceptance or non-acceptance) or five years have passed. This ensures that the proponent has a consistent process and the public has an expectation of the process for its duration.

This section also allows agencies to maintain their exemption lists for up to seven years before needing to obtain Council concurrence. The retroactivity period allows for an agency to review its existing exemption list to reflect the changes associated with the Proposed Rules.

agency, citizen group, or individual was "consulted with" but had "no comment" if that agency, citizen group, or individual is included as a "consulted" entity in the draft EIS. "No comment" can occur in at least two instances. First, when a person or agency responds to a written request for comments that it has "no comment", and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations whose names were listed in EISs as having been "consulted with" when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The Proposed Rules clarify that if the proponent desires to include attendees at informational meetings as those "consulted with" then it should indicate whether those individuals or organizations gave "no comment." This also protects individuals and organizations who wish to gather more information through an informational session but are not be prepared to also provide informed feedback at such a preliminary session from being listed as a "consulted" entity who spoke with the proponent on behalf of oneself or a particular community or interest group. The section also specifies that a summary of the oral comments made at any EIS public scoping meeting held pursuant to section 11-200.1-23 must be included. This section adds additional requirements specific to the preparation of the final EIS, including responses to comments received on the draft EIS and a list of persons or agencies consulted in preparing the final EIS.

§ 11-200.1-28 Acceptability

This section is formerly section 11-200-23, HAR (1996). The Proposed Rules introduce several minor clarifying amendments, including: (1) breaking up long paragraphs into subsections; (2) clarifying that the section applies to final EISs; (3) clarifying that the acceptability of the final EIS includes a review of acceptability of the full environmental review process--from the proposal of the action to publication of the EIS; (4) clarifying that an acceptability determination requires the approving agency or accepting authority to assess whether the proposing agency or applicant classified comments as "substantive" and have included satisfactory responses to these comments in a manner commensurate with the level of detail included in the substantive comment; and (5) clarifying that comments must have been satisfactorily incorporated into the final EIS. "Satisfactorily" in this section refers to the satisfaction of the approving agency or accepting authority that the requirements have been met. The clarifications regarding the designation of "substantive" comments and the responses thereto are intended to address concerns that proposing agencies or applicants may intentionally or unintentionally disregard substantive comments as non-substantive. These clarifications draw the approving agency or accepting authority's attention to the requirement that all components of the EIS process must be satisfactory to the approving agency or accepting authority, including the proposing agency or applicant's exercise of discretion in designating comments as substantive or non-substantive. In subsection (b)(3), the revised rule also adds in that approving agencies and accepting authorities should ensure that comments have been "appropriately incorporated into the final EIS." The addition of the word "appropriately" is intended as a recognition that not all comments will be incorporated or necessitate a change in the body of the final EIS, and that some comments, such as form letters or petitions, may not need to be appended if there is a

representative sample included pursuant to the comment response provisions of this subchapter.

The revised rule also provides in subsection (c) that for actions proposed by an agency, the OEQC may submit a recommendation regarding acceptability or non-acceptability to the accepting authority and proposing agency. The Proposed Rules do not place a deadline on the OEQC's recommendation because chapter 343, HRS does not impose a deadline on the determination of acceptability of agency actions. The Council took into consideration that the OEQC should endeavor to provide a recommendation as early as practicable, but that requiring a deadline may prevent the OEQC from providing a recommendation in the event that an accepting authority takes longer than usual to make a determination.

Subsection (e) includes a clarification that the accepting authority for an applicant action is the approving agency. Subsection (e) also clarifies that the 30-day period for an approving agency to determine the acceptability of an EIS begins with the submission of the final EIS to the approving agency or accepting authority, rather than publication of the final EIS in the bulletin. Further, subsection (e) clarifies that the 30-day acceptance determination period may be extended at the request of the applicant for an additional fifteen days.

Other minor changes were made in accordance with global edits throughout the Proposed Rules, such as updating section references, and replacing the term "statement" with EIS and clarifying that "state or county lands or funds" can include "state or county lands," "state or county funds" or both state and country lands and state and county funds.

Finally, the Proposed Rules provide minor changes to clarify the process for withdrawing an EIS.

§ 11-200.1-29 Appeals to the Council

This was formerly section 11-200-24, HAR (1996). The proposed amendments to this section are intended to clarify the existing language, as well as to specify the process by which the Council hears the appeal.

The Proposed Rules clarify that an appeal may be filed by an applicant with the Council after the non-acceptance determination by the approving agency under the acceptability criteria in subchapter 10, "Preparation of Environmental Impact Statements."

The Proposed Rules clarify that upon receipt of an appeal, the Council chairperson shall include the appeal on the agenda of the next council meeting. This connects the receipt of the notice of the appeal under section 343-5(e), HRS, with the timing of the next Council meeting.

Previous versions of the Proposed Rules included provisions that an applicant may also seek judicial review of the non-acceptance pursuant to chapter 91, HRS and that pursuing an appeal to the Council does not abrogate the applicant's right under section 34-7(c), HRS to bring a

judicial action. The Council omitted these proposed changes from Version 0.3 and the currently Proposed Rules because it received feedback that such language was unnecessary and may be outside the scope of the rules. The Council also considered but ultimately omitted in the Proposed Rules including a provision that an entity other than an applicant could appeal the non-acceptance of an EIS to the Council.

§ 11-200.1-30 Supplemental Environmental Impact Statements

All language in this section comes from sections 11-200-26 to 11-200-29, HAR (1996) and synthesizes those sections into a single section. Minor stylistic changes were made, such as replacing "statement" with EIS. Subsection (a) was formerly section 11-200-26, HAR (1996). Subsection (b) was formally section 11-200-27, HAR (1996). Subsection (c) was formerly section 11-200-28, HAR (1996). Subsection (d) was formerly 11-200-29, HAR (1996).

Version 0.1 considered changes to the sections dealing with supplemental EISs that would have: (1) explicitly added "new information" as a factor to consider when weighing the necessity of a supplemental EIS; (2) explicitly provided for which sources of new information should be considered when determining the necessity of a supplemental EIS; and (3) established a five-year review requirement of accepted EISs for actions that had not yet substantially commenced. Version 0.1 also organized the information in the currently proposed subparagraph (a) of the Proposed Rules (originally section 11-200-26, HAR (1996)) into subparts.

The Council received multiple comments both in support of and raising concern about explicitly establishing "new information" as a factor for requiring preparation of a Supplemental EIS. Many practitioners expressed that this requirement was already clear in case law, particularly through *Unite Here! Local 5 v. City and County of Honolulu*, 231 P.3d 423, 430 (Haw. 2010), also known as the Turtle Bay case. Altering this section, they provided, could create confusion where the Supreme Court of Hawaii has already established precedent.

Similarly, the Council received numerous comments both in support of and raising concerns regarding the five-year review period. There was some confusion over whether the proposal in Version 0.1 established an "expiration date." It did not. The intention was to provide a checkpoint for review with the exception that the review was only necessary if an action had not yet substantially commenced. The 1996 Rules provide that a supplemental EIS must be prepared in certain circumstances, but do not establish the time period or requirement for making that determination. The five-year review was intended to address that gap. The language of "substantial commencement," intended to ensure that actions that were already well underway or completed were not subject to the uncertainty of a supplemental EIS review, also posed some interpretation challenges. A definition for "substantial commencement" was also considered in conjunction with this section and the section on emergency actions. It was deleted in Version 0.3.

In support of the five-year review, some commenters provided that a clear checkpoint--which the 1996 Rules lack--is necessary to create certainty. In the Turtle Bay case, a review for the

necessity of a supplemental EIS took place because the developer sought a discretionary permit necessary to proceed with the completion of the proposed action. If only ministerial approvals were necessary for completion, then under the 1996 Rules the necessity of a supplemental EIS may not have been considered.

Taking those concerns into account, the Proposed Rules substantially retain the original language from the 1996 Rules and simply combine the sections into one section. The proposed requirement for five-year review has been removed. In its place, the Proposed Rules propose mandating a process (i.e., the "green sheet") for agencies to follow when considering issuing permits for actions with existing EAs and EISs. For further details on that process, see the "Green Sheet" section of this document.

Subchapter 11 National Environmental Policy Act

Subchapter 11 (National Environmental Policy Act) creates a distinct subchapter to describe how to conduct environmental review for chapter 343, HRS, when federal National Environmental Policy Act (NEPA) environmental review is also applicable. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS

This section was formerly section 11-200-25, HAR (1996). The 1996 Rules allowed cooperation between federal and state agencies on actions requiring both NEPA and HEPA review. The Proposed Rules clarify that where an action triggers both NEPA and HEPA review, the NEPA document may be used to satisfy the HEPA requirements, so long as it meets the required HEPA criteria.

In adopting the revised language in this section, the Council emphasizes that while a particular level of review may be required under NEPA, the same level of review may not be required under HEPA. For example, federal categorical exclusions (the federal equivalent of a state exemption) do not automatically result in exemptions under chapter 343, HRS. Conversely, the federal government may issue a FONSI for its purposes, but a state or county agency may require an EA or EIS be done for its purposes, or issue an exemption based on the federal FONSI. State and county agencies may do so, but must still make a determination, through their own judgment and experience, that the action is exempt, requires an EA, or may proceed directly to preparing an EIS, under chapter 343, HRS and the HEPA-specific content requirements, before determining whether the NEPA document satisfies the required level of review under HEPA.

To that end, subchapter 7 and the new section 11-200.1-12 (the "green sheet") proposed by these rules provides a tool to guide agencies on how to prepare the evaluation of whether or not the NEPA document satisfies the requirements of chapter 343, HRS.

Some of the language in this section was inspired by and based on similar language from Massachusetts and Washington, providing that federally-prepared EISs are sufficient so long as they meet the state's statutory requirements. The goal is to allow a federal EIS to meet the chapter 343, HRS requirements provided that it addresses chapter 343, HRS content requirements. In this case, state and county agencies can provide the information to the federal preparer for inclusion in its document rather than the state or county agency preparing a second document.

This section also addresses which agency is responsible (federal, state or county) for preparing the document, as well as delegation of that responsibility from the federal agency to a state or county agency.

Furthermore, this section addresses, for example, situations where a federal agency's regulations may require a public scoping meeting prior to publishing a Notice of Intent to prepare an environmental impact statement and under chapter 343, HRS, the same action would also require a public scoping after the publication of an EISPN. This clause reduces the burden on the proposing agency or applicant to conduct two public scoping meetings.

The rule also clarifies that in the case of joint documents, the preparation of any supplemental documentation would be due to federal requirements and that HEPA supplemental requirements would not apply. The rule further clarifies who the accepting authority is for federal, state, and county actions.

Lastly, the rule explicitly states that any acceptance pursuant to this section satisfies chapter 343, HRS and that no other EIS shall be required for the proposed action. If the NEPA process requires supplemental review, the responsible federal entity's supplemental review requirements would apply instead of requirements under chapter 343, HRS.

Subchapter 12 Retroactivity and Severability

Subchapter 12 (Retroactivity and Severability) creates a distinct subchapter addressing the retroactivity of the Proposed Rules when enacted and the severability of the Proposed Rules.

Section 11-200.1-32 describes when chapter 11-200.1, HAR takes effect. Section 11-200.1-33 includes the severability clause.

§ 11-200.1-32 Retroactivity

This is an entirely new section on when the Proposed Rules take effect and how the Proposed Rules apply to actions that have already completed the environmental review process or are undergoing it at the time the Proposed Rules take effect. This section was added in response to public comments concerning actions currently pending. This provision ensures that an action is not prevented from proceeding under the 1996 Rules when it otherwise would but is delayed due to a judicial proceeding or other reasons.

This section also provides a period of time for agencies to update their existing exemption lists from "classes" to "types" of action, to designate those activities that would fall under "Part 1" of the list, and to reassign exemptions to the appropriate general types.

As used in this section, publication by OEQC requires that the document was submitted and met all requirements for publication.

§ 11-200.1-33 Severability

This section was formerly section 11-200-30 in the 1996 Rules and provides that each provision in the Proposed Rules is severable and that the invalidity of any provision in this chapter does not affect the validity of the others. No amendments are proposed to this section.

Note

The historical note will be revised following public hearing on the Proposed Rules and finalization for enacting the final Proposed Rules into law.

Ramseyer

DEPARTMENT OF HEALTH

Repeal of Chapter 11-200 and Adoption of
Chapter 11-200.1
Hawaii Administrative Rules

Month Date, Year

1. Chapter 11-200, Hawaii Administrative Rules, entitled "Environmental Impact Statement Rules", is repealed.

2. Chapter 11-200.1, Hawaii Administrative Rules, entitled "Environmental Impact Statement Rules", is adopted to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 200.1

ENVIRONMENTAL IMPACT STATEMENT RULES

Historical note: This chapter is based substantially upon chapter 11-200. [Eff 12/6/85; am and comp AUG 31 1996; am 2007; R]

SUBCHAPTER 1

PURPOSE

§11-200.1-1 Purpose. (a) Chapter 343, Hawaii Revised Statutes (HRS), establishes a system of environmental review at the state and county levels that shall ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations. The purpose of this chapter is to provide agencies and persons with procedures, specifications regarding the contents of environmental assessments and environmental impact statements, and criteria and definitions of statewide application.

(b) EAs and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action. Agencies and applicants shall ensure that EAs and EISs are prepared at the earliest opportunity in the planning and decision-making process. This shall assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-

makers will be enlightened to any environmental consequences of the proposed action prior to decision-making.

(c) In preparing any document, proposing agencies and applicants shall:

(1) Make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by government decision-makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, of the document;

(2) Take care to concentrate on important issues and to ensure that the document remains essentially self-contained, capable of being understood by the reader without the need for undue cross-reference; and

(3) Conduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-1, 343-6)

SUBCHAPTER 2

DEFINITIONS

§11-200.1-2 Definitions. As used in this chapter:

"Acceptance" means a formal determination that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an EIS, as prescribed by section 11-200.1-28. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of acceptance is required prior to implementing or approving the action.

"Accepting authority" means the official who, or agency that, makes the determination that a final EIS is required to be filed, pursuant to chapter 343, HRS, and that the final EIS fulfills the definitions and requirements of an EIS.

"Action" means any program or project to be initiated by an agency or applicant.

"Addendum" means an attachment to a draft EA or draft EIS, prepared at the discretion of the proposing agency, applicant, or approving agency, and distinct from a supplemental EIS, for the purpose of disclosing and addressing clerical errors such as inadvertent omissions, corrections, or clarifications to information already contained in the draft EA or the draft EIS filed with the office.

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

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

"Approval" means a discretionary consent required from an agency prior to implementation of an action.

"Approving agency" means an agency that issues an approval prior to implementation of an applicant action.

"Council" means the environmental council.

"Cumulative impact" 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 or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

"Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent. Ministerial consent means a consent, sanction, or recommendation from an agency based upon a given set of facts, as prescribed by law without the use of judgment or discretion.

"Draft environmental assessment" means the EA submitted by a proposing agency or an approving agency for public review and comment when that agency anticipates a finding of no significant impact (FONSI).

"Effects" or "impacts" as used in this chapter are synonymous. Effects may include ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative, immediate or delayed. Effects may also include those effects resulting from actions that may have both beneficial and detrimental

effects, even if on balance the agency believes that the effect will be beneficial.

"EIS preparation notice", "EISPN", or "preparation notice" means a determination that an action may have a significant effect on the environment and, therefore, will require the preparation of an EIS, based on either an EA or an agency's judgment and experience that the proposed action may have a significant effect on the environment.

"EIS public scoping meeting" means a meeting in which agencies, citizen groups, and the general public assist the proposing agency or applicant in determining the range of actions, alternatives, impacts, and proposed mitigation measures to be considered in the draft EIS and the significant issues to be analyzed in depth in the draft EIS.

"Emergency action" means an action to prevent or mitigate loss or damage to life, health, property, or essential public services in response to a sudden unexpected occurrence demanding the immediate action.

"Environment" means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, health, air, water, minerals, flora, fauna, ambient noise, and objects of historic, cultural, or aesthetic significance.

"Environmental assessment" or "EA" means a written evaluation that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect.

"Environmental impact statement", "statement", or "EIS" means an informational document prepared in compliance with chapter 343, HRS. The initial EIS filed for public review shall be referred to as the draft EIS and shall be distinguished from the final EIS, which is the document that has incorporated the public's comments and the responses to those comments. The final EIS is the document that shall be evaluated for acceptability by the accepting authority.

"Exemption list" means a list prepared by an agency pursuant to subchapter 8. The list may contain in part one the types of routine activities and ordinary functions within the jurisdiction or expertise of the agency that by their nature do not have the potential to individually or cumulatively adversely affect the environment more than negligibly and that the agency considers to not rise to the

level of requiring further chapter 343, HRS, environmental review. In part two, the list may contain the types of actions the agency finds fit into the general types of action enumerated in section 11-200.1-15.

"Exemption notice" means a notice produced in accordance with subchapter 8 for an action that a proposing agency or approving agency on behalf of an applicant determines to be exempt from preparation of an EA.

"Final environmental assessment" means either the EA submitted by a proposing agency or an approving agency following the public review and comment period for the draft EA and in support of either a FONSI or an EISPN.

"Finding of no significant impact" or "FONSI" means a determination by an agency based on an EA that an action not otherwise exempt will not have a significant effect on the environment and therefore does not require the preparation of an EIS. A FONSI is required prior to implementing or approving the action.

"Impacts" means the same as "effects".

"Issue date" means the date imprinted on the periodic bulletin required by section 343-3, HRS.

"National Environmental Policy Act" or "NEPA" means the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C. sections 4321-4347, as amended.

"Office" means the office of environmental quality control.

"Periodic bulletin" or "bulletin" means the document required by section 343-3, HRS, and published by the office.

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

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

"Project" means a discrete, planned undertaking that has a defined beginning and end time, is site-specific, and has a specific goal or purpose.

"Program" means a series of one of more projects to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A program may include: a number of separate projects in a given geographic area which, if considered singly, may have minor impacts, but if considered together, may have significant impacts; separate projects having generic or

common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource management plans; implementation of a single project or multiple projects over a long time frame; or implementation of a single project over a large geographic area.

"Proposing agency" means any state or county agency that proposes an action under chapter 343, HRS.

"Secondary impact", "secondary effect", "indirect impact", or "indirect effect" means an effect that is caused by the action and is later in time or farther removed in distance, but is still reasonably foreseeable. An indirect effect may include a growth-inducing effect 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" or "significant impact" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals and guidelines as established by law, adversely affect the economic welfare, social welfare, or cultural practices of the community and State, or are otherwise set forth in section 11-200.1-13.

"Supplemental EIS" means an updated EIS prepared for an action for which an EIS was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things.

"Trigger" means any use or activity listed in section 343-5(a), HRS, requiring preparation of an environmental assessment.

Unless defined in this section, elsewhere within this chapter, or in chapter 343, HRS, a proposing agency or approving agency may use its administrative rules or statutes that they implement to interpret undefined terms. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-2, 343-6)

SUBCHAPTER 3

COMPUTATION OF TIME

§11-200.1-3 Computation of time. In computing any period of time prescribed or allowed by this chapter, order of the council, or by any applicable statute, the day of the act, event, or default after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or state holiday, in which case the last day shall be the next business day. [Eff] (Auth: HRS §§1-29, 8-1, 343-6) (Imp: HRS §§1-29, 8-1, 343-6)

SUBCHAPTER 4

FILING AND PUBLICATION IN THE PERIODIC BULLETIN

§11-200.1-4 Periodic bulletin. (a) The periodic bulletin shall be issued on the eighth and twenty-third days of each month.

(b) When filed in accordance with section 11-200.1-5, the office shall publish the following in the periodic bulletin to inform the public of actions undergoing chapter 343, HRS, environmental review and the associated public comment periods provided here or elsewhere by statute:

(1) Determinations that an existing exemption, FONSI, or accepted EIS satisfies chapter 343, HRS, for a proposed activity;
(2) Exemption notices and lists of actions an agency has determined to be exempt;
(3) Draft EAs and appropriate addendum documents for public review and thirty-day comment period, including notice of an anticipated FONSI;
(4) Final EAs, including notice of a FONSI, or an EISPN with thirty-day comment period and notice of EIS public scoping meeting, and appropriate addendum documents;
(5) Notice of an EISPN with thirty-day comment period and notice of EIS public scoping meeting, and appropriate addendum documents;
(6) Evaluations and determinations that supplemental EISs are required or not required;
(7) Draft EISs, draft supplemental EISs, and appropriate addendum documents for public review and forty-five day comment period;
(8) Final EISs, final supplemental EISs, and appropriate addendum documents;

(9) Notice of acceptance or non-acceptance of EISs and supplemental EISs;
(10) Republication of any chapter 343, HRS, notices, documents, or determinations;
(11) Notices of withdrawal of any chapter 343, HRS, notices, documents, or determinations; and
(12) Other notices required by the rules of the council.

(c) When filed in accordance with this subchapter, the office shall publish other notices required by statute or rules, including those not specifically related to chapter 343, HRS.

(d) The office may, on a space or time available basis, publish other notices not specifically related to chapter 343, HRS. [Eff] (Auth: HRS §§341-3, 343-5, 343-6) (Imp: HRS §§341-3, 343-3, 343-6)

§11-200.1-5 Filing requirements for publication and withdrawal. (a) Anything required to be published in the bulletin shall be submitted to the office before the close of business four business days prior to the issue date.

(b) All submittals to the office for publication in the bulletin shall be accompanied by a completed informational form that provides whatever information the office needs to properly notify the public. The information requested may include the following: the title of the action; the islands affected by the proposed action; tax map key numbers; street addresses; nearest geographical landmarks; latitudinal and longitudinal coordinates or other geographic data; applicable permits, including for applicants, the approval requiring chapter 343, HRS, environmental review; whether the proposed action is an agency or an applicant action; a citation to the applicable federal or state statutes requiring preparation of the document; the type of document prepared; the names, addresses, email addresses, phone numbers and contact persons as applicable of the accepting authority, the proposing agency, the approving agency, the applicant, and the consultant; and a brief narrative summary of the proposed action that provides sufficient detail to convey the full impact of the proposed action to the public.

(c) The office shall not accept untimely submittals or revisions thereto after the issue date deadline for which the submittal was originally filed has passed.

(d) In accordance with the agency's rules or, in the case of an applicant EA or EIS, the applicant's judgment, anything filed with the office may be withdrawn by the agency or applicant that filed the submittal with the office. To withdraw a submittal, the agency or applicant shall submit to the office a written letter informing the office of the withdrawal. The office shall publish notice of withdrawals and the rationale in accordance with this subchapter.

(e) To be published in the bulletin, all submittals to the office shall meet the filing requirements in subsections (a)to(c) and be prepared in accordance with this chapter and chapter 343, HRS, as appropriate. The following shall meet additional filing requirements:

(1) When the document is a draft EA with an anticipated FONSI, the proposing agency or approving agency shall:
   (A) File the document and determination with the office;
   (B) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the draft EA at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center; and
   (C) Distribute, or require the applicant to distribute, concurrently with its publication, the draft EA to other agencies having jurisdiction or expertise as well as citizen groups and individuals that the proposing agency reasonably believes to be affected;

(2) When the document is a final EA with a FONSI, the proposing agency or approving agency shall:
   (A) Incorporate, or require the applicant to incorporate, the FONSI into the contents of the final EA, as prescribed in sections 11-200.1-21 and 11-200.1-22;
   (B) File the final EA and the incorporated FONSI with the office; and
   (C) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the final EA with the Hawaii Documents Center;

(3) When the document is a final EA with an EISPN, the proposing agency or approving agency shall:
   (A) Incorporate, or require the applicant to incorporate, the EISPN into the contents of the final EA, as prescribed in sections 11-200.1-21, 11-200.1-22, and 11-200.1-23;
   (B) File the incorporated EISPN with the final EA; and
   (C) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the final EA with the Hawaii Documents Center;

(4) When the notice is an EISPN without the preparation of an EA, the proposing agency or approving agency shall:
   (A) File the EISPN with the office; and
   (B) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the EISPN at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center;

(5) When the document is a draft EIS, the proposing agency or applicant shall:
   (A) Sign and date the draft EIS;
   (B) Indicate that the draft EIS and all ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in subchapter 10;
   (C) File the draft EIS with the accepting authority and the office simultaneously;
   (D) Deposit, or require the applicant to deposit, concurrently with the filing to the office, one paper copy of the draft EIS at the nearest state library in each county in which the proposed action is to occur and one paper copy at the Hawaii Documents Center; and
   (E) Submit to the office one true and correct copy of the original audio file, at standard quality, of all oral comments received at the time designated within the

EIS public scoping meeting(s) for receiving oral comments;

(6) When the document is a final EIS, the proposing agency or applicant shall:

(A) Sign and date the final EIS;

(B) Indicate that the final EIS and all ancillary documents were prepared under the signatory's direction or supervision and that the information submitted, to the best of the signatory's knowledge fully addresses document content requirements as set forth in subchapter 10; and

(C) File the final EIS with the accepting authority and the office simultaneously;

(7) When the notice is an acceptance or non-acceptance of a final EIS, the accepting authority shall:

(A) File the notice of acceptance or non-acceptance of a final EIS with the office; and

(B) Simultaneously transmit the notice to the proposing agency or applicant;

(8) When the notice is of the withdrawal of an anticipated FONSI, FONSI, or EISPN, the proposing agency or approving agency shall include a rationale of the withdrawal specifying any associated documents to be withdrawn;

(9) When the notice is of the withdrawal of a draft EIS or final EIS, the proposing agency or applicant shall simultaneously file the notice with the office and submit the notice with the accepting authority; and

(10) When the submittal is a changed version of a notice, document, or determination previously published and withdrawn, the submittal shall be filed as the "second" submittal, or "third" or "fourth", as appropriate. Example: A draft EIS is withdrawn and changed. It is then filed with the office for publication as the "second draft EIS" for the particular action. [Eff] (Auth: HRS §§343-3, 343-5, 343-6) (Imp: HRS §§341-3, 343-3, 343-6)

§11-200.1-6 Republication of notices, documents, and determinations. (a) An agency or applicant responsible

for filing a chapter 343, HRS, notice, document, or determination may file an unchanged, previously published submittal in the bulletin provided that the filing requirements of this subchapter and any other publication requirements set forth in this chapter or chapter 343, HRS, are satisfied.

(b) When the publication of a previously published chapter 343, HRS, notice, document, or determination involves a public comment period under this chapter or chapter 343, HRS:

(1) The public comment period shall be as required for that notice, document, or determination pursuant to this chapter or chapter 343, HRS, or as otherwise statutorily mandated (for example, publication of an unchanged draft EIS initiates a forty-five day public comment period upon publication in the bulletin); and

(2) Any comments received during the comment period must be considered in the same manner as set forth in this chapter and chapter 343, HRS, for that notice, document, or determination type, in addition to comments received in any other comment period associated with the publication of the notice, document, or determination. [Eff] (Auth: HRS §§341-3, 343-5, 343-6) (Imp: HRS §§341-3, 343-3, 343-5, 343-6)

SUBCHAPTER 5

RESPONSIBILITIES

§11-200.1-7 Identification of approving agency and accepting authority. (a) Whenever an agency proposes an action, the authority to accept an EIS shall rest with:

(1) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or state funds or whenever a state agency proposes an action under section 11-200.1-8; or

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

If an action involves state and county lands, state and county funds, or both state and county lands and funds, the

governor or the governor's authorized representative shall have the authority to accept the EIS.

(b) Whenever an applicant proposes an action, the authority for requiring an EA or EIS, making a determination regarding any required EA, and accepting any required EIS shall rest with the approving agency that initially received and agreed to process the request for an approval. With respect to EISs, this approving agency is also called the accepting authority.

(c) If more than one agency is proposing the action or, in the case of applicants, more than one agency has jurisdiction over the action, and these agencies are unable to agree as to which agency has the responsibility for complying with chapter 343, HRS, the agencies involved shall consult with one another to determine which agency is responsible for compliance. In making the decision, the agencies shall take into consideration, including but not limited to the following factors:

(1) Which agency has the greatest responsibility for supervising or approving the action as a whole;

(2) Which agency can most adequately fulfill the requirements of chapter 343, HRS, and this chapter;

(3) Which agency has special expertise or greatest access to information relevant to the action's implementation and impacts;

(4) The extent of participation of each agency in the action; and

(5) In the case of an action with proposed use of state or county lands or funds, which agency has the most land or funds involved in the action.

(d) If there is more than one agency that is proposing the action, or in the case of applicants, more than one agency has jurisdiction over the action, and after applying the criteria in subsection (c) these agencies are unable to agree as to which agency has the responsibility for complying with chapter 343, HRS, the office, after consultation with the agencies involved, shall apply the same considerations in subsection (c) to decide which agency is responsible for compliance.

(e) The office shall not serve as the accepting authority for any proposed agency or applicant action.

(f) The office may provide recommendations to the agency or applicant responsible for the EA or EIS regarding any applicable administrative content requirements set

forth in this chapter. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 6

APPLICABILITY

§11-200.1-8 Applicability of chapter 343, HRS, to agency actions. (a) Chapter 343, HRS, environmental review shall be required for any agency action that includes one or more triggers as identified in section 343-5(a), HRS.

(1) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, license, etc.) or entitlement to those lands.

(2) Under section 343-5(a), HRS, any feasibility or planning study for possible future programs or projects that the agency has not approved, adopted, or funded are exempted from chapter 343, HRS, environmental review. Nevertheless, if an agency is studying the feasibility of a proposal, it shall consider environmental factors and available alternatives and disclose these in any future EA or EIS. If the planning and feasibility studies involve testing or other actions that may have a significant impact on the environment, an EA or EIS shall be prepared.

(3) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11), HRS, or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) When an agency proposes an action during a governor-declared state of emergency, the proposing agency shall document in its records that the emergency action was undertaken pursuant to a specific emergency proclamation. If the emergency action has not substantially commenced within sixty days of the emergency proclamation, the action will be subject to chapter 343, HRS.

(c) In the event of a sudden unexpected emergency causing or likely to cause loss or damage to life, health, property, or essential public service, but for which a

declaration of a state of emergency has not been made, a proposing agency undertaking an emergency action shall document in its records that the emergency action was undertaken pursuant to a specific emergency and shall include the emergency action on its list of exemption notices for publication by the office in the bulletin pursuant to section 11-200.1-17(d) and subchapter 4. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-9 Applicability of chapter 343, HRS, to applicant actions. (a) Chapter 343, HRS, environmental review shall be required for any applicant action that:

(1) Requires one or more approvals prior to implementation; and

(2) Includes one or more triggers identified in section 343-5(a), HRS.

(A) Under section 343-5(a), HRS, use of state or county funds shall include any form of funding assistance flowing from the State or a county, and use of state or county lands includes any use (title, lease, permit, easement, license, etc.) or entitlement to those lands.

(B) Under section 343-5(a)(1), HRS, actions involving agricultural tourism under section 205-2(d)(11) or section 205-4.5(a)(13), HRS, must perform environmental review only when required under section 205-5(b), HRS.

(b) Chapter 343, HRS, does not require environmental review for applicant actions when:

(1) Notwithstanding any other law to the contrary, for any primary action that requires a permit or approval that is not subject to a discretionary consent and that involves a secondary action that is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter; provided that the applicant for the primary action shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required.

(2) As used in this subsection:

(A) "Discretionary consent" means an action as defined in section 343-2, HRS; or an approval from a decision-making authority in an agency, which approval is subject to a public hearing.

(B) "Infrastructure" includes waterlines and water facilities, wastewater lines and wastewater facilities, gas lines and gas facilities, drainage facilities, electrical, communications, telephone, and cable television utilities, and highway, roadway, and driveway improvements.

(C) "Primary action" means an action outside of the highway or public right-of-way that is on private property.

(D) "Secondary action" means an action involving infrastructure within the highway or public right-of-way. [Eff] (Auth: HRS §§343-5, 343-5.5, 343-6) (Imp: HRS §§343-5, 343.5.5, 343-6)

§11-200.1-10 Multiple or phased actions. A group of actions proposed by an agency or an applicant shall be treated as a single action when:

(1) The component actions are phases or increments of a larger total undertaking;

(2) An individual action is a necessary precedent to a larger action;

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

(4) The actions in question are essentially identical and a single EA or EIS will adequately address the impacts of each individual action and those of the group of actions as a whole. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §343-6)

§11-200.1-11 Use of prior exemptions, findings of no significant impact, or accepted environmental impact statements to satisfy chapter 343, HRS, for proposed activities. (a) When an agency is considering whether a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed activity, the agency may

determine that additional environmental review is not required because:

(1) The proposed activity was a component of, or is substantially similar to, an action that received an exemption, FONSI, or an accepted EIS (for example, a project that was analyzed in a programmatic EIS);

(2) The proposed activity is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in a prior exemption, final EA, or accepted EIS; and

(3) In the case of a final EA or an accepted EIS, the proposed activity was analyzed within the range of alternatives.

(b) When an agency determines that a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed activity, the agency may submit a brief written determination explaining its rationale to the office for publication pursuant to section 11-200.1-4 and the proposed activity may proceed without further chapter 343, HRS, environmental review.

(c) When an agency determines that the proposed activity warrants environmental review, the agency may submit a brief written determination explaining its rationale to the office for publication pursuant to section 11-200.1-4 and the agency shall proceed to comply with subchapter 7. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 7

DETERMINATION OF SIGNIFICANCE

§11-200.1-12 Consideration of previous determinations and accepted statements. A proposing agency or applicant may incorporate information or analysis from a relevant prior exemption notice, final EA, or accepted EIS into an exemption notice, EA, EISPN, or EIS, for a proposed action whenever the information or analysis is pertinent and has logical relevancy and bearing to the proposed action (for example, a project that was broadly considered as part of an accepted programmatic EIS may incorporate relevant portions from the accepted programmatic EIS by reference). [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-13 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment and shall evaluate the overall and cumulative effects of an action.

(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected impacts, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it is likely to:

(1) Irrevocably commit a natural, cultural, or historic resource;

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

(3) Conflict with the State's environmental policies or long-term environmental goals established by law;

(4) Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community or State;

(5) Have a substantial adverse effect on public health;

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

(7) Involve a substantial degradation of environmental quality;

(8) Is individually limited but cumulatively has substantial adverse effect upon the environment or involves a commitment for larger actions;

(9) Have a substantial adverse effect on a rare, threatened, or endangered species, or its habitat;

(10) Have a substantial adverse effect on air or water quality or ambient noise levels;

(11) Have a substantial adverse effect on or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;

(12) Have a substantial adverse effect on scenic vistas and viewplanes, during day or night, identified in county or state plans or studies; or

(13) Require substantial energy consumption or emit substantial greenhouse gases. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-2, 343-6)

§11-200.1-14 Determination of level of environmental review. (a) For an agency action, through its judgment and experience, a proposing agency shall assess the significance of the potential impacts of the action, including the overall cumulative impact in light of related past, present, and reasonably foreseeable actions in the area affected, to determine the level of environmental review necessary for the action.

(b) For an applicant action, within thirty days from the receipt of the applicant's complete request for approval to the approving agency, through its judgment and experience, an approving agency shall assess the significance of the potential impacts of the action, including the overall cumulative impact in light of related past, present, and reasonably foreseeable actions in the area affected, to determine the level of environmental review necessary for the action.

(c) If the proposing agency or approving agency determines, through its judgment and experience, that the action will individually and cumulatively probably have minimal or no significant effects, and the action is one that is eligible for exemption under subchapter 8, then the agency or the approving agency in the case of an applicant may prepare an exemption notice in accordance with subchapter 8.

(d) If the proposing agency or approving agency determines, through its judgment and experience, that the action is not eligible for an exemption, then the proposing agency shall prepare or the approving agency shall require the applicant to prepare an EA beginning with a draft EA in accordance with subchapter 9, unless:

(1) In the course of preparing the draft EA, the proposing agency or approving agency determines, through its judgment and experience, that the action may have a significant effect and therefore require preparation of an EIS, then the

proposing agency may prepare, or the approving agency may authorize the applicant to prepare an EA as a final EA to support the determination prior to preparing or requiring preparation of an EIS in accordance with subchapter 10; or

(2) The proposing agency or approving agency determines, through its judgment and experience that an EIS is likely to be required, then the proposing agency may choose to prepare, or an approving agency may authorize an applicant to prepare, an EIS in accordance with subchapter 10, beginning with preparation of an EISPN. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 8

EXEMPT ACTIONS, LIST, AND NOTICE REQUIREMENTS

§11-200.1-15 General types of actions eligible for exemption. (a) Some actions, because they will individually and cumulatively probably have minimal or no significant effects, can be declared exempt from the preparation of an EA.

(b) Actions declared exempt from the preparation of an EA under this subchapter are not exempt from complying with any other applicable statute or rule.

(c) The following general types of actions are eligible for exemption:

(1) Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing;

(2) Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;

(3) Construction and location of single, new, small facilities or structures and the alteration and modification of the facilities or structures and installation of new, small equipment or facilities and the alteration and modification of

the equipment or facilities, including, but not limited to:

(A) Single-family residences less than 3,500 square feet, as measured by the controlling law under which the proposed action is being considered, if not in conjunction with the building of two or more such units;

(B) Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures;

(C) Stores, offices, and restaurants designed for total occupant load of twenty individuals or fewer per structure, if not in conjunction with the building of two or more such structures; and

(D) Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; accessory or appurtenant structures including garages, carports, patios, swimming pools, and fences; and, acquisition of utility easements;

(4) Minor alterations in the conditions of land, water, or vegetation;

(5) Basic data collection, research, experimental management, and resource and infrastructure testing and evaluation activities that do not result in a serious or major disturbance to an environmental resource;

(6) Demolition of structures, except those structures that are listed on or that meet the criteria for listing on the national register or Hawaii Register of Historic Places;

(7) Zoning variances except shoreline setback variances;

(8) Continuing administrative activities;

(9) Acquisition of land and existing structures, including single or multi-unit dwelling units, for the provision of affordable housing, involving no material change of use beyond previously existing uses, and for which the legislature has appropriated or otherwise authorized funding; and

(10) New construction of affordable housing, where affordable housing is defined by the controlling law applicable for the state or county proposing agency or approving agency, that meets the following:

(A) Has the use of state or county lands or funds or is within Waikiki as the sole triggers for compliance with chapter 343, HRS;

(B) As proposed conforms with the existing state urban land use classification;

(C) As proposed is consistent with the existing county zoning classification that allows housing; and

(D) As proposed does not require variances for shoreline setbacks or siting in an environmentally sensitive area.

(d) All exemptions under subchapter 8 are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.

(e) Any agency, at any time, may request that a new exemption type be added, or that an existing one be amended or deleted. The request shall be submitted to the council, in writing, and contain detailed information to support the request as set forth in section 11-201-16, HAR, environmental council rules. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-16 Exemption lists. (a) Each agency, through time and experience, may develop its own exemption list consistent with both the letter and intent expressed in this subchapter and in chapter 343, HRS, of:

(1) Routine activities and ordinary functions within the jurisdiction or expertise of the agency that by their nature do not have the potential to individually or cumulatively adversely affect the environment more than negligibly and that the agency considers to not rise to the level of requiring chapter 343, HRS, environmental review. Examples of routine activities and ordinary functions may include, among others: routine repair, routine maintenance, purchase of

supplies, and continuing administrative activities involving personnel only, nondestructive data collection, installation of routine signs and markers, financial transactions, personnel-related matters, construction or placement of minor structures accessory to existing facilities; interior alterations involving things such as partitions, plumbing, and electrical conveyances; and

(2) Types of actions that the agency considers to be included within the exempt general types listed in section 11-200.1-15.

(b) An agency may use part one of its exemption list, developed pursuant to subsection (a)(1), to exempt a specific activity from preparation of an EA and the requirements of section 11-200.1-17 because the agency considers the specific activity to be de minimis.

(c) An agency may use part two of its exemption list, developed pursuant to subsection (a)(2), to exempt from preparation of an EA a specific action that the agency determines to be included under the types of actions in its exemption list, provided that the agency fulfills the exemption notice requirements set forth in section 11-200.1-17 and chapter 343, HRS.

(d) These exemption lists and any amendments to the exemption lists shall be submitted to the council for review and concurrence no later than seven years after the previous concurrence; provided that in the event the council is unable to meet due to quorum when a concurrence for an agency exemption list is seven years or older, the agency may submit a letter to the council acknowledging that the existing exemption list is still valid. Upon attaining quorum, the council shall review the exemption list for concurrence. The council may review agency exemption lists periodically. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-17 Exemption notices. (a) Each agency shall create an exemption notice for an action that it has found to be exempt from the requirements for preparation of an EA pursuant to section 11-200.1-16(a)(2) or that an agency considers to be included within a general type of action pursuant to section 11-200.1-15. An agency may create an exemption notice for an activity that it has found to be exempt from the requirements for preparation of

an EA pursuant to section 11-200.1-16(a)(1) or that an agency considers to be a routine activity and ordinary function within the jurisdiction or expertise of the agency that by its nature does not have the potential to individually or cumulatively adversely affect the environment more than negligibly.

(b) To declare an exemption prior to implementing an action, an agency shall undertake an analysis to determine whether the action merits exemption pursuant to section 11-200.1-15 and is consistent with one or several of the general types listed in section 11-200.1-15 or the agency's exemption list produced in accordance with section 11-200.1-16, and whether significant cumulative impacts or particularly sensitive environments would make the exemption inapplicable. An agency shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise on the propriety of the exemption. This analysis and consultation shall be documented in an exemption notice. Unless consultation and publication are not required under subsection (c), the agency shall publish the exemption notice with the office through the filing process set forth in subchapter 4.

(c) Consultation regarding and publication of an exemption notice is not required when:

(1) The agency has created an exemption list pursuant to section 11-200.1-16;

(2) The council has concurred with the agency's exemption list no more than seven years before the agency implements the action or authorizes an applicant to implement the action;

(3) The action is consistent with the letter and intent of the agency's exemption list; and

(4) The action does not have any potential, individually or cumulatively, to produce significant impacts.

(d) Each agency shall produce its exemption notices for review upon request by the public or an agency, and shall submit a list of exemption notices that the agency has created to the office for publication in the bulletin on the eighth day of each month pursuant to subchapter 4. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 9

§11-200.1-18 Preparation and contents of a draft environmental assessment. (a) A proposing agency or an approving agency shall require an applicant to seek, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county's general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals that the proposing agency or applicant reasonably believes may be affected.

(b) The scope of the draft EA may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program. Data and analyses in a draft EA shall be commensurate with the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. A draft EA shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the draft EA, including cost-benefit analyses and reports required under other legal authorities.

(c) The level of detail in a draft EA may be more broad for programs or components of a program for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible. A draft EA for a program may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the program may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) A draft EA shall contain, but not be limited to, the following information:

(1) Identification of the applicant or proposing agency;

(2) For applicant actions, identification of the approving agency;

(3) List of all required permits and approvals (state, federal, and county) and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review;

(4) Identification of agencies, citizen groups, and individuals consulted in preparing the draft EA;
(5) General description of the action's technical, economic, social, cultural, and environmental characteristics;
(6) Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;
(7) Identification and analysis of impacts and alternatives considered;
(8) Proposed mitigation measures;
(9) Agency or approving agency anticipated determination, including findings and reasons supporting the anticipated FONSI, if applicable; and
(10) Written comments, if any, and responses to the comments received, if any, and made pursuant to the early consultation provisions of subsection (a) and statutorily prescribed public review periods. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-19 Notice of determination for draft environmental assessments. (a) After:

(1) Preparing, or causing to be prepared, a draft EA;
(2) Reviewing any public and agency comments; and
(3) Applying the significance criteria in section 11-200.1-13;

if the proposing agency or the approving agency anticipates that the proposed action is not likely to have a significant effect, the proposing agency or approving agency shall issue a notice of an anticipated FONSI subject to the public review provisions of section 11-200.1-20.

(b) The proposing agency or approving agency shall file the notice of anticipated determination when applicable and supporting draft EA with the office as early as possible in accordance with subchapter 4 after the determination is made pursuant to and in accordance with this subchapter and the requirements in subsection (c). For applicant actions, the approving agency shall also send the anticipated FONSI to the applicant.

(c) The notice of an anticipated FONSI shall include in a concise manner:

(1) Identification of the proposing agency or applicant;
(2) Identification of the approving agency or accepting authority;
(3) A brief description of the action;
(4) The anticipated FONSI;
(5) Reasons supporting the anticipated FONSI; and
(6) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-20 Public review and response requirements for draft environmental assessments. (a) This section shall apply only if a proposing agency or an approving agency anticipates a FONSI determination for a proposed action and the proposing agency or the applicant proposing the action has completed the draft EA requirements of sections 11-200.1-18 and 11-200-19.

(b) Unless mandated otherwise by statute, the period for public review and for submitting written comments shall be thirty days from the date of publication of the draft EA in the bulletin. Written comments shall be received by or postmarked to the proposing agency or approving agency and applicant within the thirty-day period. Any comments outside of the thirty-day period need not be responded to nor considered in the final EA.

(c) For agency actions, the proposing agency shall, and for applicant actions, the applicant shall: respond in the final EA in the manner prescribed in this section to all substantive comments received or postmarked during the statutorily mandated review period, incorporate comments into the final EA as appropriate, and include the comments and responses in the final EA. In deciding whether a written comment is substantive, the proposing agency or applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EA, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall be clearly indicated.

(d) Proposing agencies and applicants shall respond in the final EA to all substantive comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable topic areas with the commenter identified in each applicable topic area. All comments, except those described in subsection (e), must be appended in full to the final document; or

(2) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response for each comment letter submitted. All comments, except those described in subsection (e), must either be included with the response or appended in full to the final document.

(e) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under subsection (d)(1) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document;

provided that, if a commenter adds a distinct substantive comment to a form letter or petition, that comment must be responded to pursuant to subsection (d).

(f) In responding to substantive written comments, proposing agencies and applicants shall endeavor to resolve

conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. The response shall indicate changes that have been made to the text of the draft EA. The response shall describe the disposition of significant environmental issues raised (for example, the response may point to revisions to the proposed action to mitigate anticipated impacts or objections raised in the comment). In particular, the issues raised when the proposing agency's or applicant's position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions.

(g) An addendum document to a draft EA shall reference the original draft EA it attaches to and shall comply with all applicable filing, public review and comment requirements set forth in subchapters 4 and 9.

[Eff] (Auth: HRS §§343-3, 343-5, 343-6) (Imp: HRS §§343-3, 343-5, 343-6)

§11-200.1-21 Contents of a final environmental assessment. A final EA shall contain, but not be limited to, the following information:

(1) Identification of applicant or proposing agency;
(2) Identification of approving agency, if applicable;
(3) Identification of agencies, citizen groups, and individuals consulted in preparing the EA;
(4) General description of the action's technical, economic, social, cultural, and environmental characteristics;
(5) Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;
(6) Identification and analysis of impacts and alternatives considered;
(7) Proposed mitigation measures;
(8) The agency determination and the findings and reasons supporting the determination;
(9) List of all required permits and approvals (state, federal, and county) and, for applicants,

identification of which approval necessitates chapter 343, HRS, environmental review; and

(10) Written comments, if any, and responses to the comments received, if any, pursuant to the early consultation provisions of section 11-200.1-18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20.

[Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-22 Notice of determination for final environmental assessments. (a) After:

(1) Preparing, or causing to be prepared, a final EA;

(2) Reviewing any public and agency comments; and

(3) Applying the significance criteria in section 11-200.1-13,

the proposing agency or the approving agency shall issue a notice of a FONSI or EISPN in accordance with subchapter 9, and file the notice with the office in accordance with subchapter 4. For applicant actions, the approving agency shall issue a determination within thirty days of receiving the final EA.

(b) If the proposing agency or approving agency determines that a proposed action is not likely to have a significant effect, it shall issue a notice of a FONSI.

(c) If the proposing agency or approving agency determines that a proposed action may have a significant effect, it shall issue an EISPN.

(d) The proposing agency or approving agency shall file in accordance with subchapter 4 the notice and the supporting final EA with the office as early as possible after the determination is made, addressing the requirements in subsection (e). For applicant actions, the approving agency shall send the notice of determination for an EISPN or FONSI to the applicant.

(e) The notice of a FONSI shall indicate in a concise manner:

(1) Identification of the applicant or proposing agency;

(2) Identification of the approving agency or accepting authority;

(3) A brief description of the proposed action;

(4) The determination;

(5) Reasons supporting the determination; and

(6) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information.

(f) The notice of determination for an EISPN shall be prepared pursuant to section 11-200.1-23. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 10

PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

§11-200.1-23 Consultation prior to filing a draft environmental impact statement. (a) An EISPN, including one resulting from an agency authorizing the preparation of an EIS without first requiring an EA, shall indicate in a concise manner:

(1) Identification of the proposing agency or applicant;
(2) Identification of the accepting authority;
(3) List of all required permits and approvals (state, federal, and county) and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review;
(4) The determination to prepare an EIS;
(5) Reasons supporting the determination to prepare an EIS;
(6) A description of the proposed action and its location;
(7) A description of the affected environment, including regional, location, and site maps;
(8) Possible alternatives to the proposed action;
(9) The proposing agency's or applicant's proposed scoping process, including when and where the EIS public scoping meeting or meetings will be held; and
(10) The name, title, email address, physical address, and phone number of an individual representative of the proposing agency or applicant who may be contacted for further information.

(b) In the preparation of a draft EIS, proposing agencies and applicants shall consult all appropriate agencies, including the county agency responsible for implementing the county's general plan for each county in

which the proposed action is to occur and agencies having jurisdiction or expertise, as well as those citizen groups, and concerned individuals that the proposing agency reasonably believes to be affected. To this end, agencies and applicants shall endeavor to develop a fully acceptable draft EIS prior to the time the draft EIS is filed with the office, through a full and complete consultation process, and shall not rely solely upon the review process to expose environmental concerns.

(c) Upon publication of an EISPN in the periodic bulletin, agencies, groups, or individuals shall have a period of thirty days from the initial publication date to make written comments regarding the environmental effects of the proposed action. With good cause, the approving agency or accepting authority may extend the period for comments for a period not to exceed thirty additional days. Written comments and responses to the substantive comments shall be included in the draft EIS pursuant to section 11-200.1-24. For purposes of the scoping meeting, substantive comments shall be those pertaining to the scope of the EIS.

(d) No fewer than one EIS public scoping meeting addressing the scope of the draft EIS shall be held on the island(s) most affected by the proposed action, within the public review and comment period in subsection (c). The EIS public scoping meeting shall include a separate portion reserved for oral public comments and that portion of the scoping meeting shall be audio recorded. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §343-6)

§11-200.1-24 Content requirements; draft environmental impact statement. (a) The draft EIS, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action. In order that the public can be fully informed and that the accepting authority can make a sound decision based upon the full range of responsible opinion on environmental effects, an EIS shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) The scope of the draft EIS may vary with the scope of the proposed action and its impact, taking into consideration whether the action is a project or a program. Data and analyses in a draft EIS shall be commensurate with

the importance of the impact, and less important material may be summarized, consolidated, or simply referenced. A draft EIS shall indicate at appropriate points in the text any underlying studies, reports, and other information obtained and considered in preparing the draft EIS, including cost benefit analyses and reports required under other legal authorities.

(c) The level of detail in a draft EIS may be more broad for programs or components of a program for which site-specific impacts are not discernible, and shall be more specific for components of the program for which site-specific, project-level impacts are discernible. A draft EIS for a program may, where necessary, omit evaluating issues that are not yet ready for decision at the project level. Analysis of the program may be based on conceptual information in some cases and may discuss in general terms the constraints and sequences of events likely to result in any narrowing of future options. It may present and analyze in general terms hypothetical scenarios that are likely to occur.

(d) The draft EIS shall contain a summary that concisely discusses the following:

(1) Brief description of the action;

(2) Significant beneficial and adverse impacts (including cumulative impacts and secondary impacts);

(3) Proposed mitigation measures;

(4) Alternatives considered;

(5) Unresolved issues; and

(6) Compatibility with land use plans and policies, and listing of permits or approvals; and

(7) A list of relevant documents for actions considered in the analysis of the preparation of the EIS.

(e) The draft EIS shall contain a table of contents.

(f) The draft EIS shall contain a separate and distinct section that includes the purpose and need for the proposed action.

(g) The draft EIS shall contain a description of the action that shall include the following information, but need not supply extensive detail beyond that needed for evaluation and review of the environmental impact:

(1) A detailed map (preferably a United States Geological Survey topographic map, Flood Insurance Rate Maps, or Floodway Boundary Maps as applicable) and a related regional map;

(2) Objectives of the proposed action;
(3) General description of the action's technical, economic, social, cultural, and environmental characteristics;
(4) Use of state or county funds or lands for the action;
(5) Phasing and timing of the action;
(6) Summary technical data, diagrams, and other information necessary to enable an evaluation of potential environmental impact by commenting agencies and the public; and
(7) Historic perspective.

(h) The draft EIS shall describe in a separate and distinct section reasonable alternatives that could attain the objectives of the action. The section shall include a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions. Particular attention shall be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks of the action. Examples of alternatives include:

(1) The alternative of no action;
(2) Alternatives requiring actions of a significantly different nature that would provide similar benefits with different environmental impacts;
(3) Alternatives related to different designs or details of the proposed actions that would present different environmental impacts;
(4) The alternative of postponing action pending further study; and
(5) Alternative locations for the proposed action.

In each case, the analysis shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative. For alternatives that were eliminated from detailed study, the section shall contain a brief discussion of the reasons for not studying those alternatives in detail. For any agency actions, the discussion of alternatives shall include, where relevant, those alternatives not within the existing authority of the agency.

(i) The draft EIS shall include a description of the environmental setting, including a description of the environment in the vicinity of the action, as it exists before commencement of the action, from both a local and

regional perspective. Special emphasis shall be placed on environmental resources that are rare or unique to the region and the action site (including natural or human-made resources of historic, cultural, archaeological, or aesthetic significance); specific reference to related actions, public and private, existent or planned in the region shall also be included for purposes of examining the possible overall cumulative impacts of such actions. Proposing agencies and applicants shall also identify, where appropriate, population and growth characteristics of the affected area, any population and growth assumptions used to justify the proposed action, and any secondary population and growth impacts resulting from the proposed action and its alternatives. In any event, it is essential that the sources of data used to identify, qualify, or evaluate any and all environmental consequences be expressly noted in the draft EIS.

(j) The draft EIS shall include a description of the relationship of the proposed action to land use and natural or cultural resource plans, policies, and controls for the affected area. Discussion of how the proposed action may conform or conflict with objectives and specific terms of approved or proposed land use and resource plans, policies, and controls, if any, for the area affected shall be included. Where a conflict or inconsistency exists, the draft EIS shall describe the extent to which the agency or applicant has reconciled its proposed action with the plan, policy, or control, and the reasons why the agency or applicant has decided to proceed, notwithstanding the absence of full reconciliation.

(k) The draft EIS shall also contain a list of necessary approvals required for the action from governmental agencies, boards, or commissions or other similar groups having jurisdiction. The status of each identified approval shall also be described.

(l) The draft EIS shall include an analysis of the probable impact of the proposed action on the environment, and impacts of the natural or human environment on the action. This analysis shall include consideration of all phases of the action and consideration of all consequences on the environment, including direct and indirect effects. The interrelationships and cumulative environmental impacts of the proposed action and other related actions shall be discussed in the draft EIS. The draft EIS should recognize that several actions, in particular those that involve the construction of public facilities or structures (e.g.,

highways, airports, sewer systems, water resource actions, etc.) may well stimulate or induce secondary effects. These secondary effects may be equally important as, or more important than, primary effects, and shall be thoroughly discussed to fully describe the probable impact of the proposed action on the environment. The population and growth impacts of an action shall be estimated if expected to be significant, and an evaluation shall be made of the effects of any possible change in population patterns or growth upon the resource base, including but not limited to land use, water, and public services, of the area in question. Also, if the proposed action constitutes a direct or indirect source of pollution as determined by any governmental agency, necessary data regarding these impacts shall be incorporated into the EIS. The significance of the impacts shall be discussed in terms of subsections (m), (n), (o), and (p).

(m) The draft EIS shall include in a separate and distinct section a description of the relationship between local short-term uses of humanity's environment and the maintenance and enhancement of long-term productivity. The extent to which the proposed action involves trade-offs among short-term and long-term gains and losses shall be discussed. The discussion shall include the extent to which the proposed action forecloses future options, narrows the range of beneficial uses of the environment, or poses long-term risks to health or safety. In this context, short-term and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed action.

(n) The draft EIS shall include in a separate and distinct section a description of all irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included. The possibility of environmental accidents resulting from any phase of the action shall also be considered.

(o) The draft EIS shall address all probable adverse environmental effects that cannot be avoided. Any adverse effects such as water or air pollution, urban congestion, threats to public health, or other consequences adverse to

environmental goals and guidelines established by environmental response laws, coastal zone management laws, pollution control and abatement laws, and environmental policy including those found in chapters 128D (Environmental Response Law), 205A (Coastal Zone Management), 342B (Air Pollution Control), 342C (Ozone Layer Protection), 342D (Water Pollution), 342E (Nonpoint Source Pollution Management and Control), 342F (Noise Pollution), 342G (Integrated Solid Waste Management), 342H (Solid Waste Recycling), 342I (Special Wastes Recycling), 342J (Hazardous Waste, including Used Oil), 342L (Underground Storage Tanks), 342P (Asbestos and Lead), and 344 (State Environmental Policy), HRS, and those effects discussed in this section that are adverse and unavoidable under the proposed action must be addressed in the draft EIS. Also, the rationale for proceeding with a proposed action, notwithstanding unavoidable effects, shall be clearly set forth in this section. The draft EIS shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action. The draft EIS shall also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects.

(p) The draft EIS shall consider mitigation measures proposed to avoid, minimize, rectify, or reduce impacts, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein. Description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made. The draft EIS shall include, where possible, specific reference to the timing of each step proposed to be taken in any mitigation process, what performance bonds, if any, may be posted, and what other provisions are proposed to ensure that the mitigation measures will in fact be taken.

(q) The draft EIS shall include a separate and distinct section that summarizes unresolved issues and contains either a discussion of how such issues will be

resolved prior to commencement of the action, or what overriding reasons there are for proceeding without resolving the issues.

(r) The draft EIS shall include a separate and distinct section that contains a list identifying all governmental agencies, other organizations and private individuals consulted in preparing the statement, and shall disclose the identity of the persons, firms, or agency preparing the statement, by contract or other authorization.

(s) The draft EIS shall include a separate and distinct section that contains:

(1) Reproductions of all written comments submitted during the consultation period required in section 11-200.1-23;

(2) Responses to all substantive written comments made during the consultation period required in section 11-200.1-23. Proposing agencies and applicants shall respond in the draft EIS to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(A) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable different topic areas with the commenter identified in each applicable topic area. All comments, except those described in paragraph (3), must be appended in full to the final document; or

(B) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response being responded to for each comment letter submitted. All comments, except those described in

paragraph (3), must either be included with the response, or appended in full to the final document;

(3) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(A) The response may be grouped under paragraph (2)(A) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(B) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document; and

(C) Provided that, if a commenter adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to paragraph (2);

(4) A summary of any EIS public scoping meetings, including a written general summary of the oral comments made, and a representative sample of any handout related to the action provided at the EIS public scoping meeting(s);

(5) A list of those persons or agencies who were consulted and had no comment in a manner indicating that no comment was provided; and

(6) A representative sample of the agency consultation request letter.

(t) An addendum to a draft EIS shall reference the original draft EIS to which it attaches and comply with all applicable filing, public review, and comment requirements set forth in subchapter 10. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200.1-25 Public review requirements for draft environmental impact statements. (a) Public review shall not substitute for early and open discussion with

interested persons and agencies concerning the environmental impacts of a proposed action. Review of the draft EIS shall serve to provide the public and other agencies an opportunity to discover the extent to which a proposing agency or applicant has examined environmental concerns and available alternatives.

(b) The period for public review and for submitting written comments shall commence from the date that notice of availability of the draft EIS is initially issued in the periodic bulletin and shall continue for a period of forty-five days, unless mandated otherwise by statute. Written comments to the accepting authority with a copy of the comments to the proposing agency or applicant, shall be received by or postmarked to the approving agency or accepting authority, within the forty-five-day comment period. Any comments outside of the forty-five day comment period need not be responded to nor considered. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-26 Comment response requirements for draft environmental impact statements. (a) In accordance with the content requirements of section 11-200.1-27, the proposing agency or applicant shall respond within the final EIS to all substantive written comments received by or postmarked to the approving agency during the forty-five-day review period. In deciding whether a written comment is substantive, the proposing agency or applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EIS, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall be clearly indicated.

(b) Proposing agencies and applicants shall respond in the final EIS to all substantive written comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be

clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable topic areas with the commenter identified in each applicable topic area. All comments, except those described in subsection (c), must be appended in full to the final document; or

(2) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response for each comment letter submitted. All comments, except those described in subsection (c), must either be included with the response or appended in full to the final document.

(c) For comments that are form letters or petitions, that contain identical or near-identical language, and that raise the same issues on the same topic:

(1) The response may be grouped under subsection (b)(1) with the response to other comments under the same topic and issue with all commenters identified in the distinctly labeled section identifying commenters by topic; or

(2) A single response may be provided that addresses all substantive comments within the form letter or petition and that includes a distinct section listing the individual commenters who submitted the form letter or petition. At least one representative sample of the form letter or petition shall be appended to the final document;

Provided that if a commenter adds a distinct substantive comment to a form letter or petition, then that comment must be responded to pursuant to subsection (d).

(d) In responding to substantive written comments, proposing agencies and applicants shall endeavor to resolve conflicts, inconsistencies, or concerns identified and to provide a response that is commensurate with the content of those comments. The response shall indicate changes that have been made to the text of the draft EIS. The response shall describe the disposition of significant environmental issues raised (for example, the response may point to revisions to the proposed action to mitigate anticipated impacts or objections raised in the comment). In particular, the issues raised when the proposing agency's or applicant's position is at variance with recommendations

and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-27 Content requirements; final environmental impact statement. (a) The final EIS, at a minimum, shall contain the information required in this section. The contents shall fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action. In order that the public can be fully informed and the accepting authority can make a sound decision based upon the full range of responsible opinion on environmental effects, an EIS shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

(b) The final EIS shall consist of:

(1) The draft EIS prepared in compliance with this subchapter, as revised to incorporate substantive comments received during the review processes in conformity with section 11-200.1-26, including reproduction of all comments and responses to substantive written comments;

(2) A list of persons, organizations, and public agencies commenting on the draft EIS;

(3) A list of those persons or agencies who were consulted with in preparing the final EIS and had no comment shall be included in a manner indicating that no comment was provided;

(4) A written general summary of oral comments made at any public meetings; and

(5) The text of the final EIS written in a format that allows the reader to easily distinguish changes made to the text of the draft EIS. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-2, 343-5, 343-6)

§11-200.1-28 Acceptability. (a) Acceptability of a final EIS shall be evaluated on the basis of whether the final EIS, in its completed form, represents an informational instrument that fulfills the intent and

provisions of chapter 343, HRS, and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.

(b) A final EIS shall be deemed to be an acceptable document by the accepting authority or approving agency only if all of the following criteria are satisfied:

(1) The procedures for assessment, consultation process, review, and the preparation and submission of the EIS, from proposal of the action to publication of the final EIS, have all been completed satisfactorily as specified in this chapter;

(2) The content requirements described in this chapter have been satisfied; and

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, including properly identifying comments as substantive and responding in a way commensurate to the comment, and have been appropriately incorporated into the final EIS.

(c) For actions proposed by agencies, the proposing agency may request the office to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the office decides to make a recommendation, it shall submit the recommendation to the accepting authority and proposing agency. In all cases involving state funds or lands, the governor or the governor's authorized representative shall have final authority to accept the EIS. In cases involving only county funds or lands, the mayor of the respective county or the mayor's authorized representative shall have final authority to accept the EIS. The accepting authority shall take prompt measures to determine the acceptability or non-acceptability of the proposing agency's EIS. If the action involves state and county lands, state or county funds, or both state and county lands and state and county funds, the governor or the governor's authorized representative shall have final authority to accept the EIS.

(d) Upon acceptance or non-acceptance of the EIS, a notice shall be filed by the appropriate accepting authority with both the proposing agency and the office. For any non-accepted EIS, the notice shall contain specific findings and reasons for non-acceptance. The office shall publish notice of the determination of acceptance or non-acceptance in the periodic bulletin in accordance with

subchapter 4. Acceptance of a required statement shall be a condition precedent to the use of state or county lands or funds in implementing the proposed action.

(e) For actions proposed by applicants requiring approval from an agency, the applicant or accepting authority, which is the approving agency, may request the office to make a recommendation regarding the acceptability or non-acceptability of the EIS. If the office decides to make a recommendation, it shall submit the recommendation to the applicant and the approving agency within the period requiring an approving agency to determine the acceptability of the final EIS. Upon acceptance or non-acceptance by the approving agency, the agency shall notify the applicant of its determination, and provide specific findings and reasons. The agency shall also provide a copy of this determination to the office for publication in the periodic bulletin. Acceptance of the required EIS shall be a condition precedent to approval of the request and commencement of the proposed action. The agency shall notify the applicant and the office of the acceptance or non-acceptance of the final EIS within thirty days of the final EIS submission to the agency; provided that the thirty-day period may, at the request of the applicant, be extended for a period not to exceed fifteen days. The request shall be made to the accepting authority in writing. Upon receipt of an applicant's written request for an extension of the thirty-day acceptance period, the accepting authority shall notify the office and applicant in writing of its decision to grant or deny the request. The notice shall be accompanied by a copy of the applicant's request. An extension of the thirty-day acceptance period shall not be granted merely for the convenience of the accepting authority. If the agency fails to make a determination of acceptance or non-acceptance of the EIS within thirty days of the receipt of the final EIS, then the statement shall be deemed accepted.

(f) A non-accepted EIS may be revised by a proposing agency or applicant. The revision shall take the form of a revised draft EIS which shall fully address the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, acceptance or non-acceptance, and notification and publication of acceptability shall be the same as the requirements prescribed by subchapters 4 and 10 for an EIS submitted for acceptance. In addition, the subsequent

revised final EIS shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

(g) A proposing agency or applicant may withdraw an EIS by simultaneously sending a written notification to the office and to the accepting authority informing the office of the proposing agency's or applicant's withdrawal. Subsequent resubmittal of the EIS shall meet all requirements for filing, distribution, publication, review, acceptance, and notification as a draft EIS. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-29 Appeals to the council. An applicant, within sixty days after a non-acceptance determination by the approving agency under section 11-200.1-28 of a final EIS, may appeal the non-acceptance to the council, which within the statutorily mandated period after receipt of the appeal, shall notify the applicant appealing of its determination to affirm the approving agency's non-acceptance or to reverse it. The council chairperson shall include the appeal on the agenda of the next council meeting following receipt of the appeal. In any affirmation or reversal of an appealed non-acceptance, the council shall provide the applicant and the agency with specific findings and reasons for its determination. The agency shall abide by the council's decision. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

§11-200.1-30 Supplemental environmental impact statements. (a) An EIS that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. An EIS that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no supplemental EIS for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location, or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental EIS

shall be prepared and reviewed as provided by this chapter. As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the EIS associated with that action shall be deemed to comply with this chapter.

(b) The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental EIS is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental EISs whenever the proposed action for which an EIS was accepted has been modified to the extent that new or different environmental impacts are anticipated. A supplemental EIS shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned will not be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

(c) The contents of the supplemental EIS shall be the same as required by this chapter for the EIS and may incorporate by reference unchanged material from the same; however, in addition, it shall fully document the proposed changes from the original EIS, including changes in ambient conditions or available information that have a bearing on a proposed action or its impacts, the positive and negative aspects of these changes, and shall comply with the content requirements of subchapter 10 as they relate to the changes.

(d) The requirements of the thirty-day consultation, public notice filing, distribution, the forty-five-day public review, comments and response, and acceptance procedures, shall be the same for the supplemental EIS as is prescribed by this chapter for an EIS. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 11

NATIONAL ENVIRONMENTAL POLICY ACT

§11-200.1-31 National environmental policy act actions: applicability to chapter 343, HRS. When a

certain action will be subject both to the National Environmental Policy Act of 1969 (NEPA), as amended (P.L. 91-190, 42 U.S.C. sections 4321-4347, as amended by P.L. 94-52, July 3, 1975, P. L. 94-83, Aug. 9, 1975, and P.L. 97-258 section 4(b), Sept. 13, 1982) and chapter 343, HRS, the following shall occur:

(1) The applicant or agency, upon discovery of its proposed action being subject to both chapter 343, HRS, and the NEPA, shall notify the responsible federal entity, the office, and any agency with a definite interest in the action (as prescribed by chapter 343, HRS).

(2) When a federal entity determines that the proposed action is exempt from review under the NEPA, this determination does not automatically constitute an exemption for the purposes of this chapter. In these cases, state and county agencies remain responsible for compliance with this chapter. However, the federal exemption may be considered in the state or county agency determination.

(3) When a federal entity issues a FONSI and concludes that an EIS is not required under the NEPA, this determination does not automatically constitute compliance with this chapter. In these cases, state and county agencies remain responsible for compliance with this chapter. However, the federal FONSI may be considered in the state or county agency determination.

(4) The NEPA requires that EISs be prepared by the responsible federal entity. In the case of actions for which an EIS pursuant to the NEPA has been prepared by the responsible federal entity, the draft and final federal EIS may be submitted to comply with this chapter, so long as the federal EIS satisfies the EIS content requirements of this chapter and is not found to be inadequate under the NEPA: by a court; by the Council on Environmental Quality (or is at issue in pre-decision referral to Council on Environmental Quality) under the NEPA regulations; or by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, title 41 United States Code section 7609.

(5) When the responsibility of preparing an EIS is delegated to a state or county agency, this chapter shall apply in addition to federal requirements under the NEPA. The office and state or county agencies shall cooperate with federal entities to the fullest extent possible to reduce duplication between federal and state requirements. This cooperation, to the fullest extent possible, shall include joint EISs with concurrent public review and processing at both levels of government. Where federal law has EIS requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling the requirements so that one document shall comply with all applicable laws.

(6) Where the NEPA process requires earlier or more stringent public review, filing, and distribution than under this chapter, that NEPA process shall satisfy this chapter so that duplicative consultation or review does not occur. The responsible federal entity's supplemental EIS requirements shall apply in these cases in place of this chapter's supplemental EIS requirements.

(7) In all actions where the use of state land or funds is proposed, the final EIS shall be submitted to the governor or an authorized representative. In all actions when the use of county land or funds is proposed and no use of state land or funds is proposed, the final EIS shall be submitted to the mayor, or an authorized representative. The final EIS in these instances shall first be accepted by the governor or mayor (or an authorized representative), prior to the submission of the same to the responsible federal entity.

(8) Any acceptance obtained pursuant to this section shall satisfy chapter 343, HRS, and no other EIS for the proposed action shall be required. [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-5, 343-6)

SUBCHAPTER 12

RETROACTIVITY AND SEVERABILITY

§11-200.1-32 **Retroactivity.** (a) This chapter shall apply immediately upon taking effect, except as otherwise provided below.

(b) Chapter 11-200 shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of chapter 11-200.1, provided that:

(1) For EAs, if the draft EA was published by the office prior to the adoption of this chapter and has not received a determination within a period of five years from the implementation of this chapter, then the proposing agency or applicant must comply with the requirements of this chapter. All subsequent environmental review, including an EISPN must comply with this chapter.

(2) For EISs, if the EISPN was published by the office prior to the adoption of this chapter and the final EIS has not been accepted within five years from the implementation of this chapter, then the proposing agency or applicant must comply with the requirements of this chapter.

(3) A judicial proceeding pursuant to section 343-7, HRS, shall not count towards the five-year time period.

(c) Exemption lists that have received concurrence under chapter 11-200 may be used for a period of seven years after the adoption of this chapter, during which time the agency must revise its list and obtain concurrence from the council in conformance with this chapter. [Eff] (Auth: HRS §343-6) (Imp: HRS §343-6)

§11-200.1-33 **Severability.** If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable." [Eff] (Auth: HRS §§343-5, 343-6) (Imp: HRS §§343-6, 343-8)

3. The repeal of chapter 11-200 and the adoption of chapter 11-200.1, Hawaii Administrative Rules, shall take

effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on MONTH DATE, YEAR and filed with the Office of the Lieutenant Governor.

_____
(Name), Director

APPROVED AS TO FORM:

_____
Deputy Attorney General

IV. New Business

D. Discussion and Action on Proposed Amendments to HAR Title 15, Chapter 15, **Land Use Commission Rules,** promulgated by DBEDT

RULE-MAKING CHECKLIST

FOR

"SMALL BUSINESS IMPACT STATEMENT"

(§201M-2, SLH 1998, am L 2008)

DEPARTMENT OR AGENCY: Land use Commission

Chapter and Title: Chapter 15, Title 15

Name and Phone Number of Contact Person: Daniel Orodenker (587-3826)

A. Description:

___ New rule(s) ___ Repeal of Rule _X_ Amendment to rule(s)

B. Provided are the following information described in Items 1-7 of the Policy Section in the Governor's Administrative Directive No. 09-01

1. Exact Changes and Reasons for Changes.

The LUC has amended various sections of its rules for the purposes of clarification, conformance to various appeals and to incorporate rules requiring disclosure of project impacts on climate change and sustainability issues in conformance with the State Plan (Chapter 226, Hawai`i Revised Statutes). A complete description of the changes is attached hereto. As the LUC is a quasi-judicial body, the purpose of the rules is primarily to clarify the requirements for a petition and the methodology for presenting evidence to the Commission.

2. How would the proposed changes affect Department operations or functions?

The proposed rules would not change the responsibilities, functions, or activities of the Department. The rules clarify existing operations and/or codify statutory mandates already in place and operating.

a. Is the proposed rule authorized by a federal or state law or statute that does not require an agency to interpret or describe the requirements of the law or statute?

__X__ Yes __ No

b. Is the proposed rule an emergency regulation?

___ Yes _X_ No

c. Will the proposed rule affect small business because it:

1) will apply to a for-profit enterprise consisting of fewer than 100 full-time or part-time employees?

__X__ Yes __No

2) will cause a direct and significant economic burden upon a small business?

___ Yes _X_No

3) is directly related to the formation, operation, or expansion of a small business?

___ Yes _X_No

Provide the information requested in only Items 3-7 (Skip Items 8-11)

- If you answered YES to either Item 2. a. or Item 2. b.; or
- If you answered NO to Item 2. c. (1); or
- If you answered YES to Item 2. c.(1), and NO to both Item 2. c. (2) and Item 2. c.(3).

Provide the information requested in Items 3-11:

- If you answered YES to Item 2. c. 1), and YES to either Item 2. c. 2) or 2. c. 3).

3. Departmental Impact (i.e. fiscal, personnel, program)?

___ Yes _X_ No (If yes, describe long and short-range impacts, estimated in dollar amounts or personnel, due to enforcement, administration, execution, or implementation

of the proposed rule that may result in a savings or shortfall under the current program budget.)

The Department does not anticipate a long or short range negative impact from enforcement, administration, or implementation of the proposed rules. The area is already managed under the existing administrative rules and the proposed amendments are not expected to increase costs.

4. Impact on General Public (i.e. individuals, consumers, and businesses)?

__ Yes _X__ No (If yes, describe long- and short-range impacts due to the enforcement, implementation, or execution of the proposed rule.)

5. Impact on state economy?

___ Yes _X_ No (If yes, describe long and short-range impacts.)

The proposed rules are not expected to negatively impact the state's economy.

6. Final result anticipated from the proposed rule.

The LUC process will be clearer and more streamlined. It should provide certainty to landowners and streamline the process by clarifying requirements.

7. Other alternatives explored to carry out the statutory purpose other than rulemaking.

The proposed rules are the most efficient way to implement legal requirements of Chapter 205.

Small Business Impact Statement:

8. Is there a new or increased fee or fine?

___ Yes _X_ No (If yes, provide the following information):

a. Amount of the current fee or fine and last time it was increased.

b. Amount of the proposed fee or fine and percentage increase.

c. Reason for new or increased fee or fine.

d. Administrative cost to implement or enforce the proposed rule.

e. Amount agency expects to collect annually from change in fee or fine.

f. Will fee revert to general fund? If not, specify where and how monies will be allocated.

g. Criteria used to determine amount of fee or fine. (Example: cost of specific service, general overhead or overall program cost, or no relationship to cost).

9. Will the proposed rule affect small business?

___ Yes _X_ No (If yes, provide the following information):

a. Describe the type(s) of small business that will be directly or adversely affected by, bear the costs of, or directly benefit from the proposed rule.

There will be no impact on small business.

b. Description of any increase in direct costs, in estimated dollar amounts, to small business, such as fees or fines, or other direct costs associated with compliance.

There will be no impact on small business.

c. Description of any increase in indirect costs, in estimated dollar amounts, to small business, such as reporting, record keeping, equipment, construction, labor, professional services, revenue loss or other costs associated with compliance.

There will be no impact on small business.

d. Description of how small business was involved in the development of the proposed rules.

e. Methods considered or used to reduce the impact on small business such as:

- Simplification,
- Consolidation,
- Varying schedule for fees or fines,
- Modified compliance or reporting requirements, or

- Other alternative or less stringent measures proposed by affected businesses and, if proposed, why those proposals were not adopted.

f. If the proposed rule is more stringent than those mandated by governing federal or state law or statute, explain how and why the proposed rule is more stringent.

n/a

10. Was the departmental advisory committee on small business or other small businesses or organizations consulted during the drafting of the proposed rule, and were the committee's recommendations, if any, incorporated into the proposed rule?

There will be no impact on small business.

11. Did the Small Business Regulatory Review Board or a small business make any recommendation to the department or agency regarding the need for any rule change that may be related to the proposed rule?

There will be no impact on small business.

LUC Rule Amendments Guide

2018

The proposed changes to the LUC Rules have been developed over the past several years. Because many sections of the LUC rules have not been updated since the advent of Climate Change and Sustainability issues a comprehensive attempt has been made to bring the rules into line with the State sustainability plan and the State Plan and to conform them to modern practice.

As the changes or amendments are often small and repetitive it was deemed inefficient and cumbersome to do a line by line analysis of the proposed amendments.

This document is designed as a guide to the proposed amendments to the Land Use Commission's rules of Practice and Procedure (Hawaii Administrative Rules Chapter 15-15). The proposed rules generally consist of three major categories, or types, of changes.

1. Modernization changes – These amendments are intended to update the rules to conform to modern parlance (such as changing "counsel" to "attorney") or to modern technology (such as changing document submittal requirements from an original and fifteen copies to one original, one copy and an electronic version). Often they are repeated verbatim in various sections.

2. Clarification language – Amendments of this type are designed to clarify existing rules and/or memorialize practical interpretations of existing rule that have resulted, or been noted, as a result of various cases or petitions, appeals from LUC decisions or situations that have arisen in the course of the staff or the Commission's attempts to deal with varied situations. These changes can be either in substantive, procedural or administrative areas. They include insertion of language from one section into another to clarify applicability of a particular provision, consolidation of language covering the same topic from multiple sections into one.

3. New sub-sections - New rules or additions are primarily associated with the issue of Sustainability. The Land Use Commission is bringing its rules into line with the State Plan which addresses issues of sustainability and climate change. The proposed rule amendments require petitioners before the Land Use Commission to address issues associated with Sustainability and Climate Change impacts as a part of a petition.

This document should be read in conjunction with the attached Amended Rules". Note that deleted language in the document is ~~crossed out~~ and new language is <u>underlined</u>. Retained language is left in its original format.

[Ramseyer format]

~~DEPARTMENT OF BUSINESS,~~
~~ECONOMIC DEVELOPMENT, AND TOURISM~~

Amendment and Compilation of Chapter 15-15
Hawai`i Administrative Rules

~~October 11~~Month Date, ~~2013~~2018

1. Chapter 15-15, Hawaii Administrative Rules, entitled "Land Use Commission Rules," is amended and compiled to read as follows:

~~SUMMARY~~

~~1. §15-15-02 is repealed~~

~~2. §15-15-03 is amended.~~

~~3. §15-15-05 is amended.~~

~~4. §15-15-06 is amended.~~

~~5. §15-15-06.1 is amended.~~

~~6. §15-15-07 is amended.~~

~~7. §15-15-08 is amended.~~

~~8. §15-15-09 is amended.~~

~~9. §15-15-10 is amended.~~

~~10. §15-15-12 is repealed.~~

~~1.§15-15-13 is amended.~~

~~12. §15-15-14 is amended.~~

~~13. §15-15-15 is amended.~~

~~14. §15-15-16 is amended.~~

~~15. §15-15-18 is amended.~~

~~2.§15-15-19 is amended.~~

~~3.§15-15-20 is amended.~~

~~18. §15-15-21 is amended.~~

~~19. §15-15-22 is amended.~~

~~20. §15-15-25 is amended.~~

~~21. §15-15-27 is amended.~~

~~22. §15-15-29 is amended.~~

~~23. §15-15-34 is amended.~~

~~24. §15-15-34.1 is added.~~

~~25. §15-15-35 is amended.~~

~~26. §15-15-36 is amended.~~

~~27. §15-15-37 is amended.~~

~~28. §15-15-38 is amended.~~

~~29. §15-15-39 is amended.~~

~~30. §15-15-40 is amended.~~

~~31. §15-15-41 is amended.~~

~~32. §15-15-42 is amended.~~

~~33. §15-15-44 is amended.~~

~~34. §15-15-45 is amended.~~

~~4.§15-15-45.1 is added~~amended.

~~36. §15-15-45.2 is added.~~

~~37. §15-15-47 is amended.~~

~~38. §15-15-48 is amended.~~

~~39. §15-15-49 is repealed.~~

~~5.§15-15-50 is amended.~~

~~41. §15-15-50.5 is added.~~

~~42. §15-15-50.6 is added.~~

~~43. §15-15-51 is amended.~~

~~44. §15-15-52 is amended.~~

~~45. §15-15-53 is amended.~~

~~46. §15-15-54 is amended.~~

~~47. §15-15-55 is amended.~~

~~48. §15-15-55.1 is amended.~~

~~49. §15-15-56 is amended.~~

~~50. §15-15-57 is amended.~~

~~51. §15-15-58 is amended.~~

~~52. §15-15-59 is amended.~~

~~53. §15-15-60 is amended.~~

~~54. §15-15-61 is amended.~~

~~55. §15-15-62 is amended.~~

~~56. §15-15-63 is amended.~~

~~57. §15-15-64 is repealed.~~

~~58. §15-15-66 is amended.~~

~~59. §15-15-67 is amended.~~

~~60. §15-15-68 is repealed.~~

~~61. §15-15-69 is amended.~~

~~6.§15-15-70 is amended.~~

~~63. §15-15-70.1 is added.~~

~~7.§15-15-74 is amended.~~

~~8.§15-15-76~~ 75 ~~is amended.~~

~~9.§15-15-77 is amended.~~

~~67. §15-15-78 is amended.~~

~~68. §15-15-79 is amended.~~

~~69. §15-15-80 is amended.~~

~~10.§15-15-82 is amended.~~

~~71. §15-15-82.1 is added.~~

~~72. §15-15-83 is amended.~~

~~73. §15-15-84 is amended.~~

~~74. §15-15-85 is amended.~~

~~75. §15-15-85.1 is added.~~

~~76. §15-15-86 is amended.~~

~~77. §15-15-87 is amended.~~

~~78. §15-15-88 is amended.~~

~~79. §15-15-89 is amended.~~

~~80. §15-15-90 is amended.~~

~~81. §15-15-92 is amended.~~

~~11.§15-15-93 is amended.~~

~~83. §15-15-94 is amended.~~

~~84. §15-15-95 is amended.~~

~~85. §15-15-95.1 is added.~~

~~86. §15-15-96 is amended.~~

~~87. §15-15-96.1 is added.~~

~~12.§15-15-97 is amended.~~

~~89. §15-15-97.2 is added.~~

~~90. §15-15-98 is amended.~~

~~91. §15-15-99 is amended.~~

~~92. §15-15-100 is amended.~~

~~93. §15-15-101 is amended.~~

~~94. §15-15-102 is repealed.~~

~~95. §15-15-103 is amended.~~

~~96. §15-15-104 is amended.~~

~~97. §15-15-105 is amended.~~

~~98. §15-15-106 is amended.~~

~~99. §15-15-107 is amended.~~

~~100. §15-15-107.1 is added.~~

~~101. §15-15-109 is amended.~~

~~102. §15-15-110 is amended.~~

~~103. §15-15-120 is added.~~

~~104. §15-15-121 is added.~~

~~13. §15-15-122 is amended~~added.

~~106. §15-15-123 is added.~~

~~14. §15-15-124 is amended~~added.

~~108. §~~Chapter 15 is compiled ~~15-15-125 is added.~~

~~109. §15-15-126 is added.~~

~~110. §15-15-127 is added.~~

~~111. §15-15-128 is added.~~

~~15. Subchapter 18 is repealed.~~

~~113. Chapter 15 is compiled~~

"HAWAI`I ADMINISTRATIVE RULES

TITLE 15

DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT, AND TOURISM

CHAPTER 15

LAND USE COMMISSION RULES

Subchapter 1 General Provisions

Subchapter 2 Establishment of State Land Use Districts

Subchapter 3 Permissible Land Uses

Subchapter 4 Non-conformance

Subchapter 5 Proceedings Before the Commission

Subchapter 11 Conditions: Filing, Enforcement, Modification, Deletion

Subchapter 12 Special Permits

Subchapter 13 Government Sponsored Housing Projects

Subchapter 14 Declaratory Orders

Subchapter 15 Rulemaking Proceedings

Historical Note: This chapter is based substantially upon Rules of Practice and Procedure, Part I of the land use commission [Eff. 4/21/62; am and ren. 8/4/69; am and ren. 1/5/75; am and ren. 12/21/75; am 3/27/77; R 10/27/86] and State Land Use District

Regulations, Part II of the land use commission [Eff. 8/23/64; am and ren. 8/4/69; am and ren. 1/5/75; am and ren. 12/21/75; R 10/27/86] and land use commission rules, chapter 15-15. [Eff 10/27/86; am 3/20/87; am 7/12/93; am 3/24/94; am 7/18/94; am and comp 8/16/97; am and comp 5/08/00; am and ~~comp~~ comp 11/2/2013; am and comp]

SUBCHAPTER 1

GENERAL PROVISIONS

§15-15-01 **Purpose.** This chapter governs the practice and procedure before the land use commission, and shall be construed to secure the just and efficient determination of every proceeding. This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawai`i. The rules under this chapter are promulgated pursuant to authority provided by sections 205-1 and 205-7, HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp ~~comp~~] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-7)

§15-15-02 **REPEALED.** [R 8/16/97]

§15-15-03 **Definitions.** As used in this chapter:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land.

"Agency" means each state or county board, commission, department, or office authorized by law to make rules or to adjudicate contested cases, except those in legislative or judicial branches.

"Agency hearing" refers only to a hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14, HRS.

"Agricultural park" means the same as in section 166-2, HRS.

"Building" means any structure having a roof,

including, but not limited to, attached carports and similar structures.

"Chairperson" means the chairperson of the commission.

"Chief clerk" means the person who is responsible for receiving, recording, and preserving the records of all matters brought before the commission.

"Commission" means the land use commission of the State of Hawai`i.

"Commissioner" means a member of the commission.

"Contested case" means a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

"District" means an area of land, including lands underwater, established as an urban, agricultural, conservation, or rural district.

"Dwelling" means a building designed or used exclusively for single family residential occupancy, but not including house trailer, multi-family unit, mobile home, hotel, or motel.

"Economic feasibility" means the degree to which the market demand for the proposed project, development, or use by the petitioner is accurately estimated and appears to be substantial enough to indicate the probability of a viable endeavor to justify the boundary amendment.

"Executive officer" means the individual appointed by the commission to be the administrative officer of the commission.

"Facsimile" means a document produced by a receiver of signals transmitted over telecommunication lines, after translating the signals, to produce a duplicate of an original document.

"Farm dwelling" means a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.

"Filing" means the submittal of documents with the chief clerk. A document will be considered filed at the time it is received in the chief clerk's office, as evidenced by the date and time endorsed on the document by or at the direction of the chief clerk. Unless otherwise specifically provided in these rules, electronic or facsimile transmission of documents to the chief clerk or executive officer of the commission does not constitute filing. This definition is to be distinguished from the definition for "proper filing" for petitions to amend a district boundary.

"Hearings officer" means a person or persons duly

designated and authorized by the commission to conduct proceedings on matters within the jurisdiction of the commission for purposes of taking testimony and to report the person's findings and recommendations to the commission.

"HRS" means the Hawai`i Revised Statutes.

"Intervenor" means a person who properly seeks by application to intervene and is entitled to be admitted as a party in any contested case proceeding before the commission.

"Land" means all real property in the State including areas under water within the boundaries of the State.

"Landowner" means a person or party with a fee simple interest in the land.

"Lot" means a single parcel of land of record in the real property tax records of the county in which the land is located.

"Map" means the land use district boundaries maps of the commission.

"Meeting" means the convening of the commission for which a quorum is required in order to make a decision or deliberate toward a decision upon a matter over which the commission has supervision, control, jurisdiction, or advisory power.

"Party" means a person named or admitted as a party or entitled as of right to be admitted as a party in any contested case proceeding before the commission.

"Person" means any individual, corporation, firm, association, partnership, society, or other legal entity, and any federal, state, and county department or agency.

"Petitioner" means a person who seeks permission or authorization from the commission in any matter for which the commission is authorized to grant relief.

"Planning commission" means the planning commissions of the various counties, including the city and county of Honolulu.

"Presiding officer" means any commissioner or a hearings officer duly designated as such. Unless otherwise designated, the chairperson shall be the presiding officer.

"Proceeding" means any matter brought before the commission over which the commission has jurisdiction and shall include, but not be limited to:

(1) Petitions for district boundary amendment;
(2) Petitions for special permit;
(3) Proceedings for the adoption, amendment, or repeal of rules under sections 91-3 and 205-7, HRS;

(4) Petitions for declaratory orders under section 91-8, HRS;
(5) An investigation or review instituted or requested to be initiated by the commission; and
(6) All other matters in the administration of chapter 205, HRS.

"Proper filing," as applied in section 205-4, HRS, means after a petition for district boundary amendment has been filed with the chief clerk, and the executive officer has made a determination that the petition conforms to the requirements of section 15-15-50 and accepts the petition for processing.

"Public records" means the same as "government records" as defined in chapter 92F, HRS.

"Public institution or building" means any institution or building being used by a federal, state, or county agency for a public purpose.

"Respondent" means a person subject to any statute, rule, or order administered by the commission and upon whom an order or notice is issued by the commission instituting an agency hearing to show cause.

"Shoreline" means the same as in section 205A-1, HRS.

"Single-family dwelling" means a dwelling occupied exclusively by one family.

"State" means the State of Hawai`i.

"Structure" means a constructed or erected material or combination of materials, which requires location on the ground, including, but not limited to, buildings, radio towers, sheds, storage bins, fences, and signs.

"Unauthorized ex parte communication" means private communications or arguments with members of the commission, or its hearings officer as to the merits of a proceeding with a view towards influencing the outcome of the petition or proceeding. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and ~~am and~~ comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-1, 205-7)

§15-15-04 **Grammatical usage.** (a) Words used in the present tense include the future tense.

(b) The singular number includes the plural; and the plural, the singular.

(c) The word "shall" is always mandatory.

(d) The word "may" is always permissive.

(e) Terms not defined in this chapter shall have

the meaning customarily assigned to them. [Eff 10/27/86; comp 8/16/97; comp 5/8/00;- comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-7)

§15-15-05 **Office and office hours.** (a) The office of the commission is in Honolulu, Hawai`i. All communications to the commission, including requests for information and submittals, shall be in writing and, shall be addressed to the commission's office, unless otherwise directed by the commission.

(b) The office of the commission shall be open from 7:45 a.m. to 4:30 p.m., Monday through Friday, excepting legal holidays as designated pursuant to section 8-1, HRS, and any day or any part of a day on or for which the governor has granted administrative leave in the State, unless otherwise provided by statute or executive order. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and ~~am and~~ comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§80-1, 91-2, 205-7)

§15-15-06 **Chairperson and vice-chairperson.** (a) The commissioners shall annually elect a chairperson and one or more vice-chairpersons from its members.

(b) The chairperson shall have the responsibilities and duties prescribed in this chapter.

(c) In the absence of the chairperson, the vice-chairperson or vice-chairpersons shall have the responsibilities and duties of the chairperson prescribed in this chapter. In case of resignation or incapacity of the chairperson, a vice-chairperson shall perform such duties as are imposed on the chairperson until such time as the commission shall elect a new chairperson. In the event the chairperson or a vice-chairperson resigns, the commission shall elect a new chairperson or vice-chairperson, as the case may be, as soon as practicable after such resignation. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and ~~am and~~ comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp.: HRS §§91-2, 205-7)

§15-15-06.1 **Hearings officer.** (a) The commission may appoint a hearings officer pursuant to

section 92-16, HRS.

(b) If for any reason the hearings officer designated is unable to complete a hearing, the commission, without abatement of the proceedings, may assign the matter to another hearings officer. [Eff and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§92-16, 205-1)

§15-15-07 **Executive officer.** (a) The executive officer shall be appointed by the commission to serve as the administrative head of the commission staff and have responsibilities and duties as prescribed by the commission. The executive officer shall be directly responsible to the commission, and shall have control of and responsibility for the execution of the commission's policies, the administration of its affairs, and the employment and supervision of its personnel, subject to the commission's oversight. From time to time, or as requested, the executive officer shall furnish the commission members with such information and make such recommendations as shall be necessary to effect the purposes of the commission and for the proper administration of its affairs. The executive officer shall develop annual budgets, authorize and certify payrolls, requisitions, invoices, and other such documents essential to the proper administration of the commission.

(b) The executive officer shall prepare a hearings calendar and the agenda for all meetings and hearings, under the direction of the chairperson.

(c) The executive officer or such other person as may be authorized by the commission shall certify all decisions and orders and other actions of the commission.

(d) The executive officer may be appointed by the commission to serve as hearings officer.

(e) The executive officer may interpret land use district boundaries at the request of the public. Interpretation of district boundaries shall be done in compliance with section 15-15-22.

(f) The executive officer may conduct the prehearing conference provided under section 15-15-57. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-1)

§15-15-08 **Chief clerk.** (a) Under the supervision of the executive officer, the chief clerk shall have custody of the commission's official records and shall be responsible for the maintenance and custody of the docket files, including the transcripts and exhibits, the minutes of all of the commission's meetings and hearings, and all of the commission's decisions, orders, opinions, rules, and approved forms.

(b) In addition to other duties, the chief clerk shall maintain a docket file of all proceedings filed with the commission, including all petitions for district boundary amendments, all applications for special permits, and all petitions for rule-making or declaratory ruling filed with the commission, and each docket shall be assigned a number. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: §§91-2, 205-1)

§15-15-09 **Public records.** All public records shall be available for inspection at the office of the commission during regular business hours. Public information on matters within the jurisdiction of the commission, but which excludes confidential information, may be obtained by inquiring in person during regular business hours, or by submitting a written request to the commission. Requests made via facsimile or electronic mail to the commission are acceptable. Commission staff may respond to any inquiry or request by making the records available at the commission office. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§92F-1, et seq.)

§15-15-10 **Meetings; generally.** (a) The commission may meet and exercise its power in the State of Hawai`i. Except as provided in sections 92-4 and 92-5, HRS, all of the commission meetings and hearings are open to the public. Unless waived by the chairperson, the parliamentary procedure to be utilized by the commission in the conduct of its meetings and hearings shall be based on the current edition of Robert's Rules of Order Newly Revised, but only if it does not conflict with chapters 91 and 92, HRS, or

these rules.

(b) The commission shall allow all interested persons an opportunity to submit data, views, arguments or present oral testimony on any agenda item in an open meeting. The commission may provide for the recordation of all presented oral testimony. The commission may impose limitations on the submission of data, views, arguments, or oral testimony in the interest of preserving due process concerns of the contested case proceeding.

~~[~~[Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)(Imp: HRS §§91-2, 92-3, 92-7)

§15-15-11 **Executive meetings.** (a) The commission may hold an executive meeting from which the public may be excluded, for those purposes permitted by section 92-4, HRS, but only if there is an affirmative vote of two-thirds of the members present at the meeting; provided the affirmative vote constitutes a majority of the members to which the commission is entitled. The reason for holding the executive meeting shall be publicly announced and the vote of the members shall be recorded and entered into the minutes of the meeting.

(b) The commission shall not make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in section 92-5(a), HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] ~~-~~(Auth: HRS §§205-1, 205-7) (Imp: HRS §§92-4, 92-5)

§15-15-12 **REPEALED.** [~~R~~ R 11/2/2013]

§15-15-13 **Quorum and number of votes necessary for a decision.** (a) Unless otherwise provided by law, a majority of all the members to which the commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the commission is entitled shall be necessary to make a commission decision valid; provided all approvals of petitions for boundary amendments under section 205-4, HRS, shall require six affirmative votes

and approvals for special permits under section 205-6, HRS, shall require five affirmative votes. [~~If a petition receives six affirmative votes, any subsequent vote reflecting the commission's approval of the form of the order shall require five affirmative votes.~~]

(b) If the commission's action to approve a petition for boundary amendment under section 205-4, HRS, fails to obtain six affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the commission. [~~If a petition fails to receive six affirmative votes, any subsequent vote reflecting the commission's approval of the form of the order shall require five affirmative votes.~~]

(c) If the commission's action to approve a petition for a special permit under section 205-6, HRS, fails to obtain five affirmative votes, findings of fact, conclusions of law, and a decision and order denying the petition shall be filed by the commission. [~~If a petition fails to receive five affirmative votes, any subsequent vote reflecting the commission's approval of the form of the order shall require five affirmative votes.~~]

(d) In contested cases, commission members who have not heard and examined all of the evidence may vote only after the procedures set forth in section 91-11, HRS, have been complied with. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§91-13.5, 205-1, 205-7) (Imp: HRS §§91-13.5, 92-15, 205-4, 205-6)

§15-15-14 **Removal of persons from meetings.** The presiding officer or executive officer may remove any person who willfully disrupts a meeting or hearing or other proceeding before the commission. [Eff 10/27/86; comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §92-3)

§15-15-15 **Minutes of meetings.** (a) The commission shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of

the participants. The minutes shall include, but need not be limited to:

(1) The date, time, and place of the meeting;

(2) The members of the commission recorded as either present or absent;

(3) The substance of all matters proposed, discussed, or decided, and a record, by individual member, of any votes taken; and

(4) Any other information that any member of the commission requests be included or reflected in the minutes.

(b) The minutes shall be public and shall be available within thirty days after the meeting except where the disclosure would be inconsistent with section 92-5, HRS. The commission may withhold publication of the minutes of executive meetings so long as their publication would defeat the lawful purpose of the executive meeting. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] -(Auth: HRS §§205-1, 205-7) (Imp: HRS §92-9)

§15-15-16 **Computation of time.** In computing any period of time prescribed by this chapter, by notice, or by any order, or rule of the commission, or any applicable statute, the time begins with the day following the act, event, or default and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday, or a day or a part of a day on or for which the governor has granted administrative leave in the State, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Unless otherwise specified in these rules, when the prescribed period of time is less than seven days, Saturdays, Sundays, or legal holidays within the designated period shall not be included in the computation. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] -(Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

SUBCHAPTER 2

ESTABLISHMENT OF STATE LAND USE DISTRICTS

§15-15-17 **Districts; district maps.** (a) In

order to effectuate the purposes of chapter 205, HRS, all the lands in the State shall be divided and placed into one of the four land use districts:

(1) "U" urban district;
(2) "A" agricultural district;
(3) "C" conservation district; or
(4) "R" rural district.

(b) The boundaries of land use districts are shown on the maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission. Not all ocean areas and offshore and outlying islands of the State in the conservation district are shown when deemed unnecessary to do so. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; ~~and~~ comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-2)

§15-15-18 **Standards for determining "U" urban district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "U" urban district, the following standards shall be used:

(1) It shall include lands characterized by "city-like" concentrations of people, structures, streets, urban level of services and other related land uses;
(2) It shall take into consideration the following specific factors:
    (A) Proximity to centers of trading and employment except where the development would generate new centers of trading and employment;
    (B) Availability of basic services such as schools, parks, wastewater systems, solid waste disposal, drainage, water, transportation systems, public utilities, and police and fire protection; and
    (C) Sufficient reserve areas for foreseeable urban growth;
(3) It shall include lands with satisfactory topography, drainage, and reasonably free from the danger of any flood, tsunami, unstable soil condition, and other adverse environmental effects;
(4) Land contiguous with existing urban areas shall be given more consideration than non-contiguous land, particularly when

indicated for future urban use on state or county general plans or county community plans or development plans;

(5) It shall include lands in appropriate locations for new urban concentrations and shall give consideration to areas of urban growth as shown on the state and county general plans or county community plans or development plans;

(6) It may include lands which do not conform to the standards in paragraphs (1) to (5):
  (A) When surrounded by or adjacent to existing urban development; and
  (B) Only when those lands represent a minor portion of this district;

(7) It shall not include lands, the urbanization of which will contribute toward scattered spot urban development, necessitating unreasonable investment in public infrastructure or support services; and

(8) It may include lands with a general slope of twenty per cent or more if the commission finds that those lands are desirable and suitable for urban purposes and that the design and construction controls, as adopted by any federal, state, or county agency, are adequate to protect the public health, welfare and safety, and the public's interests in the aesthetic quality of the landscape. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am ~~and~~ comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-2, 205-7) (Imp: HRS §205-2)

§15-15-19 **Standards for determining "A" agricultural district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply:

(1) It shall include lands with a high capacity for agricultural production;

(2) It may include lands with significant potential for grazing or for other agricultural uses;

(3) It may include lands surrounded by or contiguous to agricultural lands or which are not suited to agricultural and ancillary activities by reason of topography, soils,

and other related characteristics; and

(4) It shall include all lands designated important agricultural lands pursuant to part III of chapter 205, HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-2, 205-7) (Imp: HRS §205-2)

§15-15-20 **Standards for determining "C" conservation district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "C" conservation district, the following standards shall apply:

(1) It shall include lands necessary for protecting watersheds, water resources, and water supplies;

(2) It may include lands susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the state and federal government, and lands necessary for the protection of the health and welfare of the public by reason of the land's susceptibility to inundation by tsunami and flooding, to volcanic activity, and landslides;

(3) It may include lands used for national or state parks;

(4) It shall include lands necessary for the conservation, preservation, and enhancement of scenic, cultural, historic, or archaeologic sites and sites of unique physiographic or ecologic significance;

(5) It shall include lands necessary for providing and preserving parklands, wilderness and beach reserves, for conserving natural ecosystems of indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered, and for forestry and other related activities to these uses;

(6) It shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps. All offshore and outlying islands of the State are classified

conservation unless otherwise designated on the land use district maps;

(7) It shall include lands with topography, soils, climate, or other related environmental factors that may not be normally adaptable or presently needed for urban, rural, or agricultural use, except when those lands constitute areas not contiguous to the conservation district;

(8) It may include lands with a general slope of twenty per cent or more which provide for open space amenities or scenic values; and

(9) It may include lands suitable for farming, flower gardening, operation of nurseries or orchards, growing of commercial timber, grazing, hunting, and recreational uses including facilities accessory to those uses when the facilities are compatible with the natural physical environment. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-2, 205-7) (Imp: HRS §205-2)

§15-15-21 **Standards for determining "R" rural district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "R" rural district, the following standards shall apply:

(1) Areas consisting of small farms; provided that the areas need not be included in this district if their inclusion will alter the general characteristics of the areas;

(2) Activities or uses as characterized by low-density residential lots of not less than one-half acre and a density of not more than one single family dwelling per one-half acre in areas where "city-like" concentrations of people, structures, streets, and urban levels of services are absent, and where small farms are intermixed with the low-density residential lots; and

(3) It may also include parcels of land which are surrounded by, or contiguous to this district, and are not suited to low-density residential uses for small farm or agricultural uses. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-2, 205-7) (Imp: HRS §205-2)

§15-15-22 Interpretation of district boundaries.

(a) Except as otherwise provided in this chapter:

(1) A district name or letter appearing on the land use district map applies throughout the whole area bounded by the district boundary lines;

(2) Land having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps, shall be included in the conservation district;

(3) All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps; and

(4) All water areas within the State are considered to be within a district and controlled by the applicable district rules.

(b) All requests for boundary interpretations shall be in writing and include the tax map key identification of the property and a print of a map of the property. All requests for boundary interpretations involving shoreline properties shall be accompanied by a survey map showing the locations of the shoreline as provided for in section 205A-42, HRS. Any erosion or accretion through natural processes shall be reflected on the map. Further, any shoreline structure, piers, and areas of man-made fill which were constructed or completed since the date of adoption of the state land use district boundaries existing as of the date of the request for boundary interpretation shall be reflected on the map.

(c) The executive officer may request the following information:

(1) Additional copies of the print, including a reproducible master map of the print or an electronic copy in a recognized format of the executive officer's designation; and

(2) Additional information such as, but not limited to, tax map key maps, topographic maps, aerial photographs, certified shoreline surveys, and subdivision maps relating to the boundary interpretation.

The executive officer may employ, or require that the

party requesting the boundary interpretation employ, at its sole expense, a registered professional land surveyor to prepare a map for interpretation.

(d) The executive officer may use all applicable commission records in determining district boundaries.

(e) The following shall apply whenever uncertainty exists with respect to the boundaries of the various districts:

(1) Whenever a district line falls within or abuts a street, alley, canal, navigable or non-navigable stream or river, it may be deemed to be in the midpoint of the foregoing. If the actual location of the street, alley, canal, navigable or non-navigable stream or river varies slightly from the location as shown on the district map, then the actual location shall be controlling;

(2) Whenever a district line is shown as being located within a specific distance from a street line or other fixed physical feature, or from an ownership line, this distance shall be controlling; and

(3) Unless otherwise indicated, the district lines shall be determined by the use of the scale contained on the map.

(f) Whenever subsections (a), (b), (c), (d), or (e) cannot resolve an uncertainty concerning the location of any district line, the commission, upon written application or upon its own motion, shall determine the location of those district lines. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-1)

SUBCHAPTER 3

PERMISSIBLE LAND USES

§15-15-23 Permissible uses; generally. Except as otherwise provided in this chapter, the following land and building uses are compatible and permitted within the following land use districts, except when applicable county ordinances or regulations are more restrictive. Except as otherwise provided in this chapter, uses not expressly permitted are prohibited.

[Eff 10/27/86; comp 8/16/97; comp 5/8/00; ~~and~~ comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-2)

§15-15-24 **Permissible uses within the "U" urban district.** Any and all uses permitted by the counties, either by ordinances or rules may be allowed within this district, subject to any conditions imposed by the commission pursuant to section 205-4(g), HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-2)

§15-15-25 **Permissible uses within the "A" agricultural district.** (a) Permissible uses within the agricultural district on land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be those uses set forth in section 205-4.5, HRS.

(b) Permissible uses within the agricultural district on land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses as set forth in sections 205-2, 205-4.5, and 205-5, HRS, and also uses compatible to the activities described in 205-2(d), HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§205-2, 205-4.5)

§15-15-26 **Permissible uses within the "C" conservation district.** Uses of land within a conservation district shall be governed by the rules of the state department of land and natural resources, title 13, and chapter 183C, HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-2)

§15-15-27 **Permissible uses within the "R" rural district.** (a) Permissible uses within the rural district shall include the following activities:

(1) All agricultural related activities and uses

permitted under section 15-15-25;

(2) Low-density residential lots of not more than one dwelling house per one-half acre, except as provided by county ordinance pursuant to section 46-4(c), HRS;

(3) Golf courses and golf driving ranges and golf-related facilities;

(4) Public, quasi-public and public utility facilities; and

(5) The commission for good cause may allow one lot of less than one-half acre, but not less than 18,500 square feet, or an equivalent residential density, provided all other lots in the subdivision have the minimum lot size of one-half acre. A petition for variance may be processed under the special permit procedure pursuant to subchapter 12. This exception shall apply to lots of record existing prior to January 1, 1977, and of not more than two acres. There shall be no more than one single-family dwelling per one-half acre, except as may be provided for in this section. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and ~~am and~~ comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-2)

SUBCHAPTER 4

NONCONFORMANCE

§15-15-28 Statement of intent. This subchapter is intended to expedite the eventual elimination of existing uses or structures that are not in conformity with the provisions of subchapter 3 because their continued existence violates basic concepts of health, safety, and welfare as well as principles of good land use. However, in applying subchapter 3, no elimination of nonconforming uses or structures shall be effected so as to cause unreasonable interference with established property rights. [Eff 10/27/86; comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

§15-15-29 Nonconforming uses. (a) Any lawful use of lands or buildings existing prior to the establishment of a land use district, may be continued even though those uses do not conform to the provisions thereof.

(b) Except as otherwise provided, the following provisions shall apply to nonconforming uses or structures within any district:

(1) It shall not be changed to another nonconforming use or structure;

(2) It shall not be expanded or increased in intensity of use; and

(3) It shall not be reestablished after discontinuance and abandonment for a continuous period of one year. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

§15-15-30 Nonconforming areas and parcels. A lot of record or any proposed subdivision of land which is not in conformity with this subchapter, but which has received approval by the county having jurisdiction prior to the establishment of the land use district, shall be permitted as a nonconforming area subject to the ordinances and rules of the county. All lots within the nonconforming area shall be considered nonconforming parcels. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

§15-15-31 Casual or illegal use of land. A casual, intermittent, temporary, or illegal use of lands or buildings shall not be sufficient to establish the existence of a nonconforming use. [Eff 10/27/86; comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

§15-15-32 Existence of nonconforming use is a

question of fact. Whether a nonconforming use exists shall be a question of fact and shall be decided by the board, commission, or agency having jurisdiction over uses within the district. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

§15-15-33 **Illegal uses.** An illegal use of lands or buildings shall not be validated by the adoption of this chapter. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-8)

SUBCHAPTER 5

PROCEEDINGS BEFORE THE COMMISSION

§15-15-34 **Quasi-judicial proceedings; waiver or suspension of rules.** (a) The intent and purpose of chapter 205, HRS, is to establish quasi-judicial procedures which would ensure the effective application of established state land use policies through an adversarial process in a hearing in which diverse interests will have an opportunity to present their views in an open and orderly manner. Accordingly, the commission expects all persons and parties to comply with this subchapter and chapter 91, HRS, so that the commission will have a full and complete record upon which it can render its decision.

(b) Unless contrary to statute, the commission may waive or suspend any rule when the commission determines that: (1) good cause exists for such waiver; and (2) strict enforcement of such procedural rule would impose a manifest injustice upon a party or person who has substantially complied with the commission's rules in good faith. No rule relating to jurisdictional matters shall be waived or suspended by the commission. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-3)

§15-15-34.1 **Verbatim transcripts.** Verbatim transcripts of hearings and other proceedings before the commission pursuant to chapter 91, HRS, shall be made and kept by the commission. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-9)

§15-15-35 **Appearance before the commission.** (a) Any party to a proceeding before the commission may appear on the party's own behalf. A partnership, corporation, trust, or association, or other legal entity, may be represented by a duly authorized agent. An officer or employee of a department or agency of the State or a political subdivision may represent that department or agency in any proceeding before the commission.

(b) A party may be represented by an attorney. The attorney who appears before the commission shall be a member in good standing of the Hawai`i state bar. A member of the bar of another jurisdiction may appear by motion or by association with a member in good standing of the Hawai`i state bar. All pleadings and documents shall be served on the member of the Hawai`i state bar.

(c) The United States or any of its agencies may be represented by an employee of the agency or any attorney who is a member in good standing of the bar of any state and who is employed as an attorney by the United States or one of its agencies.

(d) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the commission, by such an act represents that the person is legally authorized to do so and shall comply with the laws of this State and the several counties, and the rules of the commission. Further, the person shall maintain the respect due to the commission, and shall never deceive or knowingly present any false statements of fact or law to the commission. The commission at any time may require any person appearing before the commission in a representative capacity to prove the person's authority and qualification to act in that capacity.

(e) All former employees of the State, as that term is defined in section 84-3, HRS, shall comply with the provisions of chapter 84, HRS, standards of conduct, prior to making an appearance in a representative capacity before the commission. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS

§§205-1, 205-7) (Imp: HRS §91-2)

§15-15-36 **Decisions and orders.** (a) All decisions and orders for boundary amendment and special permit applications shall be signed by the chairperson or presiding officer (b) Unless otherwise indicated in the order, the effective date of a decision and order shall be the date it is filed by the chief clerk.

(c) Official copies of decisions and orders and other commission actions shall be effectuated under the signature of the chairperson, executive officer, or by the chief clerk. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp ~~013;~~ ~~comp~~] (Auth: HRS §205-1, 205-7) (Imp: HRS §91-12)

§15-15-37 **Filing documents; place and time.** All pleadings, briefs, submittals, petitions, reports, maps, exceptions, memoranda, and other legal papers required or permitted to be filed with the commission in any proceeding shall be filed at the office of the commission before or on the date prescribed by statute, rules, or order of the commission. Unless otherwise ordered and except as provided by section 15-15-50, the date on which the original papers are filed by or at the direction of the chief clerk shall be regarded as the date of filing. The commission will not accept a facsimile or electronic copy of any document for filing purposes unless otherwise permitted by the executive officer. [Eff 10/27/86; am 3/24/94; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4; SLH 1992, Act 227, §1)

§15-15-38 **Format.** (a) All documents exceeding seventy five pages shall be placed in three-ring binders or equivalent (prongs and rubber bands are not acceptable) and be printed upon white paper 8-1/2 x 11 inches in size. Twelve point font or larger shall be used. Tables, maps, charts, exhibits, or appendices may be larger and shall be folded to that size where practical and tabbed. All pleadings shall be printed and shall be one and a half spaced or greater, except that footnotes and quotations in excess of a few lines

may be single-spaced. Reproduction may be by any process, provided all copies are clear and permanently legible. Electronic copies shall be similarly formatted and bookmarked.

(b) All pleadings shall show the title of the proceeding before the commission and the case docket number assigned by the chief clerk and shall show the name, address, and telephone number of the person or attorney.

(c) The original of each pleading shall be signed by each party or the party's attorney. If the party is a corporation, association, partnership, or other legal entity, the pleading may be signed by an officer or partner thereof or other authorized person. The title and name of the person signing shall be typed below the signature.

(d) In addition to the paper originals and one paper copy, the parties shall also submit documents and pleadings in electronic format, as directed by the executive officer. However, the filing date shall be the date the paper original is filed in the office of the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] -(Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-39 **Verification.** (a) Petitions, amendments thereto, and other pleadings which initiate a proceeding, and amendments thereto shall be verified by at least one of the persons or officers or other authorized signatory of the party filing the same.

(b) If the party filing the pleading is a corporation, association, partnership, or other legal entity, the pleading may be verified by an officer or partner thereof or other authorized person. Evidence of such authorization shall be provided.

(c) The attorney for a party may sign and verify a pleading if the party is absent, or for some cause unable to sign and verify the pleading. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-40 **Copies.** Unless otherwise required by this subchapter or the commission, all parties shall file with the commission a paper original, one paper copy and one electronic copy of each pleading or

amendment thereof. Additional copies shall be promptly provided if the chairperson or the executive officer so requests. The commission, by order, may modify the number or format of copies required under this section. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-41 **Defective or nonconforming documents.** (a) The mere fact that a document has been filed or been deemed a proper filing by the executive officer pursuant to section 15-15-50 (d) and (e) shall not be deemed a waiver of any failure to comply with this subchapter. Except as provided in subsection (b), if a document filed in a proceeding governed by this chapter is defective, not in substantial conformity with the applicable rules of the commission, or is otherwise insufficient, the commission may on its own motion or on the motion of any party, strike or dismiss such document or require its amendment. If amended, the document shall be effective as of the date the amended or corrected document is deemed a proper filing by the executive officer.

(b) Notwithstanding the provisions of sections 15-15-50(e), 15-15-50(f), and 15-15-50.5, the commission may, on its own motion, or on motion by any of the parties addressing alleged deficiencies of the petition, dismiss defective or nonconforming petitions with or without prejudice. If the petition is determined by the commission to be defective or nonconforming, the date of proper filing shall be the date the commission determines that the defects are cured. If the defects are jurisdictional, including, without limitation, failure to satisfy the requirements of section 15-15-50(c)(5), the commission shall dismiss the petition without prejudice. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-42 **Extensions of time.** (a) Whenever a party is required to file a pleading within a period prescribed or allowed by these rules by notice given thereunder, or by an order, the chairperson, presiding officer, or the executive officer may:

(1) For good cause shown, with or without notice or hearing, extend such period if written request therefor is made before the expiration of the period originally prescribed or as extended by a previous order;

(2) Pursuant to a stipulation between all of the parties, without notice or hearing, extend the period; or

(3) Upon motion after the expiration of the specified period, permit the act to be done where the failure to act is clearly shown to be the result of excusable neglect; but may not extend the time for taking any action on jurisdictional matters.

(b) Extensions of time to file any pleading or other document required by a decision and order of the commission must be requested more than fourteen days prior to the next scheduled hearing date on the matter.

This section shall not apply to extensions of time affecting jurisdictional matters [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-43 **Amended pleadings.** All pleadings may be amended at any time until forty-five days prior to the hearing date set pursuant to section 15-15-51. Amendments offered prior to the hearing date shall be served on all parties and filed with the commission. All parties shall have the opportunity to provide any further response to address the amended pleading up to thirty days prior to the hearing date set pursuant to section 15-15-51. No amended pleadings shall be filed after forty-five days prior to the date of the hearing and no responses shall be filed after thirty days prior to the hearing date, unless a stipulation is reached by all parties, or good cause is shown and approval of the chairperson, presiding officer, or the chairperson's designee is obtained. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; ~~and~~ comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7, SLH 1995, Act 235, §2) (Imp: HRS §§91-2, 205-1, 205-7)

§15-15-44 **Retention of documents.** The commission shall retain all documents filed with or presented to

the commission in the files of the commission. However, the chairperson or presiding officer may permit a party to withdraw original documents submitted by a party upon submission of properly authenticated copies to replace the original documents. The party shall not withdraw the original documents until it has submitted the authenticated copies and it has given to the chief clerk a receipt, specifying the date and identifying the original documents withdrawn. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-45 Service of process. (a) The commission shall cause to be served all orders, notices, and other papers issued by it, together with any other papers that it is required by law to serve. All other papers shall be served by the parties filing them.

(b) All papers served by either the commission or any party shall be filed and served upon all parties or their attorney and shall contain a certificate of service. Any attorney entering an appearance subsequent to the proceeding shall notify all other attorneys then of record and all parties not represented by an attorney of that fact.

(c) The final decision and order, and any other paper required to be served by the commission upon a party, shall be served upon the party's attorney of record or in the absence of an attorney, upon the party.

(d) Service of papers other than the notice of hearing and the final decision and order, shall be made personally or, unless otherwise provided by law, by first class mail. Notice of hearing shall be served as provided in section 15-15-51, and the final decision and order shall be served by certified mail.

(e) Service upon parties, other than the commission, shall be regarded as complete upon the occurrence of at least one of the following: (1) the party or its attorney is personally served; (2) the document is delivered to the party's office or its attorney's office and left with some responsible person; or (3) the document is properly stamped, addressed and mailed by first class mail to the last known address of the party on file with the commission or to the party's attorney.

(f) Whenever a party has the right to do some act

or take some proceedings within a prescribed period after the service of a notice or other paper upon the person, and the notice or paper is served by mail, two days shall be added to the prescribed period. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-45.1 Fees. (a) Unless otherwise provided herein, a motion for incremental districting approval, motion for amendment to a decision and order, requested rule making, a motion to release conditions, a motion for declaratory order, a motion for special permit, or a motion to amend a special permit, a motion for order to show cause, or motion for important agricultural land designation, by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check, for $1,000, made payable to the State of Hawai`i. State or county departments or agencies that submit such petitions, motions, or applications shall not be subject to the filing fee. Such petition, motion, or application filed jointly by a state or county department or agency and a person who is not a state or county department or agency shall be subject to the filing fee.

(b) A petition for an amendment to a district boundary filed by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check for $5,000, made payable to the State of Hawai`i. State or county departments or agencies that submit a petition for amendment to a district boundary shall not be subject to the filing fee. A petition for an amendment to a district boundary filed jointly by a state or county department or agency and a person who is not a state or county department or agency shall be subject to the filing fee.

(c) A petition for intervention in any proceeding filed by any person other than a state or county department or agency shall be accompanied by a filing fee by cashier's check in the amount of $50, made payable to the State of Hawai`i. State or county departments or agencies that submit such petitions for intervention shall not be subject to the filing fee.

(d) Except as otherwise provided by law, a copy of any public document or government record, including any map, plan diagram, photograph, or photostat, which is open to inspection by the public shall be furnished

to any person requesting the same by the executive officer having charge or control thereof upon the payment of the reasonable cost of reproducing such copy, which amount shall not be less than 12 cents per page, sheet, or fraction thereof. In addition, the requestor shall be responsible to pay for labor costs for searching, reviewing, and segregating, and actual time for reproducing, and material costs, including electricity cost, equipment cost including rental cost, cost for certification, and other related costs of providing the requested public document or government record.

(e) The petitioner, movant, or applicant for any petition, motion, or application shall, unless otherwise ordered by the commission, reimburse the commission for or pay at the direction of the commission any expenses related to the publication of any required hearing notice, expenses of court reporter services, expenses of the hearing room, expenses for audio/visual services and equipment, and any other hearing-related expenses.

(f) After notice and opportunity to be heard, the commission may also assess any party to any proceeding before the commission a reasonable fee or require reimbursements for hearing expenses as determined by the commission, including without limitation, expenses of court reporter, hearing room, and expenses for audio/visual services and equipment.

(g) The commission may assess a reasonable fee or require reimbursements to be made for inexcusable absence of a party from a contested case proceeding. The assessment may include, but not be limited to, such costs for airfare, room rental fees, and publication fees. [Eff and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-4.1, 205-7) (Imp: HRS §§91-2, 92-21, 205-4.1)

§15-15-45.2 **Fees nonrefundable.** The fees set forth in this chapter shall be nonrefundable. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4.1, 205-7) (Imp: HRS §§91-2, 92-21, 205-4.1)

SUBCHAPTER 6

APPLICATION REQUIREMENTS FOR BOUNDARY AMENDMENT PETITIONS

§15-15-46 **Standing to initiate boundary amendments.** The following persons may initiate a petition to the commission for district boundary amendment:

(1) State departments or agencies;
(2) County departments or agencies of the county in which the property is situated; or
(3) Any person with a property interest in the property sought to be reclassified. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§205-3.1, 205-4)

§15-15-47 **Filing.** The petitioner shall file one original, and one paper copy and one electronic copy of a petition for boundary amendment and all supporting documents and exhibits, with the commission. Additional copies shall be promptly provided if the chairperson or the executive officer so requests. The number and format of copies required under this section may be modified by order of the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-48 **Service of petition.** (a) At the time the petition is filed with the commission, the petitioner shall serve copies of the petition and all supporting documents upon:

(1) the county planning department and planning commission of the county within which the subject land is situated,
(2) the appropriate island planning commission,
(3) the state office of planning, and
(4) all persons with a property interest in the subject property as recorded in the county's real property tax records at the time the petition is filed.

(b) The petitioner shall serve copies of the petition upon any potential intervenor upon receipt of a notice of intent to intervene pursuant to section 15-15-52(b).

(c) Copies of all documents filed by petitioner after filing of the petition shall be served upon the county planning department and the state office of planning at the same time the document is filed with the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-49 **REPEALED.** [~~R~~ R 11/2/2013]

§15-15-50 **Form and contents of petition.** (a) The form of the petition for boundary amendment shall conform to the requirements of subchapters 5 and 6. All petitions shall:

(1) State clearly and concisely the authorization or relief sought; and

(2) Cite by appropriate reference the statutory provision or other authority under which commission authorization or relief is sought.

(b) For petitions to reclassify properties from the conservation district to any other district, the petition shall not be deemed a proper filing unless an approved environmental impact statement or finding of no significant impact is approved or accepted by the commission for the proposed boundary amendment request. Such approved or accepted environmental impact statement or finding of no significant impact shall be filed with and be part of the petition for boundary amendment. Notwithstanding any rule to the contrary, the processes provided by subsections (e) and (f) shall not commence until this subsection is satisfied.

(c) The following information shall also be provided in each petition for boundary amendment:

(1) The exact legal name of each petitioner and the location of the principal place of business and if an applicant is a corporation, trust, or association, or other legal entity, the state in which the petitioner was organized or incorporated;

(2) The name, title, and address of the person to whom correspondence or communications in regard to the petition are to be addressed;

(3) Description of the subject property, acreage, and tax map key number, with maps, including the tax map, that identify the area stated in

the petition. If the subject property is a portion of one or more tax map key parcels, or the petition proposes incremental development of the subject property on both increments of development, the petitioner shall include a map and description of the subject property and each increment in metes and bounds prepared by a registered professional land surveyor;

(4) The boundary amendment sought and present use of the property, including an assessment of conformity of the boundary amendment to the standards for determining the requested district boundary amendment;

(5) The petitioner's property interest in the subject property. The petitioner shall attach as exhibits to the petition the following:

(A) A true copy of the deed, lease, option agreement, development agreement, or other document conveying to the petitioner a property interest in the subject property or a certified copy of a nonappealable final judgment of a court of competent jurisdiction quieting title in the petitioner;

(B) If the petitioner is not the owner in fee simple of the subject property, or any part thereof, written authorization of all fee owners to file the petition and a true copy of the deed to the subject property; and

(C) An affidavit of the petitioner or its agent attesting to its compliance with section 15-15-48;

(6) A description of any easements on the subject property, together with identification of the owners of the easements; a description of any other ownership interests shown on the tax maps.

(7) Type of use or development being proposed, including without limitation, a description of any planned development, residential, golf course, open space, resort, commercial, or industrial use;

(8) A statement of projected number of lots, lot size, number of units, densities, selling price, intended market, and development timetables;

(9) A statement describing the financial

condition together with a current certified balance sheet and income statement as of the end of the last calendar year, or if the petitioner is on a fiscal year basis, as of the end of the petitioner's last fiscal year, and a clear description of the manner in which the petitioner proposes to finance the proposed use or development. If such information is protected from disclosure under chapter 92F, HRS, the petitioner may request a protective order to protect the confidentiality of the information pursuant to section 15-15-70.1. A petitioner which is a state or county department or agency, shall be exempt from this requirement;

~~(10~~ (10) ~~)~~ Description of the subject property and surrounding areas including the use of the property over the past two years, the present use, the soil classification, the agricultural lands of importance to the State of Hawai`i classification (ALISH), the Land Study Bureau productivity rating, the flood and drainage conditions, and the topography of the subject property;

~~(11)~~ (11) An assessment of the impacts of the proposed use or development upon the environment, agriculture, recreational, cultural, historic, scenic, flora and fauna, groundwater, or other resources of the area. If required by chapter 343, HRS, either a finding of no significant impact after review of an environmental assessment or an environmental impact statement conforming to the requirements of chapter 343, HRS, must be filed;

(12) ~~(12)~~ Availability or adequacy of public services and facilities such as schools, parks, wastewater systems, solid waste disposal, drainage, water, transportation systems, public utilities, police and fire protection, civil defense, emergency medical service and medical facilities, and to what extent any public agency would be impacted by the proposed development or boundary amendment;

(13) ~~(13)~~ Location of the proposed use or development in relation to adjacent land use districts and any centers of trading and employment;

(14) ~~(14)~~ Economic impacts of the proposed boundary amendment, use, or development including, without limitation, the provision of any impact on employment opportunities, and the potential impact to agricultural production in the vicinity of the subject property, and in the county and State;

(15) ~~(15)~~ A description of the manner in which the petitioner addresses the housing needs of low income, low-moderate income, and gap groups;

(16) ~~(16)~~ An assessment of need for the boundary amendment based upon the relationship between the use or development proposed and other projects existing or proposed for the area and consideration of other similarly designated land in the area;

(17) ~~(17)~~ An assessment of conformity of the boundary amendment to applicable goals, objectives, and policies of the Hawai`i state plan, chapter 226, HRS, and applicable priority guidelines and functional plan policies;

(18) ~~(18)~~ An assessment of the conformity of the boundary amendment to objectives and policies of the coastal zone management program, chapter 205A, HRS;

(19) ~~(19)~~ An assessment of conformity of the boundary amendment to the applicable county general plans, development or community plans, zoning designations and policies, and proposed amendments required;

(20) ~~(20)~~ Petitioners submitting petitions for boundary amendment to the urban district shall also represent that development of the subject property in accordance with the demonstrated need therefor will be accomplished before ten years after the date of commission approval. In the event full urban development cannot substantially be completed within such period, the petitioner shall also submit a schedule for development of the total of such project in increments together with a map identifying the location of each increment, each such increment to be completed within no more than a ten-year period;

(21) ~~(21)~~ A [~~statement~~]written disclosure and analysis addressing Hawaiian customary and traditional rights under Article XII, section

7 of the Hawai`i State Constitution;

(22) ~~(22)~~ Any written comments received by the petitioner from governmental and non-governmental agencies, organizations, or individuals in regards to the proposed boundary amendment; [~~and~~]

(23) ~~(23)~~ A copy of the notification of petition filing pursuant to subsection (d) [~~.~~];

(24) ~~(24)~~ A statement and analysis pursuant to section 226-109, HRS, addressing climate change related threats to the proposed development and proposed mitigation measures. The statement and analysis shall address, but not be limited to, the following issues:

(A) The impacts of sea level rise on the proposed development;

(B) Infrastructure adaptations to address the impacts of climate change including sewer, water and roadway improvements;

(C) The overall carbon footprint of the proposed development and any mitigation measures or carbon footprint reductions proposed; and

(D) The location of the proposed development and the threats imposed to the proposed development by sea level rise, based on the maps and information contained in the Hawaii Sea Level Rise Vulnerability Adaptation report and the proposed mitigation measures taken to address those impacts.

(25) ~~(25)~~ A statement and analysis addressing the proposed development's adherence to sustainability principles and priority guidelines and climate change issues as contained in section 226-108, HRS, the Hawai`i State Plan (Sustainability), and smart growth principles, including, but not limited to:

(A) Walkability;

(B) Accessibility to alternate forms of transportation;

(C) Transit oriented development opportunities;

(D) Green infrastructure, including water recharge and reuse and water recycling;

(E) Mitigation of heat island effects; and,

(F) Urban agricultural opportunities.

(d) The petitioner shall send a notification of petition filing to persons included on a mailing list provided by the chief clerk. The notification of petition filing shall be in a form as prescribed by the executive officer, and shall include, but not be limited to, the following information:

(1) Petitioner's name and mailing address;
(2) Landowner's name;
(3) Tax map key identification of the property requested for boundary amendment;
(4) Location of the property;
(5) Requested boundary amendment and approximate acreage;
(6) Proposed use of the property;
(7) A statement that detailed information on the petition may be obtained by reviewing the petition and maps on file at the office of the commission or the respective county planning department or at the commission's website;
(8) A statement that informs potential intervenors on the mailing list provided by the commission that they may file a notice of intent to intervene with the commission within thirty days of the date of the notification of petition filing pursuant to section 15-15-52(b);
(9) A statement that informs the general public to contact the office of the commission for information on participating in the hearing; and
(10) ~~(10)~~ A location map depicting the petition area.

The notification of petition filing shall be sent to all persons on the mailing list on the same day that the petition is filed with the commission. The petitioner shall submit to the commission an affidavit that the petitioner has sent the notification of petition filing pursuant to this subsection.

(e) The executive officer shall receive and complete a review of the petition for completeness within thirty days of the filing of the petition. The provisions herein, however, are subject to the requirements of subsection (b) on petitions for reclassification of conservation district lands.

(f) Upon completion of the review pursuant to subsection (e), the executive officer shall determine whether the petition is a proper filing and is accepted for processing. The petition shall be deemed a proper filing if the items required in subsections (a), (b),

(c), and (d) have been submitted. The petition may be deemed defective by the executive officer if any of the items required in subsections (a), (b), (c), or (d) have not been submitted. If the petition is deemed defective, the executive officer shall notify the petitioner of the determination and the reasons for the determination. The petition may be deemed as a proper filing upon review of the additional information submitted and upon determination by the executive officer, and the date the petition will be deemed a proper filing will be the date the executive officer determines the defects have been cured. The executive officer will file a notice of proper filing and mail the notice to the petitioner, the State office of planning, the county planning agency, and to persons who have filed a notice of intent to intervene. The executive officer's determination is subject to review in accordance with section 15-15-41. The provisions herein, however, are subject to the requirements of section 15-15-50(b) on petitions for boundary amendment of conservation district lands.

(g) The petitioner has a continuing obligation to update the information submitted in the petition prior to and during the pendency of the hearing on the petition. [Eff 10/27/86; am 3/24/94; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-4, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-50.5 **Dismissal of petition for failure to provide additional information or correct defects.** Where the executive officer, pursuant to section 15-15-50(f), has determined that a petition is defective or nonconforming and the petitioner has not provided additional information or cured any defects within nine (9) months after the date of issuance of the notice that the petition is defective, the executive officer shall notify the petitioner in writing that the petition is dismissed for want of prosecution unless objections thereto, showing good cause with specific reasons, are filed within ten days after the date of such notification. If objections are not filed within said ten-day period, the executive officer shall file an order of dismissal with or without prejudice. If objections are filed within said ten-day period, the commission shall hear the objections upon notice and determine whether the petition should be dismissed. [Eff and comp 11/2/2013; comp] (Auth:

HRS §§205-1, 205-4, 205-7)

§15-15-50.6 **Withdrawal or amendment of petition.** (a) The petitioner may withdraw or amend the petition without prejudice: (1) at any time before a petition for district boundary amendment is deemed a proper filing or, (2) any time after a petition for district boundary amendment has been deemed a proper filing but before it has been set for hearing; provided that if substantive amendments are made, the filing date for the petition shall be the date the amended petition is deemed a proper filing, and petitioner must send a notification of filing of the amended petition in conformance with the requirements of section 15-15-50(d).

(b) If a petition for district boundary amendment has been set for hearing, the petition may be withdrawn only upon the commission's granting of a motion for withdrawal filed by the petitioner. In the event the commission grants a motion to withdraw, the petitioner may not refile the petition within one year after the granting of the motion for withdrawal.

(c) If a petition for district boundary amendment has been set for hearing, the petition may be amended only in compliance with the requirements of section 15-15-43. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4, 205-7)

SUBCHAPTER 7

AGENCY HEARING AND POST HEARING PROCEDURES

§15-15-51 **Notice of hearing for boundary amendment petitions.** (a) Not less than sixty days and not more than one hundred eighty days after the proper filing of a petition for boundary amendment, a hearing shall be conducted by the commission or a hearings officer on the island in which the subject property is situated.

(b) The notice of hearing shall be served on the office of planning, the planning commission and the planning department of the county in which the subject property is situated, the appropriate planning commission of the island on which the subject property

is situated, all persons with a property interest in the subject property that is recorded in the county's real property tax records at the time the petition is submitted, all persons with an easement over, on, upon or through the subject property, and all persons who appear on the county tax map to have an interest in the subject property. In addition, notice of the hearing shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings.

(c) The notice of hearing for a boundary amendment shall be published at least once in the county in which the land sought to be redistricted is situated as well as once statewide at least thirty days in advance of the hearing. The notice of hearing shall also be filed with the lieutenant governor's office at least six calendar days before the hearing.

(d) The notice of hearing of a boundary amendment shall include:

(1) The date, time, place, and nature of the hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved;

(5) The fact that parties may retain an attorney if they so desire and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation, trust, or other legal entity may represent the corporation, trust, or other legal entity;

(6) Where the map of the subject property or petition may be inspected; and

(7) The rights of interested persons under section 205-4(e), HRS.

(e) The hearing may be continued or reopened by the commission when necessary, provided that notice is given pursuant to section 92-7, HRS, and the continued or re-opened hearing shall not extend beyond three hundred sixty-five days from the date the petition is deemed properly filed, unless an extension of time is requested by motion by any party, by stipulation, or by the commission on its own motion, so long as the commission votes affirmatively on the motion or stipulation by a two-thirds vote of the membership of the commission. The extension of time shall not exceed

ninety days beyond three hundred sixty-five days from the date the petition is deemed properly filed. [Eff10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: ~~HRS §§205-1, 205-4, 205-7~~) (Imp: HRS §§1-28.5, 91-9, 92-7, 92-41, 205-4)

§15-15-52 **Intervention in proceeding for district boundary amendments, except proceedings pursuant to chapter 201H, HRS.** (a) The petitioner, the state office of planning, and the planning department of the county within which the subject land is situated shall appear in every case as parties, and make recommendations relative to the proposed boundary amendment.

(b) Within thirty days of the date of the notification of petition filing pursuant to section 15-15-50(d), persons who intend to intervene may file a notice of intent to intervene with the commission. The notice of intent to intervene shall provide, but not be limited to, the following information:

(1) The person's name and mailing address; and

(2) The nature and extent of the person's interest in the petition.

The notice of intent to intervene shall be served upon the petitioner, the state office of planning, and the respective county planning department. Upon receipt of a notice of intent to intervene, the petitioner shall serve a copy of the petition filed with the chief clerk upon the potential intervenor. All persons who wish to formally intervene shall comply with subsections (e), (f), (g), and (h).

(c) Persons who may intervene upon timely application include:

(1) All departments and agencies of the State and of the county in which the land is situated; and

(2) All persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.

(d) All other persons may apply for leave to intervene, which shall be freely granted, provided the commission or its hearings officer may deny an application to intervene when, in the commission's, or

hearings officer's discretion it appears that:

(1) The position of the applicant for intervention is substantially the same as the position of a party already admitted to the proceeding; and

(2) The admission of additional parties will render the proceedings inefficient and unmanageable.

(e) In a boundary amendment proceeding, petitions to intervene and become a party shall be in conformity with subchapter 5 and filed with the commission. An original and one paper copy, plus one electronic copy, of the petition for intervention with proof of service on all parties shall be filed with the commission within fifteen calendar days after the notice of hearing is published pursuant to section 15-15-51(c). Except for good cause shown, late filing shall not be permitted. The number and format of copies required under this section may be modified by order of the commission.

(f) Petitions for intervention shall make reference to the following:

(1) Nature of the petitioner's statutory or other right;

(2) Nature and extent of the petitioner's interest in the matter, and if an abutting property owner, the tax map key description of the property; and

(3) Effect of any decision in the proceeding on the petitioner's interest.

(g) Petitions for intervention pursuant to subsection (d) shall also make reference to the following:

(1) Other means available whereby the petitioner's interest may be protected;

(2) Extent the petitioner's interest will not be represented by or differs from that of existing parties;

(3) Extent the petitioner's participation can assist in development of a complete record;

(4) Extent the petitioner's participation will broaden the issues; and

(5) How the petitioner's intervention would serve the public interest.

(h) Petitions for intervention shall be accompanied by a filing fee as provided for in section 15-15-45.1. The fee shall not apply to state and county agencies.

(i) If any party opposes the petition for intervention, the party shall file a pleading in

opposition within seven days after being served.

(j) All petitions to intervene shall be heard prior to the scheduled hearing.

(k) A person whose petition to intervene has been denied may appeal the denial to the circuit court pursuant to section 91-14, HRS. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4, 205-7, SLH 1995, Act 235, §2) (Imp: HRS §205-4, SLH 1995, Act 235, §1)

§15-15-53 **Intervention in other than district boundary amendment proceeding or important agricultural lands designation proceeding.** (a) In any proceeding other than a district boundary amendment proceeding or important agricultural lands designation proceeding before the commission, petitions to intervene and become a party shall conform to subchapter 5 and be filed no later than fifteen days after the date of the publication of the hearing notice.

(b) Contents of the petition shall conform to sections 15-15-52(e) and 15-15-52(f).

(c) Petitions to intervene in special permit proceedings will not be considered since the record is made by and before the county planning commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4, 205-7) (Imp: HRS §§205-1, 205-4)

§15-15-54 **Consolidation.** The commission, upon its own initiative or upon motion by any party, may consolidate for hearing or other purposes, or may contemporaneously consider, two or more proceedings which involve substantially the same parties or issues which are the same or closely related if the commission finds that consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-55 **Statements of position.** No later than

thirty days after the postmarked date of notice that the petition has been deemed a proper filing, the state office of planning and appropriate county planning department, and any intervenor, or person or legal entity who filed a timely notice of intent to intervene and whose intervention petition is still pending, shall file with the commission a statement of position with a summary of reasons in support or opposition, including without limitation, a statement describing the respective positions of any department within the State and county that may be impacted by the boundary amendment. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7, SLH 1995, Act 235, §2) (Imp: HRS §§91-2, 205-4, SLH 1995, Act 235, §1)

§15-15-55.1 **Filing of exhibits.** (a) No later than twenty-five days prior to the date set for hearing pursuant to section 15-15-51, or as specified in a prehearing order issued in accordance with section 15-15-57, all parties shall submit all exhibits to substantiate their position on the boundary amendment.

(b) No later than twenty-five days prior to the scheduled hearing pursuant to section 15-15-51, or as specified in a prehearing order issued in accordance with section 15-15-57, all intervenors granted intervention shall submit all exhibits to substantiate their position on the boundary amendment petition.

(c) Each party shall have the opportunity to provide further response to address the exhibits submitted or amended pleadings up to twenty days prior to the hearing date set pursuant to section 15-15-51 or as specified in a prehearing order issued in accordance with section 15-15-57.

(d) Any amendments to pleadings shall be submitted pursuant to section 15-15-43. [Eff and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7, SLH 1995, Act 235, §2) (Imp: HRS §§91-2, 205-4, SLH 1995, Act 235, §1)

§15-15-56 **Stipulations.** All parties may enter into appropriate stipulations as to testimony, exhibits, findings of fact, conclusions of law, and conditions of reclassification concerning the proposed boundary amendment as follows:

(1) A petitioner who desires to enter into a stipulation shall prepare a proposed

stipulation as to any or all testimony, exhibits, proposed findings of fact, conclusions of law, and conditions of reclassification concerning the proposed boundary amendment;

(2) All parties shall sign the proposed stipulation as to any or all testimony, exhibits, proposed findings of fact, conclusions of law, conditions of reclassification, and a proposed decision and order, if at all, and shall submit such stipulation to the commission at least fourteen business days prior to the hearing date;

(3) At the hearing, the commission may approve or deny the proposed stipulation and proposed decision and order in whole or in part, or the commission may require the parties to submit additional evidence concerning the proposed stipulation and proposed decision and order;

(4) The commission may approve the proposed decision and order by amending or adopting the proposed decision and order. The commission shall issue a decision and order pursuant to provisions of sections 15-15-36 and 15-15-74 and section 205-4(g), HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-4)

~~§205-4)~~

§15-15-57 **Prehearing conference; exchange of exhibits; prehearing conference order.** (a) The chairperson, presiding officer, or the executive officer shall be authorized to hold one or more prehearing conferences with the parties for the purpose of identifying the issues, identifying the positions of the parties, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, determining the extent of agreement as to proposed findings, and such other matters as may expedite orderly conduct and disposition of the hearing. No motions and decisions on substantive matters shall occur at the prehearing

conference.

(b) The chairperson, presiding officer, or the executive officer may issue a prehearing conference order that shall establish a schedule for the mutual exchange of exhibits and identification of witnesses. The prehearing conference order shall insure that all parties will be provided an opportunity to actively participate in the hearing. No party shall be allowed to present additional exhibits or witnesses that are material or substantial and not identified within the schedule provided by the prehearing conference order, unless the presenting party provides good cause or the exhibit or witness is being presented for rebuttal purposes, or by stipulation of the parties with the permission of the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-58 **Procedure for witnesses.** (a) The commission may subpoena witnesses as set forth in section 15-15-69.

(b) Together with other witnesses that the commission may desire to hear at the hearing, the commission shall also allow a representative of a citizen or community group to testify, who indicates a desire to express the views of those citizen or community group concerning the proposed boundary amendment. Anyone who desires to testify shall make written application to be a witness prior to the hearing and, if the person desires to express the views of a citizen or community group, shall submit written evidence to show that the person is a duly authorized representative of the citizen or community group.

(c) The presiding officer shall place witnesses under oath or affirmation prior to testifying. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-59 **Conduct of hearing.** (a) The hearing shall be conducted in accordance with this subchapter. Unless otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence and the burden of persuasion.

(b) The presiding officer shall convene the hearing and summarize the proceeding.

(c) Before presenting the case, the parties shall have the opportunity to make opening statements in the order in which they present witnesses. Opening statements may be waived.

(d) Unless otherwise directed by the presiding officer, witnesses shall be called in the following order in a district boundary amendment proceeding:

(1) Witnesses for the petitioner;
(2) Witnesses for the county planning department;
(3) Witnesses for the state office of planning;
(4) Witnesses for each intervenor, in the order in which intervention was granted;
(5) Rebuttal witnesses for the petitioner;
(6) Additional witnesses as the presiding officer may determine.

(e) Witnesses shall be examined in the following order:

(1) Direct examination by the party calling the witness;
(2) Cross-examination by the other parties;
(3) Examination by the presiding officer or any member of the commission;
(4) Redirect examination by the party calling the witness;
(5) Recross examination by the other parties;
(6) Reexamination by the presiding officer or any member of the commission.

(f) After all parties have presented their cases through testimony and exhibits, all parties may provide closing statements in the order in which they presented witnesses; provided that petitioner may make a rebuttal closing statement. Closing statements may be waived. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-60 **Presiding officer.** (a) Notwithstanding section 15-15-06, in all hearings before the commission, the chairperson, a vice-chairperson, one of the other commissioners, or a hearings officer appointed by the commission shall preside at the hearing.

(b) The presiding officer shall convene the hearing and briefly state the nature of the case, control the schedule and course of the hearings, administer oaths and affirmations, receive evidence,

hold appropriate conferences before and during hearings, rule upon all objections or motions which do not involve a final determination of the proceedings, receive offers of proof, and fix the time for the filing of briefs or proposed findings of fact, conclusions of law and decisions and orders and responses or objections thereto, dispose of any other matter that normally and properly arises in the course of a hearing, and take all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing.

(c) The presiding officer may postpone or continue any hearing upon a motion of any party without a hearing. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)(Imp: HRS §§91-2, 205-4)

§15-15-61 **Disqualification.** No commissioner or hearings officer shall sit in any proceeding in which the commissioner or hearings officer has a personal pecuniary or business interest, or one in which the commissioner or hearings officer is related within the first degree by blood or marriage to any party to the proceeding. However, if, after declaring the nature of the circumstances of the pecuniary interest or consanguinity to the parties, and the parties do not oppose the commissioner or hearings officer sitting in the proceeding, the commissioner or hearings officer may participate in the proceeding. The record shall note clearly the waiver by the parties. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-62 **Ex parte communications.** (a) No person whether or not a party to a proceeding before the commission shall make an unauthorized ex parte communication either oral or written about the proceeding to any member of the commission or hearings officer who will be a participant in the decision-making process or the executive officer.

(b) The following classes of ex parte communications are permitted:

(1) Communications which relate solely to matters which a commission member or hearings officer is authorized by the commission to dispose of

on an ex parte basis, including communications regarding scheduling or other procedural matters regarding the course of the proceeding;

(2) Requests for information with respect to the status of a proceeding;

(3) Communications which all parties to the proceeding agree or which the commission has formally ruled may be made on an ex parte basis; and

(4) Communications with representatives of any news media on matters intended to inform the general public. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-13, 205-4)

§15-15-63 **Evidence.** (a) In contested cases, evidentiary requirements shall be controlled by this section.

(b) Any oral or documentary evidence may be received, but the commission shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The commission shall give effect to the rules of privilege recognized by law. Neither the commission nor a hearings officer is bound by the common law rules relating to the admission or rejection of evidence.

(c) The presiding officer shall rule on the admissibility of all evidence. The rulings may be reviewed by the commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the commission is necessary to promote justice, the presiding officer may refer the matter to the commission for determination.

(d) When objections are made to the admission or exclusion of evidence, the objecting party shall briefly state the grounds relied upon. Formal exceptions to rulings are unnecessary and need not be taken.

(e) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

(f) With the approval of the presiding officer, a witness may read into the record the testimony of a witness on direct examination. Before any written testimony is read, unless excused by the presiding officer, the witness shall provide an original and one paper copy and one electronic copy of the written testimony to the chief clerk, with a copy to each party to the proceeding. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the written testimony may be received into evidence without reading, provided that the witness shall be subject to proper cross-examination on matters contained in the written testimony. Any amendments to written direct and rebuttal testimony, or the introduction of totally new matters by revisions or supplements shall be accompanied by a sworn affidavit or declaration explaining why these matters were not submitted with the original written testimony.

(g) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.

(h) Exhibits shall be legible and may be prepared on paper not exceeding 8-1/2 x 11 inches in size or bound or folded to the respective approximate size, where practical. Where practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form. When exhibits are offered in evidence, the party shall furnish the original, one paper copy and one electronic copy of the exhibits to the chief clerk with a copy to each party to the proceeding, unless copies have been previously furnished or the presiding officer directs otherwise. The number and format of copies required under this section may be modified by order of the commission.

(i) A party may use maps or other demonstrative exhibits as evidence provided the parties submit the number of legible copies as may be required by the presiding officer. The commission shall not permit the introduction of or testimony from any visual aid not introduced as evidence.

(j) If any matter contained in the petition or in a document filed as a public record with the commission is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of

the document are specifically identified and are otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(k) The commission may take official notice of matters as may be judicially noticed by the courts of the State of Hawai`i. Official notice may also be taken of generally recognized technical or scientific facts within the commission's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(l) At the hearing, the presiding officer may require the production of further evidence through testimony or exhibits upon any issue. The presiding officer may authorize the filing of specific documentary evidence as a part of the record after the close of the hearing, subject to the rights of the parties to request reopening of the hearing within a specified time after the receipt of such evidence, or may keep the hearing open until such time as evidence is received by the commission. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving an exhibit number therefor, but the hearing shall remain open. The presiding officer is authorized to close the hearing when the exhibit is received, provided that there is no objection from any party, and no request to cross-examine by any party or a request to answer questions by a commissioner. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-10, 205-4)

§15-15-64 REPEALED. [~~R~~ R 11/2/2013]

§15-15-65 Limiting testimony. To avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a particular issue. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-66 **Removal from proceeding.** Any person who wilfully disrupts a hearing or other proceeding may be removed from the hearing room. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 92-3, 205-4)

§15-15-67 **Co-counsel.** Where a party is represented by more than one attorney or representative, only one of the attorneys or representatives shall be permitted to make an opening statement, or to examine or cross-examine a particular witness or to state any objections or to make closing statements, unless otherwise authorized by the presiding officer. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and ~~comp~~ comp 11/2/2013; comp] ~~(~~Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-68 **REPEALED.** [R 11/2/2013]

§15-15-69 **Subpoenas.** (a) Any party may file a written motion for the issuance of a subpoena requiring the attendance of a witness for the purpose of taking oral testimony before the commission, which motion shall not require a hearing.

(b) Motions for the issuance of subpoenas duces tecum shall:

(1) Be in writing;

(2) Specify the particular document or record, or part thereof, desired to be produced;

(3) State the reasons why the production thereof is believed to be material and relevant to the issues involved; and

(4) Include a statement of the reasons why the testimony of the witness is believed to be material and relevant to the issues involved.

(c) Three original copies of the subpoenas duces tecum shall be submitted together with the motion filed pursuant to subsection (b).

(d) The presiding officer, chairperson, or in the

chairperson's absence, any commissioner, may issue subpoenas. Subpoenas shall not be issued unless the party requesting the subpoena has complied with this section. Signed and sealed blank subpoenas shall not be issued to any person. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued.

(e) A party requesting the subpoenas shall be responsible for service of the issued subpoenas, and pay the witnesses summoned the same fees and mileage as are paid witnesses in circuit courts of the State of Hawai`i, and the fees and mileage shall be paid by the party at whose instance the witness appears.

(f) Notwithstanding any rule to the contrary, the chairperson, a commissioner, or a duly-appointed hearings officer may make an oral motion to request the issuance of a subpoena. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 92-16, 205-4)

§15-15-70 **Motions.** (a) Any party may make motions before, during, or after the close of a hearing.

(b) All motions, other than those made during a hearing, shall:

(1) Be in writing;

(2) State the grounds for the motion;

(3) Set forth the relief or order sought;

(4) Be accompanied by a memorandum in support of the motion, if the motion involves a question of law; and

(5) Be filed with the commission at least ten business days before the next regularly scheduled meeting of the commission.

(c) Every motion, except one entitled to be heard ex parte, shall indicate whether a hearing is requested on the motion. If a motion requires the consideration of facts not appearing of record, it shall be supported by affidavits or declarations.

(d) The moving party shall serve a copy of all motion papers on all other parties and shall file the original plus one paper copy and one electronic copy with the commission and proof of service. The number and format of copies required under this section may be modified by order of the commission.

(e) The opposing party or parties shall serve on all other parties and file counter affidavits and memorandums in opposition to the motion and of the authorities relied upon not later than seven days after being served with any written motion, or, if the hearing on the motion will occur less than seven days after the motion is served, at least forty-eight hours before the time set for hearing, unless otherwise ordered by the chairperson, chairperson's designee, or hearings officer. The chairperson, chairperson's designee, or hearings officer may order the opposing party or parties to file its memorandum in opposition earlier than the seven day period. The opposing party shall file the original plus one paper copy and one electronic copy with the commission and proof of service. The number and format of copies required under this section may be modified by order of the commission.

(f) Any party who does not oppose a motion or who intends to support a motion or who desires a continuance shall notify the commission, through the executive officer, and the opposing counsel within seven days after being served or, if the hearing on the motion will occur less than seven days after the motion is served, within forty-eight hours before the time set for hearing.

(g) Failure to serve or file memoranda in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion.

(h) Motions that do not involve the final determination of a proceeding may be heard and determined by the chairperson, commissioner, or hearings officer.

(i) If a hearing is requested, the executive officer shall set a date and time for hearing on the motion.

(j) If a hearing on the motion is not requested, the commission may decide the matter upon the pleadings, memoranda, and other documents filed with the commission, or hold a hearing on the matter.

(k) Any motion, except a motion for relief from or release of conditions submitted by the same party or parties and based upon substantially the same grounds as a previous motion that has been considered by the commission or denied by the commission shall not be again considered.

(l) After the hearing on the evidence is closed, but before the commission votes on a decision, a party for good cause shown may move to re-open the hearing to

take newly discovered evidence. The motion shall specify the facts claimed to constitute good cause, including material changes of fact or of law alleged to have occurred since the closing of the hearing and shall provide a description of the proposed additional evidence and an explanation of why the newly discovered evidence was not previously adduced. The party filing the motion shall be responsible for fees and costs pursuant to section 15-15-45.1.

(m) Orders granting, denying or otherwise disposing of motions, [~~except~~] including motions to amend decisions and orders relating to district boundary amendments and to special permits, [~~may~~] shall be signed by the chairperson or any vice chairperson, or the presiding officer, or the hearings officer, as the case may be. [~~Orders granting, denying, or otherwise disposing of motions relating to amendments of decisions and orders in district boundary amendment proceedings and to special permits shall be signed by the commissioners who have heard or examined the evidence relating to the motion and who have voted affirmatively on the decision.~~] [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-70.1 **Protective orders.** Any party or any person may move for a protective order to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by other law. A motion for protective order shall specifically identify the document or information to be protected. The movant shall bear the burden of establishing that the information should be protected. Stipulations for protective order, subject to the commission's approval, may be filed in lieu of motions for protective orders. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)

§15-15-71 **Substitution of parties.** Upon motion and for good cause shown, the commission may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; ~~comp~~ 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2, 205-4)

§15-15-72 **Correction of transcript.** The chairperson, presiding officer, or hearings officer shall determine any motion at the hearing to correct the transcript. Any motions after the hearing to correct the transcript shall be filed with the commission within seven days after receipt of the transcript unless otherwise directed, and shall be served on all parties. Such motions shall certify the date when the transcript was received. If no objections are received before seven days after the date of service, the transcript, upon approval of the commission, shall be changed to reflect the corrections. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-73 **Post hearing procedures.** Post hearing procedures shall conform to subchapters 9 and 10. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp](Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

§15-15-74 **Decision.** (a) For district boundary amendment petitions filed before December 31, 1995, within a period of not more than one hundred twenty days after the close of the hearing, unless otherwise ordered by the court, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions in accordance with subchapter 11.

(b) For district boundary amendment petitions filed on or after July 14, 1998, prior to a period of not more than three hundred sixty-five days after the petition has been deemed a proper filing by the commission or the executive officer, unless otherwise ordered by a court, or unless a time extension, not to exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions in accordance with subchapter 11. If the commission fails

to act on the petition pursuant to section 205-4(g), HRS, the petition shall be deemed approved, subject to the provisions of section 15-15-90(e).

(c) Notwithstanding subsections (a)[~~,~~] and (b), decisions for petitions submitted pursuant to section 201H-38, HRS, shall be made in the timeframe as provided in section 15-15-97.

(d) Notwithstanding subsections (a) and (b), decisions on acceptance or non-acceptance of environmental compliance documents submitted pursuant to chapter 343, HRS, shall be made within thirty days of receipt of the final statement, provided that the period may be extended at the request of the applicant for a period not to exceed fifteen days. Notification of a determination of acceptance or non-acceptance will be by letter from the executive officer to the applicant and office of environmental quality control, pursuant to chapter 343, HRS.] [Eff 10/27/86; am 3/24/94; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§91-13.5, 205-1, 205-4, 205-75) (Imp: HRS §§ 91-13.5, 201G-118, 205-4, SLH 1992, Act 227, §1, SLH 1994, Act 261, §1)

§15-15-75 **Appeals.** Parties to proceedings to amend land use district boundaries may obtain judicial [~~reviews~~]review as provided in section 205-19, HRS.[~~thereof in the manner set forth in section 91-14, HRS.~~] [Eff 10/27/86; comp 8/16/97; comp 5/8/00; comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§~~§~~91-14, 205-4, 205-19)

§15-15-76 **Re-application by the petitioner for boundary amendment.** (a) The commission shall not accept any petition for boundary amendment covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of filing findings of fact and conclusions of law denying the petition unless the petitioner submits significant new data or additional reasons which substantially strengthen the petitioner's position, provided that in no event shall any new petition be accepted within six months of the date of filing of the findings of fact and conclusions of law.

(b) Additionally, the commission shall not accept

any petition for boundary amendment for the same request involving the same land that was before the commission and withdrawn voluntarily by the petitioner within one year of the date of the withdrawal. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-2)

SUBCHAPTER 8

DECISION-MAKING CRITERIA FOR BOUNDARY AMENDMENTS

§15-15-77 **Decision-making criteria for boundary amendments.** (a) The commission shall not approve an amendment of a land use district boundary unless the commission finds upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, is not violative of section 205-2, HRS, and is consistent with the policies and criteria established pursuant to sections 205-16, 205-17, and 205A-2, HRS.

(b) In its review of any petition for amendment of district boundaries pursuant to this chapter, the commission shall specifically consider the following:

(1) The extent to which the proposed boundary amendment conforms to the applicable goals, objectives, and policies of the Hawai`i state plan and relates to the applicable priority guidelines of the Hawai`i state plan and the adopted functional plans;

(2) The extent to which the proposed boundary amendment conforms to the applicable district standards;

(3) The impact of the proposed boundary amendment on the following areas of state concern:

(A) Preservation or maintenance of important natural systems or habitats;

(B) Preservation and [~~M~~]~~maintenance~~] maintenance of valued cultural resources and activities, and, historical, or natural resources, including water resource uses;

(C) Maintenance of other natural resources relevant to Hawai`i's economy including, but not limited to agricultural resources;

(D) Commitment of state funds and resources;
(E) Provision for employment opportunities and economic development; and
(F) Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups;

(4) In establishing the boundaries of the districts in each county, the commission shall give consideration to the general plan, and community, development, or community development plans of the county in which the land is located;

(5) The representations and commitments made by the petitioner in securing a boundary amendment, including a finding that the petitioner has the necessary economic ability to carry out the representations and commitments relating to the proposed use or development;

(6) Lands in intensive agricultural use for two years prior to date of filing of a petition or lands with a high capacity for intensive agricultural use shall not be taken out of the agricultural district unless the commission finds either that the action:
(A) Will not substantially impair actual or potential agricultural production in the vicinity of the subject property or in the county or State; or
(B) Is reasonably necessary for urban growth; and

(7) In considering boundary amendments for lands designated important agricultural lands pursuant to part III, chapter 205, HRS, the commission shall specifically consider the standards and criteria set forth in section 205-50, HRS.

(c) Amendments of a land use district boundary in conservation districts involving land areas fifteen acres or less shall be determined by the commission pursuant to this subsection and section 205-3.1, HRS.

(d) Amendments of a land use district boundary in other than conservation districts involving land areas fifteen acres or less shall be determined by the appropriate county land use decision-making authority for the district.

(e) Amendments of a land use district boundary involving land areas greater than fifteen acres shall be determined by the commission, pursuant to this subsection and section 205-3.1, HRS. [Eff 10/27/86; am

and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§205-3.1, 205-4, 205-16, 205-17)

§15-15-78 **Incremental districting.** (a) If it appears to the commission that full development of the subject property cannot substantially be completed within ten years after the date of the commission's approval and that the incremental development plan submitted by the petitioner can be substantially completed, and if the commission is satisfied that all other pertinent criteria for amending the land use boundary for the subject property or part thereof are present, then the commission may:

(1) Grant the petitioner's request to amend the land use boundary for the entire subject property; or

(2) Amend the land use boundary for only that portion of the subject property which the petitioner plans to develop first and upon which it appears that substantial development can be completed within ten years after the date of the commission's approval. At the same time, the commission shall indicate its approval of the future land use boundary amendment of the total subject property requested by the petitioner, or so much thereof as shall be justified as appropriate therefor by the petitioner, such approval to indicate a schedule of incremental land use boundary amendments over successive periods not to exceed ten years each. The commission may amend the land use boundary of the subject property, if it finds such an ~~a~~amendment is justified.

(b) In amending a land use district boundary on an incremental basis, in addition to standards in this subchapter, the commission may consider projected population growth for the area, other lands that have received boundary amendments in the area, the availability of and impacts on resources, and the desirability of directing growth and development to the area over a long term basis.

(c) Upon receipt of an application for boundary amendment for the second and subsequent increments of property for which previous approval for incremental development has been granted by the commission, substantial completion of any offsite and onsite

improvements of the development, in accordance with the approved incremental plan, of the preceding increment that received boundary amendment will be prima facie proof that the approved incremental plan complies with the requirements for boundary amendment.

(d) The following are procedures for processing incremental boundary amendment applications:

(1) The petitioner shall file an original, one paper copy and one electronic copy of an application to approve the second or subsequent increments utilizing the same docket number as the original petition. The number and format of copies required under this section may be modified by order of the commission;

(2) The petitioner shall serve copies of the application on all parties of record in the original proceeding;

(3) The application shall include facts, affidavits or declarations, and other documentation, including a metes and bounds description and map, in support of the fact that the petitioner has substantially completed offsite and onsite improvements, complied with chapter 343, HRS, where applicable, and complied with conditions of the commission approval in accordance with the approved incremental plan of the preceding increment receiving a boundary amendment;

(4) A prehearing conference may be conducted pursuant to section 15-15-57;

(5) A notice of hearing shall be published notifying the public of the time and place the application will be considered by the commission and will provide for the admission of public witnesses;

(6) The procedures for hearing the application will be subject to the timeframes presently existing for district boundary amendments, and the provisions of section 15-15-13; and

(7) The petitioner shall provide notice of the application to all persons having a property interest in the increment for which a land use district boundary amendment is sought.

[Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: §205-4)

§15-15-79 **Performance time.** (a) Petitioners granted district boundary amendments shall make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary amendment, in developing the property receiving the boundary amendment. The commission may act to amend, nullify, change, or reverse its decision and order if the petitioner fails to perform as represented to the commission within the specified period.

(b) The commission may provide by condition that absent substantial commencement of use of the subject property or substantial progress in developing the land receiving the boundary amendment in accordance with representations and commitments made by the petitioner to the commission, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use district classification or be changed to a more appropriate land use district classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances pursuant to section 15-15-92. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] -(Auth: HRS §§205-1, 205-4, 205-7) (Imp: HRS §205-4)

SUBCHAPTER 9

POST HEARING PROCEDURES FOR HEARINGS BEFORE THE COMMISSION

§15-15-80 **Briefs.** The presiding officer may fix the time for the filing of briefs. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the commission in writing with one original, one paper copy, and one electronic copy filed with the commission, and a copy served upon or mailed to the parties to the proceeding. Ordinarily, when a matter is to be submitted on concurrent briefs, extensions shall not be granted unless a stipulation is filed with the commission.

[Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-81 **Oral argument.** The commission or the presiding officer may direct or permit the presentation of oral argument with the petitioner opening and concluding the argument. Not more than fifteen minutes on each side of the proceeding shall be allowed for argument without special leave of the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-9, 205-4)

§15-15-82 **Issuance of decisions and orders.** (a) A proceeding shall stand submitted for decision by the commission after the taking of evidence, and the filing of briefs or the presentation of oral argument as may have been prescribed by the presiding officer or hearings officer. ~~The petitioner~~ [~~Each party to the proceeding~~] The petitioner shall submit a proposed decision and order which shall include proposed findings of fact, conclusions of law, and proposed conditions; all other parties may submit a proposed decision and order including proposed findings of fact, conclusions of law and proposed conditions. If a party enters into a partial stipulation as authorized in section 15-15-82.1, the party shall nevertheless file a proposed decision and order indicating the findings of fact, conclusions of law and proposed conditions that are stipulated to and also set forth proposed findings of fact, conclusions of law and proposed conditions that it proposes that are different than the stipulation. A proposed decision and order shall be filed with the commission consisting of one paper original, one paper copy, and one electronic copy, and a copy shall be served upon each party to the proceeding. [~~and an opportunity given to each~~] Each party to the proceedings shall be given the opportunity to comment [~~thereon.~~] on each proposed decision and order filed with the commission.~~[thereon.]~~

(b) A commission member may prepare a proposed findings of fact and conclusions of law, and serve the document upon each party not less than ten business days prior to the meeting at which the proposed findings of fact and conclusions of law shall be

presented.

(c) Notwithstanding any provision of this chapter to the contrary, each party may provide its position on the commission members' proposed findings of fact and conclusions of law within five business days from the date of service. Any party providing its position shall provide a summary of its reasons for support or objection.

(d) Every decision and order adverse to a party to the proceeding, rendered by the commission in a contested case, shall be accompanied by separate findings of fact and conclusions of law.

(e) Findings of fact, conclusions of law, and decision and order shall be issued by the commission for district boundary amendments and special permits deemed approved pursuant to section 91-13.5, HRS. The decision and order shall include mandatory conditions pursuant to section 15-15-90(e). For orders determining the acceptability of environmental compliance documents pursuant to chapter 343, HRS, the chair or presiding officer shall sign for the commission. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§91-13.5, 205-1, 205-7) (Imp: HRS §§91-2, 91-12, 205-4)

§15-15-82.1 **Stipulation as to findings of fact, conclusions of law, conditions of boundary amendment, and decision and order.** After the close of the evidentiary portion of the hearing, some or all parties may enter into stipulations as to findings of fact, conclusions of law, conditions of boundary amendment, and decision and order concerning the proposed boundary amendment as follows:

(1) A petitioner who desires to enter into a stipulation shall prepare a proposed stipulation as to any or all findings of fact, conclusions of law, conditions of boundary amendment, and decision and order concerning the proposed boundary amendment;

(2) Parties in agreement with a stipulation shall sign the proposed stipulation as to any or all proposed findings of fact, conclusions of law, conditions of boundary amendment, and a proposed decision and order, and shall submit such stipulation to the commission within the time frame specified by the commission;

(3) After the hearing, the commission may adopt

the proposed stipulation, and if it adopts the stipulated decision and order the commission may amend, accept, modify or reject in part or in whole any of the findings of fact, conclusions of law, conditions of boundary amendment, and anything else contained in the stipulation;

(4) The commission shall issue a decision and order pursuant to provisions of sections 15-15-36 and 15-15-74 and section 205-4(g), HRS.

[Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)

§15-15-83 **Service of decisions and orders.** The commission shall serve the decisions and orders by personal delivery or mailing certified copies to the parties of record. The effective date of the decision and order is the date certified by the executive officer. When a party to a proceeding has appeared by a representative, service upon the representative or attorney shall be deemed to be service upon the party. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-12, 205-4)

§15-15-84 **Reconsideration of decision.** (a) A motion for reconsideration shall be filed with the commission within seven calendar days after issuance of the commission's written decision and order. The motion for reconsideration shall clearly specify that the motion is for reconsideration.

(b) The motion for reconsideration shall state specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

(c) In no event will the commission consider any motion for reconsideration on any petition after the period within which the commission is required to act on the petition. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

POST HEARING PROCEDURES FOR HEARING
CONDUCTED BY HEARINGS OFFICER

§15-15-85 **Recommended decision.** (a) Upon completion of taking of the evidence, the hearings officer may request the parties to submit a proposed findings of fact, conclusions of law, and decision and order, consisting of one original, one paper copy, and one electronic copy. Proposed decision and orders submitted shall be served upon each party to the proceeding and an opportunity given to each party to comment thereon. Upon receipt of the proposed decision and orders and any comments from the parties, the hearings officer shall prepare and submit to the commission a recommended decision which shall include recommended findings of fact, conclusions of law and a recommended decision and order.

(b) The record shall include the petition and other pleadings, notice of hearing, motions, rulings, orders, transcript of the hearing, stipulations, documentary evidence, offers of proof, proposed findings, or other documents submitted by the parties, all matters placed in evidence, objections to the conduct of the hearing, the recommended decision of the hearings officer, and all other matters placed in evidence. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp -] (Auth: HRS §§205-1, 205-7)

§15-15-85.1 **Proposed decision.** Upon receipt of the hearings officer's recommended decision, the commission may adopt it as its proposed decision, or may remand it to the hearings officer for any clarification or correction, or may modify or reject it and issue its own proposed decision.

A copy of any proposed decision of the commission shall be served upon each party. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)

§15-15-86 **Exceptions; extension of time; finality of proposed decision.** (a) Within fourteen calendar days after the date of mailing or personal service of a

copy of the commission's proposed decision, a party may file with the commission exceptions to any part thereof and request review by the commission. Such party shall serve copies of exceptions and briefs upon each party to the proceeding.

(b) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken;

(2) Identify that part of the proposed decision to which objections are made;

(3) Designate by page citation the portions of the record relied upon and specify authorities relied upon to sustain each point; and

(4) State all the grounds for exceptions to a ruling, finding, or conclusion. Grounds not cited or specifically urged are waived.

(c) Any party may apply for an extension of time within which to file exceptions to the proposed decision by filing a written application setting forth the reason for the request. The application shall be filed before the expiration of the period prescribed for the filing of exceptions. Upon good cause shown, the executive officer may extend the time for filing exceptions for an additional period not to exceed ten (10) calendar days.

(d) If no exceptions and request for review are filed within the time specified, the proposed decision shall become final, unless the commission, on its own motion, orders further proceedings to be held. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-11, 205-4)

§15-15-87 Support of hearings officer's recommended decision. (a) Within seven days after service of the exceptions taken to the proposed decision, any party may file with the commission a brief opposing the exceptions. Such party shall serve copies of the brief in support upon each party to the proceeding

(b) The brief opposing exceptions shall:

(1) Answer specifically the points of procedure, fact, law, or policy to which exceptions were taken;

(2) State the facts and reasons why the proposed decision must be affirmed; and

(3) Designate by page citation the portions of

the record relied upon. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-11, 205-4)

§15-15-88 **Argument on exceptions.** Upon the filing of exceptions by a party adversely affected by the proposed decision, the commission shall grant such party an opportunity to present arguments to the commission. The executive officer, with direction from the chairperson, shall set the time and place of hearing of argument on exceptions and give written notice to the parties. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-10, 91-11, 205-4)

§15-15-89 **Final decision.** (a) When exceptions have been filed to the commission's proposed decision, the commission, within forty-five days after the hearing on exceptions, shall render its final decision. In rendering its final decision, the commission shall consider the whole record or such portions thereof as may be cited by the parties and shall resolve all questions of fact by what it deems to be the greater weight of the evidence thereon. The final decision shall contain findings of fact and conclusions of law upon which the decision is based.

(b) After the commission has heard and examined all of the evidence, the commission, shall issue its decision within forty-five days after receiving the evidence, or filing of any memoranda or proposed findings of fact and conclusions of law upon which the decision is based. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 92-16)

SUBCHAPTER 11

CONDITIONS: FILING, ENFORCEMENT, MODIFICATION, DELETION

§15-15-90 Imposition of conditions; generally.
(a) In approving a petition for boundary amendment, the commission may impose conditions necessary to uphold the general intent and spirit of chapters 205, 205A, and 226, HRS, and to assure substantial compliance with representations made by the petitioner in seeking the boundary amendment.

(b) The commission may request the appropriate state or county agency to report periodically to the commission on the petitioner's compliance with the applicable conditions imposed by the commission.

(c) The commission may require the petitioner to submit periodic reports indicating what progress has been made in complying with any conditions that may have been imposed by the commission.

(d) The commission may require the petitioner to notify the commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the property covered by the approved petition.

(e) If a boundary amendment petition filed pursuant to section 205-4, HRS, is approved pursuant to section 91-13.5, HRS, or a petition filed pursuant to section 201H-38, HRS, is deemed approved on the forty-sixth day, the following mandatory conditions shall apply:

(1) Petitioner shall develop the land to which the boundary amendment applies in substantial compliance with the representations made to the commission. Failure to so develop the subject property may result in reversion of the subject property to its former land use district classification, or change it to a more appropriate land use district classification;

(2) Petitioner shall provide notice to the commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the subject property prior to or during development of the subject property, excluding, however, individual lot sales or lease in a residential or industrial development;

(3) Petitioner shall timely provide without any prior notice, annual reports to the commission, state office of planning, and the

respective county planning department in connection with the status of the project proposed for the land to which the boundary amendment applies, and petitioner's progress in complying with the conditions imposed. The annual report shall be submitted in a form prescribed by the executive officer of the commission. The annual report shall consist of one original, one paper copy, and one electronic copy, and shall be due prior to or on the anniversary date of the approval of the petition;

(4) The commission may fully or partially release the conditions provided herein as to all or any portion of the land to which the boundary amendment applies upon timely motion and upon the provision of adequate assurance by the petitioner of satisfaction of the conditions imposed;

(5) Within seven days of the approval date of the petition, the petitioner shall:

(A) Record with the bureau of conveyances a statement that the land to which the boundary amendment applies is subject to conditions imposed herein by the commission; and

(B) File a certified copy of such recorded statement with the commission;

(6) Petitioner shall record the conditions imposed herein by the commission with the bureau of conveyances pursuant to section 15-15-92;

(7) Petitioner shall provide affordable housing opportunities for low, low-moderate, and moderate income residents of the State of Hawai`i to the satisfaction of the respective county in which the land to which the boundary amendment applies is located. The respective county shall consult with the Hawai`i housing finance and development corporation prior to its approval of the petitioner's affordable housing plan. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between the petitioner and the respective county;

(8) Provided that the proposed land uses include residential units, petitioner shall contribute to the development, funding, and

construction of public school facilities as determined by and to the satisfaction of the state department of education;

(9) Petitioner shall participate in the funding and construction of adequate wastewater transmission and disposal facilities, on a fair-share basis, as determined by the respective county in which the land to which the boundary amendment applies is located, and the state department of health;

(10) ~~(10)~~ Petitioner shall prepare a traffic impact analysis report. The traffic impact analysis report shall identify the traffic impacts attributable to the proposed development and recommended proposed mitigation measures. The report should also reflect the latest planning efforts for transportation. The report shall be reviewed and approved by the state department of transportation, and the respective county transportation agency in which the land to which the boundary amendment applies is located. Based upon the report, the petitioner may be required to participate on a fair-share basis, in the funding and construction of local and regional transportation improvements and programs, including dedication of rights-of-way as determined by the state department of transportation and the respective county transportation agency in which the land to which the boundary amendment applies is located;

(11) ~~(11)~~ Petitioner shall, on a fair-share basis, fund and construct adequate civil defense measures as determined by the state civil defense agency;

(12) ~~(12)~~ Petitioner shall have an archaeological inventory survey conducted by a professional archaeologist. The findings shall be submitted to the state department of land and natural resources, state historic preservation division in report format for adequacy review and a copy shall be provided to the commission. The state historic preservation division shall verify in writing with a copy provided to the commission that the survey report is acceptable, that significance evaluations are acceptable, and that mitigation commitments are acceptable;

(13) ~~(13)~~ If significant historic sites are present, the petitioner shall submit a detailed historic preservation mitigation plan for review by the state historic preservation division and a copy shall be provided to the commission. This plan may include preservation and archaeological data recovery subplans (detailed scopes of work). The state historic preservation division shall verify in writing with a copy provided to the commission that the plan has been successfully executed;

(14) ~~(14)~~ Petitioner shall stop work in the immediate vicinity should any previously unidentified burials, archaeological or historic sites such as artifacts, marine shell concentrations, charcoal deposits, or stone platforms, pavings or walls be found. Subsequent work shall proceed upon an archaeological clearance from the state historic preservation division when it determines that mitigative measures have been implemented to its satisfaction;

(15) ~~(15)~~ Petitioner shall participate in an air quality monitoring program as specified by the state department of health;

(16) ~~(16)~~ Petitioner shall be responsible for implementing sound attenuation measures to bring noise levels from vehicular traffic in the affected properties down to a level of fifty-five decibels;

(17) ~~(17)~~ If the petition for a boundary amendment involves prime agricultural lands, petitioner shall be responsible for contributing to the protection of an equivalent amount of prime agricultural lands and related infrastructure via long-term agricultural conservation easements or other agriculturally-related assets as determined by and to the satisfaction of the state department of agriculture;

(18) ~~(18)~~ Petitioner shall notify all prospective buyers of property of the potential odor, noise, and dust pollution if there are any agricultural district lands surrounding the land to which the boundary amendment applies;

(19) ~~(19)~~ To the extent that the petition area is contiguous or adjacent to lands in the State

land use agricultural district, any action that would interfere with or restrain farming operations on those lands is prohibited, provided the farming operations are conducted in a manner consistent with generally accepted agricultural and management practices. Petitioner shall notify all prospective developers or purchasers of all or any portion of the petition area or any interest in the petition area, and shall require its purchasers to provide subsequent notification to lessees or tenants that farming operations and practices on adjacent or contiguous land in the State land use agricultural district are protected under chapter 165, HRS, the Hawai`i Right to Farm Act. This notice shall be included in any disclosure required for the sale or transfer of all or any portion of the petition area or any interest in the petition area;

(20) ~~(20)~~ Petitioner shall fund the design and construction of drainage improvements required as a result of the development of the land to which the boundary amendment applies to the satisfaction of the appropriate state and county agencies;

(21) ~~(21)~~ Petitioner shall cooperate with the state department of health and the respective county to conform to the program goals and objectives of chapter 342G, HRS, and the respective county's approved integrated solid waste management plans in accordance with a schedule and timeframe satisfactory to the state department of health;

(22) ~~(22)~~ To the extent required by the state department of health, petitioner shall ensure that nearshore, offshore, and deep ocean waters remain in pristine condition;

(23) ~~(23)~~ Petitioner shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed uses. Water transmission facilities shall be coordinated and approved by appropriate state and county agencies. The county's water use and development plan shall be amended to reflect changes in water demand forecasts and in water development plans to supply the proposed uses; and

(24) ~~(24)~~ Petitioner shall preserve and protect

any established gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural, and religious practices on the land to which to the boundary amendment applies.

(f) If a special permit filed pursuant to section 205-6, HRS, is approved pursuant to section91-13.5, HRS, the following mandatory conditions shall apply:

(1) All conditions listed under subsection (e);

(2) The proposed use shall be established within one year from the date that the special permit was approved pursuant to section 91-13.5, HRS; and

(3) The special permit shall be valid for a period of five years from the approval date pursuant to section 91-13.5, HRS.

[Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§91-13.5, 205-1, 205-7) (Imp: HRS §§91-13.5, 205-4)

§15-15-91 **Applicability.** Conditions imposed by the commission shall run with the land and shall be binding upon the petitioner and each and every subsequent owner, lessee, sub-lessee, transferee, grantee, assignee, or developer. [Eff 10/27/86; comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-4)

§15-15-92 **Filing procedure for conditions imposed by the commission.** (a) Within seven days of issuance of the decision and order pursuant to section 15-15-83, the petitioner shall file a notice of imposition of conditions, in a form prescribed by the executive officer, with the bureau of conveyances.

(b) All conditions imposed by the commission in its decision and order and conditions pursuant to section 15-15-90(e), shall be recorded at the bureau of conveyances and shall comply with the following procedures:

(1) The document listing the conditions shall be submitted to the commission for review and approval by the executive officer prior to filing with the bureau of conveyances;

(2) The petitioner shall record the conditions at

the bureau of conveyances within sixty days after the receipt of the decision and order requiring the same. The timeframe for recordation of the condition may be extended pursuant to section 15-15-42;

(3) Evidence of recordation shall be by certified copy under the signature of the registrar of conveyances. The petitioner shall forward a certified copy to the commission; and

(4) Description of the land shall be sufficiently accurate to identify the land intended to be affected. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4)

§15-15-93 Enforcement of conditions, representations, or commitments. (a) Any party or interested person may file a motion with the commission requesting an issuance of an order to show cause upon a showing that there has been a failure to perform a condition, representation, or commitment on the part of the petitioner. The party or person shall also serve a copy of the motion for an order to show cause upon any person bound by the condition, representation, or commitment. The motion for order to show cause shall state:

(1) The interest of the movant;
(2) The reasons for filing the motion;
(3) A description and a map of the property affected by the condition;
(4) The condition ordered by the commission which has not been performed or satisfied;
(5) Concisely and with particularity the facts, supported by an affidavit or declaration, giving rise to a belief that a condition ordered by the commission has not been performed or satisfied; and
(6) The specific relief requested.

(b) Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.

The commission shall serve the order to show cause in writing by registered or certified mail with return receipt requested at least thirty days before the hearing. A copy shall be also sent to all parties in the boundary amendment proceedings. The order to show cause shall include:

(1) A statement of the date, time, place, and nature of the hearing;

(2) A description and a map of the property to be affected;

(3) A statement of the legal authority under which the hearing is to be held;

(4) The specific sections of the statutes, or rules, or both, involved; and

(5) A statement that any party may retain counsel if the party so desires.

(c) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 7, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.

(d) Post hearing procedures shall conform to subchapter 7 or subchapter 9. Decisions and orders shall be issued in accordance with subchapter 7 or subchapter 9.

(e) Absent substantial commencement of construction, the commission may revert the property to its former land use classification or a more appropriate classification. For the purposes of this subsection (e) substantial commencement shall be determined based on the circumstances or facts presented in the order to show cause regardless of dollar amount expended or percentage of work completed.

(f) [~~(e)~~] The commission shall amend its decision and order to incorporate the order to show cause by including the reversion of the property to its former land use classification or to a more appropriate classification.

(g) [~~(f)~~] Fees for a motion for order to show cause will be borne by the movant pursuant to section 15-15-45.1 herein. However, should the motion for order to show cause be granted, any further fees for proceedings arising from the motion shall be borne by the party upon which the order to show cause has been issued. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 205-4, 205-12, 205-17)

§15-15-94 **Modification or deletion of conditions or orders.** (a) If a petitioner, pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed by the commission, or imposed pursuant to section 15-15-90(e) or (f), or modification of the commission's order, the petitioner shall file a motion in accordance with section 15-15-70 and serve a copy on all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that may have a property interest in the subject property as recorded in the county's real property tax records at the time that the motion is filed.

(b) For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order.

(c) Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 11. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] -(Auth: HRS §§205-1, 205-7) (Imp: HRS §205-4)

SUBCHAPTER 12

SPECIAL PERMITS

§15-15-95 **Petition before county planning commission.** (a) Any person who desires to use land within an agricultural or rural district for other than a permissible agricultural or rural use may petition the county planning commission of the county within which the land is located for a special permit to use the land in the manner desired; provided that if the person is not the owner or sole owner in fee simple of the land, the record shall include evidence that the person requesting the special permit has written authorization of all fee simple owners to file the petition, which authorization shall also include an acknowledgement that the owners and their successors shall be bound by the special permit and its conditions.

(b) Special permits for areas greater than fifteen acres require approval of both the county planning commission and the commission. Special permits approved by the county planning commission and which require commission approval must be forwarded to the commission within sixty days following the county planning commission's decision. The county shall assure that prior to the county hearing on the petition for special permit, copies of the special permit petition are forwarded to the land use commission, the state office of planning, and the department of agriculture for their review and comment. The decision of the county planning commission recommending approval of the special permit, together with the complete record, including maps, charts, other exhibits and other evidence, and the complete transcript of the proceeding before the county planning commission must be transmitted to the commission. Unless otherwise required by the commission, the planning commission shall file with the commission an original, one paper copy of the complete record, together with an electronic copy of the complete record. The number and format of copies required under this section may be modified by order of the commission.

_____-(c) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an "unusual and reasonable use":

(1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;

(2) The proposed use would not adversely affect surrounding property;

(3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;

(4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and

(5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

_____-(d) Petitions for issuance of a special permit shall specify the proposed use and state concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the special permit, and shall include any facts, views, arguments, maps,

plans, and relevant data in support of the petition.

(e) The petitioner shall comply with all of the rules of practice and procedure of the county planning commission in which the subject property is located.

(f) The county planning commission may impose such protective conditions as it deems necessary in the issuance of a special permit. The county planning commission shall establish, among other conditions, a reasonable time limit suited to establishing the particular use proposed, and if appropriate, a time limit for the duration of the proposed use, which shall be a condition of the special permit; provided, however, that the commission for good cause shown, may specify or change the time period of the special permit. If the permitted use is not substantially established to the satisfaction of the county planning commission within the specified time, it may revoke the permit. The county planning commission, with the concurrence of the commission, may extend the time limit if it deems that circumstances warrant the granting of the extension. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-6)

§15-15-95.1 **Applicability of subchapter 5.** Except as otherwise provided in this subchapter, the procedural provisions of subchapter 5 shall apply to petitions for special permits. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)

§15-15-96 **Decision and order by the land use commission.** (a) Within forty-five days after receipt of the county planning commission's decision and the complete record of the proceeding before the county planning commission, as determined by the executive officer, the commission shall act to approve, approve with modification, or deny the petition. The commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the petitioner. Upon determination by the commission, the petition may be remanded to the county planning commission for further proceedings.

(b) The commission shall not consider any petition for special permit covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of the filing of the findings of fact, conclusions of law, and decision and order denying the petition for special permit unless the petitioner submits significant new data or additional reasons which substantially strengthen the petitioner's position, provided that in no event shall any new petition be accepted within six months of the date of the filing of the findings of fact, conclusions of law, and decision and order. Additionally, the commission shall not consider any petition for special permit for the same request involving the same land that was before the commission and withdrawn voluntarily by the petitioner within one year of the date of the withdrawal.

(c) A denial or modification of the special permit, as the case may be, of the proposed use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawai`i rules of civil procedure.

(d) If a special permit is approved pursuant to section 91-13.5, HRS, the provisions of section 15-15-82(e) and section 15-15-90(f) shall apply. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§91-13.5, 205-1, 205-7) (Imp: HRS §§91-13.5, 205-6)

§15-15-96.1 **Modification of special permit.** Any request for modification of a special permit or modification, release, or deletion of a condition imposed on a special permit, whether imposed by the county planning commission or the commission, shall first be submitted to the appropriate county planning commission and, for special permits for land greater than fifteen acres in size, the commission, for consideration and decision.

The decision of the county planning commission with respect to modification of a special permit, or modification, release or deletion of a condition to a special permit shall comply with the requirements of section 15-15-95 and 15-15-96. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)

SUBCHAPTER 13

GOVERNMENT SPONSORED HOUSING PROJECTS

§15-15-97 **Procedure for processing petitions for housing projects under section 201H-38, HRS.** (a) Petitions for housing projects under section 201H-38, HRS, shall be processed according to the procedures provided in this section.

(b) Not less than sixty days prior to the filing of a petition, the petitioner shall:

(1) File an original, one paper copy, and one electronic copy of a notice of intent to file a petition with the commission according to a format provided by the commission; the number and format of copies required under this section may be modified by order of the commission;

(2) Publish the notice of intent at least once in a newspaper of general circulation in the State as well as in a county newspaper in which the subject property is situated. The notice of intent shall include:

(A) The name and address of the petitioner and the petitioner's property interest in the subject property;

(B) Proposed boundary amendment;

(C) Tax map key;

(D) Acreage;

(E) Existing land use;

(F) Brief description of the proposed development or use;

(G) The date that the petitioner shall file its petition with the commission; and

(H) Inform the public of the rights of interested persons under section 205-4(e), HRS;

(3) Serve copies of the notice of intent to file a petition upon the director of the state office of planning, the planning department of the county in which the subject property is situated, and persons with a property interest in the subject property that is recorded in the county's real property tax records. The notice of intent to file a petition shall also be sent to persons on a

mailing list provided by the chief clerk. In proceedings related to 201H petitions, the petitioner's notice of intent shall also serve as the notice of hearing for the purposes of intervention;

(4) File an original and one paper copy of an affidavit of mailing the notices of intent to the persons specified in paragraph (3); and

(5) File an affidavit of publication of the notice of intent to file a petition in compliance with paragraph (2).

(c) Persons who may intervene upon timely application include:

(1) All departments and agencies of the State and of the county in which the land is situated; and

(2) All persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.

(d) All other persons may apply for leave to intervene, which shall be freely granted, provided the commission or its hearings officer may deny an application to intervene when, in the commission's or hearing officer's discretion, it appears that:

(1) The position of the applicant for intervention is substantially the same as the position of a party already admitted to the proceeding; and

(2) The admission of additional parties will render the proceedings inefficient and unmanageable.

(e) Petitions to intervene and become a party shall be in conformity with subchapter 5 and filed with the commission. An original and one paper copy, together with one electronic copy of the petition for intervention with proof of service on all parties shall be filed with the commission within fifteen days after the notice of intent to file a petition is published pursuant to section 15-15-97(b)(2). Except for good cause shown, late filing shall not be permitted.

(f) The petition for intervention shall make reference to the following:

(1) Nature of the proposed intervenor's statutory or other right;

(2) Nature and extent of the proposed intervenor's interest, and if an abutting

property owner, the tax map key description of the property; and

(3) Effect of any decision in the proceeding on the proposed intervenor's interest.

(g) If applicable, the petition shall also make reference to the following:

(1) Other means available whereby the proposed intervenor's interest may be protected;

(2) Extent the proposed intervenor's interest may be represented by existing parties;

(3) Extent the proposed intervenor's interest in the proceeding differs from that of the other parties;

(4) Extent the proposed intervenor's participation can assist in development of a complete record;

(5) Extent the proposed intervenor's participation will broaden the issues; and

(6) Extent the proposed intervenor's intervention would serve the public interest.

(h) Petitions for intervention shall be accompanied by a filing fee of $50. The fee shall not apply to state and county agencies.

(i) The commission may conduct a pre-application meeting with the petitioner and proposed parties to the proceeding for the purpose of determining information requirements, possible issues, proposed stipulations, and other matters which may assist in contributing to a more orderly hearing process.

(j) If the petitioner fails to file the petition on the date stated in its notice of intent, the petitioner shall refile a notice of intent in the manner set forth in this section.

(k) The petitioner shall file a petition in conformance with subchapters 5 and 6 except that at the time of filing, the petition shall include:

(1) A finding of no significant impact or approved environmental impact statement if conservation district lands are involved;

(2) A proposed decision and order;

(3) An affidavit that the petitioner has met with interested community groups to discuss the proposed project;

(4) A clear description of the manner in which petitioner proposes to finance the proposed development, including a budget, a marketing plan, and a feasibility study; and

(5) A certification from the Hawai`i housing finance and development corporation or county

housing agency that the petition involves a section[~~,~~] 201H-38, HRS, housing project, including a certified copy of an approved county council resolution approving the project with conditions and any exemptions granted.

(l) Petitions that fail to comply with the requirements set forth in subsections (b) and (k) shall be deemed defective and the date of filing of the petition shall be as of the date the defect is cured.

(m) The hearing on the application shall be conducted in accordance with subchapter 7, except that the time requirements for holding a hearing, statement of position, and decision making shall not apply.

(n) Notice of the hearing shall be published to the extent provided by law.

(o) The commission shall approve or disapprove a boundary amendment within forty-five days after the petition has been deemed a proper filing by the executive officer. If on the forty-sixth day the petition is not disapproved, it shall be deemed approved by the commission, and the provisions of section 15-15-90(e) shall apply. [Eff 3/20/87; am 7/18/94; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; am and comp] (Auth: HRS §§201G-118, 205-1, 205-4, 205-7) (Imp: HRS §§205-4, 201G-118)

§15-15-97.1 REPEALED. [R 5/8/00]

§15-15-97.2 Fees. The petitioner will be responsible for fees pursuant to section 15-15-45.1. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-4.1, 205-7) (Imp: HRS §§91-2, 92-21, 205-4.1)

SUBCHAPTER 14

DECLARATORY ORDERS

§15-15-98 Who may petition. (a) On petition of any interested person, the commission may issue a

declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation.

(b) A farmer or landowner with lands qualifying under section 205-45, HRS, may file a petition for declaratory order to designate the lands as important agricultural lands and shall file a petition that conforms to the requirements of this section and section 205-44 and 205-45, HRS.

(c) Notwithstanding the other provisions of this subchapter, the commission, on its own motion or upon request but without notice of hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

§15-15-99 **Petition for declaratory order; form and contents.** The petition shall be submitted consisting of one original, one paper copy, and one electronic copy, and shall conform to the format requirements of sections 15-15-38, 15-15-39, and 15-15-40, and shall contain:

(1) The name, address including zip code, and telephone number of each petitioner;
(2) A statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition;
(3) A designation of the specific statutory provision, rule, or order in question, together with a complete statement of the relevant facts and a statement of the issues raised or controversy or uncertainty involved;
(4) A statement of the petitioner's interpretation of the statute, rule or order or the petitioner's position or contention with respect thereto;
(5) A memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention. The commission may require the petitioner to file additional data or memoranda;
(6) The names of any other potential parties;
(7) The signature of each petitioner; and
(8) A statement whether the petition for

declaratory ruling relates to any commission docket for district boundary amendment or special permit, and if so, the docket number and identification of all parties to the docket. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

§15-15-100 – **Consideration of petition for declaratory order.** (a) The commission, within ninety days after submission of a petition for declaratory order, shall:

(1) Deny the petition where:
  (A) The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future; or
  (B) The petitioner's interest is not of the type which confers sufficient standing to maintain an action in a court of law; or
  (C) The issuance of the declaratory order may adversely affect the interest of the State, the commission, or any of the officers or employees in any litigation which is pending or may be reasonably be expected to arise; or
  (D) The petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission; or
(2) Issue a declaratory order on the matters contained in the petition; or
(3) Set the petition for hearing before the commission or a hearings officer in accordance with this subchapter. The procedures set forth in subchapter 7 shall be applicable.

(b) If the matter is set for hearing, the commission shall render its findings and decision within one hundred and twenty days after the close of the hearing or, if post hearing briefs are filed, forty-five days after the last brief is filed, unless a different time period is stated at the hearing. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp

11/2/2013; comp] (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

§15-15-101 **Declaratory orders; dismissal of petition.** The commission, without notice or hearing, may dismiss a petition for declaratory order that fails in material respect to comply with the requirements of this subchapter. The dismissal shall be in writing and state the reasons therefor. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

§15-15-102 **REPEALED.** [R R 11/2/2013]

§15-15-103 **Declaratory orders; request for hearing.** The commission may, but shall not be required to, conduct a hearing on a petition for declaratory order. Any petitioner or party in interest who desires a hearing on a petition for a declaratory order shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit establishing those facts. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

§15-15-104 **Applicability of declaratory order.** An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. It shall not be applicable to different fact situations or where additional facts not considered in the order exist. The order shall have the same force and effect as other orders issued by the commission. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp]

(Auth: HRS §§91-8, 205-1, 205-7) (Imp: HRS §§91-2, 91-8)

15-15-104.1 Fees. The Petitioner shall be responsible for fees pursuant to section 15-15-45.1 herein. [Eff and comp 11/2/2013; comp] ~~(Auth: HRS §§205-1, 205-4.1, 205-7) (Imp: HRS §§91-2, 92-21, 205-4.1)~~

SUBCHAPTER 15

RULEMAKING PROCEDURES

§15-15-105 Initiation of rulemaking proceedings. (a) The commission, at any time on its own motion, may initiate proceedings for the adoption, amendment, or repeal of any rule of the commission.

(b) Any interested person may petition the commission for the adoption, amendment, or repeal of any rule of the commission. The petitioner shall file and deliver one original, one paper copy and one electronic copy of the petition to the office of the commission. The number and format of copies required under this section may be modified by order of the commission. Petitions for rulemaking filed with the commission shall become matters of public record. [Eff 10/27/86; comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-6, 205-7)

§15-15-106 Rulemaking; form and contents of petition. Petitions for rulemaking need not be in any special form but shall conform to the requirements of this subchapter and shall contain:

(1) The name, address (including zip code), and telephone number of each petitioner;
(2) A statement of the petitioner's interest in the subject matter;
(3) A statement of the reasons in support of the proposed rule, amendment, or repeal;
(4) The authorization or relief sought;
(5) The citation of the statutory provision or

other authority under which commission authorization or relief is sought;

(6) A draft or the substance of the proposed rule or amendment or a designation of the provisions the repeal of which is desired; and

(7) The signature of each petitioner.

Any petition which does not conform to the foregoing requirements may be rejected by the commission. The rejection shall be in writing and shall state the reasons therefor. [Eff 10/27/86; comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] ~~(~~Auth: HRS §§91-13.5, 205-1, 205-7) (Imp: HRS §91-13.5, 91-6, 205-7)

§15-15-107 **Rulemaking; action on petition.** (a) Within sixty days after the filing of a petition for rulemaking, the commission shall either deny the petition in writing, stating its reasons for its denial or initiate proceedings for the adoption, amendment, or repeal of the rule, in accordance with section 91-3, HRS.

(b) Any petition that fails in material respect to comply with the requirements of this subchapter, or that fails to disclose sufficient reasons to justify the institution of public rulemaking proceedings shall not be considered by the commission. The commission shall notify the petitioner in writing of the denial, stating the reasons therefor. Denial of a petition shall not prevent the commission from acting on its own motion on any matter contained in the petition.

(c) If the commission determines that the petition is in order and that it discloses sufficient reasons in support of the proposed rulemaking to justify the institution of rulemaking proceedings, the procedures to be followed shall be as set forth in sections 15-15-108, 15-15-109, 15-15-110, and chapter 92, HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-3, 91-6, 92-1, et seq.)

§15-15-107.1 **Commission action.** The commission shall consider all statements, views, comments, and documents of record before taking final action in a rulemaking proceeding. Unless otherwise provided by

law, any decision rendered pursuant to this subchapter shall not be subject to a motion for reconsideration or judicial review. The adoption, amendment or repeal of a rule is subject to approval of the governor and filing with the lieutenant governor. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §91-3)

§15-15-108 **Rulemaking; notice of public hearing.** (a) When, pursuant to a petition therefor or upon its own motion, the commission proposes to adopt, amend, or repeal any rule, the notice of hearing shall be published pursuant to the requirements of sections 1-28.5 and 91-3, HRS. The notice of hearing shall also be mailed to all persons or agencies who have made timely written requests for advance notice of the commission's rulemaking proceedings at their last recorded address. The notice of hearing shall be published at least thirty days prior to the date set for public hearing. The notice of hearing shall also be filed with the lieutenant governor's office.

(b) A notice of the proposed adoption, amendment, or repeal of a rule shall include:

(1) A statement of the date, time, and place where the public hearing will be held;

(2) Reference to the authority under which the adoption, amendment, or repeal of a rule is proposed; and

(3) A statement of the substance of the proposed rules. [Eff 10/27/86; am and comp 8/16/97; am and comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§1-28.5, 91-3, 92-41)

§15-15-109 **Rulemaking; conduct of public hearing.** (a) The chairperson of the commission or, in the chairperson's absence, another member designated by the commission, or a duly appointed hearings officer shall conduct the public hearing for the adoption, amendment, or repeal of the rules. The commission shall afford interested persons a reasonable opportunity to offer testimony with respect to the matter specified in the notice of hearing, in order to obtain a clear and orderly record. The presiding officer shall have authority to administer oaths or affirmations and to take all other actions necessary to the orderly conduct

of the hearing.

(b) Each such public hearing shall be held at the time and place set in the notice of hearing but may at that time and place be continued by the presiding officer from day to day or adjourned to a later date or to a different place without notice other than the announcement thereof at the hearing.

(c) At the commencement of the hearing, the presiding officer shall read the notice of hearing and shall outline briefly the procedure to be followed. Testimony shall then be received with respect to the matters specified in the notice of hearing in such order as the presiding officer shall prescribe.

(d) Each witness, before proceeding to testify, shall state the witness' name, address, and whom the witness represents at the hearing, and shall give any information respecting the witness' appearance as the presiding officer may request. The presiding officer shall confine the testimony to the matters for which the hearing has been called. In order to allow persons to have an equal amount of time to testify, or to prevent cumulative unnecessary testimony, the presiding officer may limit the amount of time for testimony per individual or per issue. Every witness may be subject to questioning by the members of the commission or by any other representative of the commission. Questions by other than commission members or staff shall be permitted only at the discretion of the presiding officer.

(e) All interested persons or agencies shall be afforded an opportunity to submit data, views, or arguments orally or in writing that are relevant to the matters specified in the notice of hearing. A person may submit written comments, data, views, or arguments ten days after the close of the scheduled public hearing date. An original and one paper copy and one electronic copy of written comments, recommendations, replies, or exhibits shall be submitted.

(f) Unless otherwise specifically ordered by the commission, testimony given at the public hearing shall not be reported verbatim. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-2, 91-3)

§15-15-110 **Emergency rulemaking.** If the commission finds that an imminent peril to public health or safety requires adoption, amendment, or

repeal of a rule upon less than thirty days notice of hearing, and states in writing its reasons for that finding, it may adopt emergency rules pursuant to section 91-3(b) and 91-4, HRS. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§91-3, 91-4)

SUBCHAPTER 16

LAND USE DISTRICT BOUNDARIES

§15-15-111 **Land use district boundaries.** (a) The boundaries of land use districts are shown on the land use district maps, entitled "Land Use District Boundaries, dated December 20, 1974," as amended, maintained and under the custody of the commission.

(b) The official maps entitled "Land Use District Boundaries, dated December 20, 1974," as amended, are located in the commission office. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-1)

SUBCHAPTER 17

IMPORTANT AGRICULTURAL LAND DESIGNATION AND PROCEEDINGS

§15-15-120 **Criteria and procedure for the identification of important agricultural lands.** (a) The commission shall not approve a petition to have land designated as important agricultural land, either in whole or in part, unless the commission finds upon a clear preponderance of the evidence, that the designation is reasonable and consistent with the policies of chapter 205 HRS and the provisions of this subchapter 17.

(b) Any petition seeking to designate lands as important agricultural lands shall adhere to the requirements of subchapter 14 of this chapter. A

petition seeking to designate lands as important agricultural lands and a reclassification of lands to urban, rural or conservation under section 205-45, HRS, or a credit for reclassification of lands to urban, rural or conservation, shall be set for hearing in accordance with section 15-15-100. Any hearing set for determination of a petition for designation of important agricultural lands under this section shall be held pursuant to the procedures and requirements set forth in section 205-4, HRS, and subchapters 7 and 14 of this chapter. Petitions to intervene shall follow the procedures and requirements contained in section 15-15-52.

(c) In review of any petition seeking, in part or in whole, to have lands classified as important agricultural lands, the commission shall specifically consider the following:

(1) Whether the land is currently used for agricultural production;

(2) The land's soil qualities and whether the growing conditions support agricultural production of food, fiber, or fuel- and energy-producing crops;

(3) The land's classification or identification under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawai`i (ALISH) system adopted by the board of agriculture on January 28, 1977;

(4) If the land has been or is a type that has been associated with traditional native Hawaiian agricultural uses, such as taro cultivation, or unique agricultural crops and uses, such as coffee, vineyards, aquaculture, and energy production;

(5) The land shall have sufficient quantities of water to support viable agricultural production;

(6) If the land's designation as important agricultural lands will be consistent with general, development, and community plans of the county;

(7) Land that contributes to maintaining a critical land mass important to agricultural operating productivity; and

(8) Whether the land has, or is near, support infrastructure conducive to agricultural productivity, such as transportation to markets, water, or power.

(d) If a petition is limited solely to designation by a landowner of important agricultural lands, the commission shall weigh the criteria set forth in section 15-15-120(c) against each other to meet the objectives of section 205-42 HRS.

(e) The commission shall not accept any petition to designate lands as important agricultural lands covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of filing of findings of fact and conclusions of law denying the petition. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7, 205-45) (Imp: HRS §205-44)

§15-15-121 Petition by farmer or landowner.

(a) A farmer or landowner seeking to have lands designated important agricultural lands may file a petition for declaratory ruling with the commission seeking to have its lands designated important agricultural lands.

(b) The petition for declaratory ruling shall be submitted in accordance with subchapter 14 and shall include:

(1) Tax map keys of the land to be designated along with verification and authorization from the applicable landowners;

(2) Proof of qualification for designation under section 15-15-120; and

(3) The current or planned agricultural use of the area to be designated.

(c) The commission shall review the petition and the accompanying submissions to evaluate the qualifications of the land for designation as important agricultural lands in accordance with section 15-15-121.

(d) A petition for declaratory order seeking designation of lands as important agricultural lands shall only be granted if a two-thirds majority of the

commission finds, after its review and evaluation and based upon a preponderance of the evidence, that the subject lands qualify for designation as important agricultural lands under this subchapter and sections 205-44 and 205-45, HRS. If a petition fails to receive the affirmative votes of two-thirds of the commissioners, findings of fact, conclusions of law and a decision and order denying the petition shall be filed by the commission. [Eff and comp 11/2/2013; comp _____] (Auth: HRS §§205-1, 205-7, 205-45) (Imp: HRS §205-45)

§15-15-122 **Petition by farmer or landowner for designation of important agricultural land and urban, rural or conservation re-classification.** (a) A landowner may, within the same petition for declaratory order as described in subsection 15-15-121, request the reclassification of a portion of the land which is the subject of the petition in the agricultural district to the rural, urban, or conservation district, or a combination thereof. The land sought to be reclassified as urban, rural or conservation shall:

(1) Be within the same county as the land sought to be designated as important agricultural lands;

(2) If the reclassification of the land is proposed to the urban district, that reclassification to urban is consistent with the relevant county general and community, development, or community development plans; and

(3) Be no more than fifteen percent of the total acreage which is the subject of the petition such that at least eighty-five per cent of the total acreage which is the subject of the petition is sought to be designated as important agricultural land; and

(4) Meet all of the requirements of subchapter 8 herein.

(b) In a petition for declaratory order under this section seeking to designate lands important agricultural lands in the agricultural district to the rural, conservation or urban district, the lands to be designated important agricultural lands shall be deemed qualified for such designation only if the commission reasonably finds that the lands meet the criteria of sections [~~15-[115-120(c)(5)~~]15-15-120(c)(5) and (c)(7).

(c) A petition for declaratory order under this

section shall be submitted in accordance with subchapter 14 and be set for initial hearing within 90 days of submission. The procedure for the hearing shall be in conformance with the procedures set forth in subchapter 7, and shall include:

(1) Tax map key numbers of the land to be designated as important agricultural lands and, if applicable, the land to be reclassified from the agricultural district to the rural, urban, or conservation district;

(2) Verification of ownership and/or authorization from the applicable landowners;

(3) Proof of qualification for designation as important agricultural lands under this subchapter;

(4) The current or planned agricultural use of the area sought to be designated as important agricultural lands; and

(5) The current or planned use of the area sought to be reclassified to the rural, urban, or conservation district.

(d) An application for a declaratory order to designate important agricultural land in combination with the reclassification of agricultural land to the rural, urban, or conservation district shall not be deemed a proper filing until the petitioner has submitted a certification, issued by the state department of agriculture as to the quality of the land which is the subject of the petition.

(e) In review of any petition seeking to have lands classified as important agricultural lands in combination with a request to reclassify a portion of the agricultural land to the urban, rural or conservation designation, the commission shall review the petition and the accompanying submissions in accordance with this subchapter and section 205-44, HRS. The commission shall also specifically determine, by a preponderance of the evidence whether:

(1) The land is suitable for the reclassification in accordance with subchapters 2 and 8; and

(2) If the reclassification of a portion the land is proposed to the urban district, that reclassification to urban is consistent with the relevant county general and community, development, or community development plan.

(f) Approval of a petition for designation of important agricultural lands in conjunction with a petition for urban, rural or conservation reclassification under this section shall require

approval by a vote of a two-thirds majority of the commissioners. The commission shall include reasonable conditions in its order.

(g) Should the commission find that either the designation of lands in the petition sought to be identified as important agricultural lands or the lands identified in the petition for reclassification to urban, rural, or conservation is not supported by a preponderance of the evidence and should not be approved, the commission shall deny the petition in its entirety. [Eff and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7, 205-45) (Imp: HRS §205-45)

§15-15-123 **Adherence to chapter 343 HRS.** A petition filed under this subsection, if applicable, shall adhere to the requirements of chapter 343, HRS. No petition under this subchapter will be deemed complete unless it has met the requirements of chapter 343, HRS. [Eff -and comp 11/2/2013; comp] (Auth: HRS §§205-1, -205-7, 205-45)

§15-15-124 **Private landowner credits in important agricultural land proceeding.** (a) The commission shall allow a petitioner for an important agricultural land designation to reserve the right to designate lands for reclassification to urban, rural, or conservation at a future proceeding. The commission shall not grant a landowner the right to reserve lands for future reclassification greater than fifteen percent of the total acreage of land which is the subject of the petition, total acreage being the land sought to be designated important agricultural land plus the land sought to be reclassified urban, rural or conservation.

(b) Where a petitioner submits a petition for designation of lands as important agricultural lands in combination with a request to reclassify lands urban, rural or conservation and the commission grants the petition under this subchapter, the petitioner may, if specifically requested in the petition, obtain credits for the difference between fifteen percent of the total amount of land requested to be reclassified as urban, rural and conservation and the amount of land set forth in the petition to be so reclassified, if the

amount of land for reclassification to urban, rural or conservation set forth in the petition is less than fifteen percent of the total land subject to the petition.

(c) In order to preserve the right to reclassify lands under this section at a future proceeding a request for future credits must be specified in any petition for designation of important agricultural lands or petition for designation of important agricultural lands in conjunction with a request to reclassify lands to the urban, rural or conservation district.

(d) If a petition fails to include a request for future credits under subsection ~~(a)~~ [~~(b)~~] (a) or ~~(b)~~ [~~(c)~~] (b), the petitioner's right to such credits shall be waived and the petitioner shall be barred from claiming the credits at a future date.

(e) Credits held by a petitioner under this section may only be applied to lands owned or held by the petitioner in the same county as the lands designated important agricultural lands in the original petition giving rise to the credits are located.

(f) In order to utilize such credits to have lands reclassified under this section the petitioner must, prior to utilization of such credits and before the credits are applied to any land to be reclassified, file a petition for declaratory order pursuant to subchapters 5 and 14 and section 15-15-123.

(g) A petition for use of credit for reclassification of land granted under this section must be filed within ten years of the effective date of the original order by which the credits were granted by the commission. Unused credits shall expire and become unusable if not used within ten years from the effective date the original order by which the credits were granted by the commission.

(h) Credits issued under this section may only be used by the petitioner awarded the credits under the original declaratory order granting the credits. Unused or unexhausted credits awarded under this section may not be transferred to another person.

(i) If a petitioner files a request for declaratory order to utilize credits held pursuant to this section the commission shall not grant such petition unless:

(1) By a preponderance of the evidence presented,

the land is suitable for reclassification in accordance with sections 205-2 and 205-3.1, HRS;

(2) The reclassification is consistent with the relevant county general and, development, or community development plans;

(3) By a preponderance of the evidence presented, the land sought to be reclassified is suitable for reclassification in accordance with subchapters 2 and 8; and

(4) The petitioner has met all of the requirements of chapter 343 HRS with regard to the subject petition. [Eff and comp 11/2/2013; am and comp] (Auth: HRS §§205-1, 205-7, 205-45) (Imp: HRS §205-45)

§15-15-125 **County identification of important agricultural lands.** (a) Receipt of recommendations and maps from the planning department of a county under section 205-48, HRS, shall not be considered a petition for a declaratory order designating land within its jurisdiction as important agricultural lands. The commission shall however, designate lands within the relevant county and adopt maps designating important agricultural lands in such county within 365 days of the submission being deemed complete pursuant to subsection (b). Such time period for determination may be extended for a period of up to one hundred and eighty days by order of the chairperson of the commission. The form and content of the county recommendations shall conform to the requirements of sections 205-42, 205-43, 205-44, and 205-47, HRS.

(b) The county making such recommendations to designate land important agricultural lands shall provide the commission a complete record of its proceedings in support of its recommendation, including evidence the county has specifically adhered to the requirements of section 205-47, HRS, including records evidencing that:

(1) Maps of potential lands to be considered for designation as important agricultural lands have been developed in consultation and cooperation with landowners, the state

department of agriculture, agricultural interest groups, including representatives from the Hawai`i farm bureau federation and other agricultural organizations, the United States department of agriculture - natural resources conservation service, the state office of planning, and other groups as necessary.

(2) Each county, through its planning department, has utilized an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process.

(3) The county has taken notice of those lands already designated important agricultural lands by the commission.

(4) Upon identification of potential lands to be recommended to the county council as potential important agricultural lands, each county has taken reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands.

(5) Evidence that the important agricultural lands mapping relates to, supports, and is consistent with the:

(A) Standards and criteria set forth in section 205-44, HRS, and this subchapter have been met;

(B) County's adopted land use plans, as applied to both the identification and exclusion of important agricultural lands from such designation;

(C) Comments received from government agencies and others identified in section 205-47(b), HRS;

(D) Viability of existing agribusinesses;

(E) Representations or position statements of the owners whose lands are subject to the potential designation; and

(F) Any other relevant information.

(6) The important agricultural lands maps have

been adopted by the county council, by resolution.

(c) A submission by a county under this section shall not be deemed complete unless all of the evidence set forth in section 15-15-125(b) has been transmitted and accepted by the commission.

(d) Any hearing under this section shall adhere to the procedures set forth in this subchapter and subchapters 1 and 5, and shall be conducted as a rulemaking proceeding in accordance with section 15-15-109 and held in the relevant county.

(e) The commission may, under this section:

(1) Remand the matter back to the county for further review or clarification;

(2) Adopt the recommendations of the county in its entirety after receipt of the complete record from the county pursuant to section 15-15-126, and designate lands in such county as important agricultural lands; or

(3) Based on evidence presented, amend or revise the county recommendation and proposal to exclude, or include, certain lands from designation as important agricultural lands.

(f) The county shall serve a file-stamped copy of the county report and maps submitted pursuant to a petition under this section on the state department of agriculture and the state office of planning within one business day of filing with the commission. The state office of planning and state department of agriculture shall review the county submittal pursuant to section 205-48, HRS, and provide comments to the commission within forty-five days of the county filing being deemed complete.

(g) Approval of maps and a designation of important agricultural lands under this section shall require the affirmative vote of two-thirds of the commission. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§205-47, 205-48, 205-49)

§15-15-126 Criteria for designation of lands as important agricultural lands pursuant to county recommendation. (a) In designating important

agricultural lands in the state, pursuant to the recommendations of individual counties, the commission shall consider the extent to which:

(1) The proposed lands meet the standards and criteria under section 205-44, HRS, and section 15-15-120;

(2) The proposed designation is necessary to meet the objectives and policies for important agricultural lands in sections 205-42 and 205-43, HRS; and

(3) The commission has designated lands within the county as important agricultural lands, pursuant to this subchapter.

(b) Should the commission determine that more than fifty percent of a landowners' landholdings, excluding lands held in the conservation district, are already designated as important agricultural lands, pursuant to this subchapter, the commission shall not designate any additional lands of that landowner as important agricultural lands except by a petition from the landowner pursuant to this subchapter.

(c) The designation of lands as important agricultural lands and the adoption of maps of those lands pursuant to this section shall be based upon written findings of fact and conclusions of law, and a showing by a preponderance of the evidence that the subject lands meet the standards and criteria set forth in section 15-15-120.

(d) Designation of agricultural lands as important agricultural lands under this section shall be by an affirmative vote of two-thirds of the membership to which the commission is entitled. If the petition is not approved by a vote of two-thirds majority of the commission it shall be deemed denied.

[Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §§205-47, 205-49)

§15-15-127 **Standards and criteria for the reclassification or rezoning of important agricultural lands.** (a) Any land use district boundary amendment or change in zoning involving important agricultural lands identified pursuant to this subchapter shall be considered as, and meet the submittal requirements for, a district boundary amendment under this chapter.

(b) An application for a special permit involving important agricultural lands shall include evidence that the request has been referred to the state department of agriculture and the state office of planning for review and comment and contain as part of the petition any comments or recommendations made by both the state department of agriculture and the state office of planning.

(c) In addition to the criteria set forth in subchapter 8, any decision by the commission or county pursuant to this section shall specifically consider, and find by a preponderance of the evidence, that:

(1) The land to be reclassified is not critical for agriculture based on the amount of similarly suited lands in the area and the State as a whole;

(2) The proposed district boundary amendment or zone change will not harm the productivity or viability of existing agricultural activity in the area, or adversely affect the viability of other agricultural activities or operations that share infrastructure, processing, marketing, or other production-related costs or facilities with the agricultural activities on the land in question;

(3) The district boundary amendment or zone change will not cause the fragmentation of or intrusion of nonagricultural uses into largely intact areas of lands identified by the State as important agricultural lands that create residual parcels of a size that would preclude viable agricultural use;

(4) The public benefit to be derived from the proposed action is justified by a need for additional lands for nonagricultural purposes;

(5) The proposed district boundary amendment or zone change will not negatively impact the ability or capacity of state and county agencies to provide and support additional agricultural infrastructure or services in the area;

(6) The public benefit from the proposed district boundary amendment or zone change outweighs the benefits of retaining the land for agricultural purposes;

(7) The proposed action will have no significant impact upon the viability of agricultural operations on adjacent agricultural lands;

(8) The decision-making criteria of subchapter 8 governing decisions of the land use commission on district boundary amendments have been met; and

(9) The decision-making criteria adopted by each county to govern decisions of county decision-making authorities under this chapter have been met.

(d) The reclassification of lands designated as important agricultural shall be based upon written findings of fact and conclusions of law pursuant to subchapters 7 and 11.

(e) A reclassification of lands designated as important agricultural lands shall be by an affirmative vote of two-thirds of the membership to which the commission is entitled.

(1) If the petition is not approved by a vote of two-thirds of the membership of the commission, it shall be deemed denied.

(2) The commission shall not accept any petition to designate lands as important agricultural lands covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of filing of findings of fact and conclusions of law denying the petition.

(f) The commission may, upon petition by the farmer or landowner of lands designated as important agricultural lands, remove all or a portion of those important agricultural lands from the "important agricultural lands" designation if, after a hearing held pursuant to subchapter 14, the commission finds upon a preponderance of the evidence that a sufficient supply of water is no longer available to allow profitable farming of the land due to governmental actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control.

(g) The commission may only remove an important agricultural land designation on lands originally designated as important agricultural lands pursuant to a declaratory order that both designated land as important agricultural lands and reclassified land as

urban, rural or conservation, or a combination thereof, with the prior authorization of the legislature as expressed by a two-thirds vote of each house of the legislature voting separately. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7, 205-45) (Imp: HRS §205-50)

§15-15-128 **Periodic review and amendment of important agricultural lands maps.** (a) Amendment of the maps of important agricultural lands initiated by the county shall be conducted in accordance with section 15-15-109.

(b) In a county-initiated proceeding for an amendment of important agricultural land maps and designation under section 15-15-128(a), the "important agricultural lands" designation shall be removed from lands previously designated as important agricultural lands where the commission finds, by a preponderance of the evidence, that a sufficient supply of water is no longer available to allow profitable farming of the lands due to governmental actions, acts of God, or other causes beyond the farmer or landowner's reasonable control.

(c) The commission shall not remove the important agricultural lands designation if the lands were designated important agricultural lands by declaratory order in combination with the reclassification of land in the agricultural district to the rural, conservation or urban district pursuant to section 205-45, HRS, unless the legislature provides prior authorization by adoption of a concurrent resolution in accordance with section 205-45, HRS. [Eff and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)(Imp: HRS §205-52)

SUBCHAPTER 18

PETITIONS FOR HAWAI`I HOUSING AUTHORITY RENTAL HOUSING PROJECTS

Repealed

§15-15-122 **REPEALED.**" [R 8/16/97]

2. Material, except source notes and other notes, to be repealed, is bracketed and stricken. New material is underscored.

3. Additions to update source notes and other notes to reflect these amendments are compilations are not underscored.

4. These amendments to and compilation of chapter 15-15, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted _____, 2018, and filed with the Office of the Lieutenant Governor.

LUIS SALAVERIA
Director of Business, Economic Development, and Tourism

APPROVED AS TO FORM:

Deputy Attorney General

~~Amendments to and compilation of chapter 15, title 15, Hawaii Administrative Rules on the summary page dated [October 4, 2013]~~ _____, ~~[2013]~~2018 ~~were adopted on [October 4, 2013]~~ _____, ~~[2013]~~2018, ~~following public hearings held on [September 5, 10, 11, 18, 24, and 25 2013]~~ _____ ~~[2013]~~2018 ~~after public notice was given in the Honolulu Star Advertiser, the Maui News, West Hawai`i Today, the Hawai`i Tribune Herald and The Garden Isle on [August 5, 2013]~~ _____, ~~[2013]~~2018~~.~~

~~They shall take effect ten days after filing with the Office of the Lieutenant Governor~~

~~[RONALD I. HELLER]~~
~~ARNOLD WONG~~
~~Chairperson~~

~~[RICHARD LIM]~~
LUIS SALAVERIA
~~Director, Department of Business, Economic Development and Tourism~~

~~[NEIL ABERCROMBIE]~~
DAVID Y. IGE
~~Governor~~
~~State of Hawai`i~~

~~APPROVED AS TO FORM:~~

~~[DIANE ERICKSON]~~
~~Deputy Attorney General~~

V. Legislative Matters

A. Update on HB2235, SB2753, and SB2885 "Relating to the Small Business Regulatory Review Board"

Any handouts will be distributed at the Board Meeting

V. Legislative Matters

B. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration the Gubernatorial Nomination of Mary Albitz to the Small Business Regulatory Review Board for a term to expire June 20, 2021

Any handouts will be distributed at the Board Meeting

V. Legislative Matters

C. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration the Gubernatorial Nomination of Will Lydgate to the Small Business Regulatory Review Board for a term to expire June 30, 2021

Any handouts will be distributed at the Board Meeting

V. Legislative Matters

D. Update on Governor's Message 513 and 514 Submitting for Consideration the Gubernatorial Nomination of Reg Baker to the Small Regulatory Review Board for a term to expire June 30, 2018 and June 30, 2022, respectively

Any handouts will be distributed at the Board Meeting

V. Legislative Matters

E. Discussion and Action on Senate Bill 2059, "Relating to Public Accountancy"

THE SENATE
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

S.B. NO. 2059 S.D. 1

A BILL FOR AN ACT

RELATING TO PUBLIC ACCOUNTANCY.

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

SECTION 1. The purpose of this Act is to amend the requirements for obtaining a temporary permit to practice public accountancy in Hawaii, including:

(1) Specifying who may be granted a temporary permit to practice;

(2) Specifying the requirements that must be met prior to obtaining a temporary permit to practice;

(3) Requiring a person to obtain a temporary permit to practice from the board of public accountancy prior to commencing public accountancy services in Hawaii;

(4) Specifying a time frame for the temporary permit to practice;

(5) Requiring persons granted a temporary permit to practice to consent to and certify various obligations, including being under the authority of the board of public accountancy and paying all applicable taxes to the State; and

(6) Making conforming amendments to the laws relating to public accountancy.

SECTION 2. Chapter 466, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§466- Temporary permits to practice.** (a) The board may grant a temporary permit to persons who wish to actively engage in the practice of public accountancy for a limited period of time in Hawaii. The temporary permit to practice granted pursuant to this section shall be limited to attest, peer review, or litigation support services.

(b) The temporary permit to practice may be granted to any person who:

(1) Has attained eighteen years of age;

(2) Is a United States citizen, a United States national, or an alien authorized to work in the United States;

(3) Possesses a history of competence, trustworthiness, and fair dealing;

(4) Holds a valid license of certified public accountant or of public accountant issued under the laws of another state or United States jurisdiction;

(5) Incidental to the person's practice in such other state or jurisdiction, desires to practice public accountancy in this State on a temporary, and not a permanent or recurring, basis; and

(6) Has completed an application in a form and method prescribed by the board and paid any applicable fees for a temporary permit to practice.

(c) No person shall commence public accountancy services in Hawaii on a temporary basis without first obtaining a temporary permit to practice under this section.

(d) A temporary permit to practice issued under this section shall be effective for a period not exceeding one hundred twenty cumulative days in any twelve-month period, unless otherwise extended at the discretion of the board for complicated attest, peer review, or litigation support services, and shall specify the nature and extent of the practice so permitted. A temporary permit issued pursuant to this section may be renewed in a subsequent year. More than three requests for temporary permits to practice within three years shall be prima facie evidence that the individual is engaged in the

active practice of public accountancy in Hawaii and a permit issued under section 466-7 shall be required.

(e) A licensee of another state or jurisdiction who obtains a temporary permit to practice shall consent and certify to:

(1) The personal and subject matter jurisdiction and disciplinary authority of the board;

(2) Comply with this chapter and the rules adopted by the board;

(3) Cease to offer or render professional services in this State as an individual and on behalf of the licensee's accountancy firm if:

(A) The license from the state of the licensee's principal place of business is no longer current and active; or

(B) The licensee's practice has been limited or conditioned in any jurisdiction, including the licensee's principal place of business;

(4) Notify the board within fifteen days if:

(A) Any disciplinary action relating to the individual's license is commenced in any state,

jurisdiction, or proceeding by the board against the licensee; or

(B) The licensee is convicted of any criminal offense in any state, jurisdiction, or country;

(5) Not to assume, use a title or designation, or use any other title, designation, words, letters, sign, card, or device that would tend to indicate that the person is a certified public accountant licensed in Hawaii or public accountant licensed in Hawaii;

(6) Provide the name and general excise tax license number of the licensee's Hawaii certified public accountancy firm and pay the related state income tax and any other applicable taxes associated with the practice of public accountancy in Hawaii; and

(7) Pay all costs associated with any out-of-state investigation, enforcement, and collection efforts associated with the temporary permit to practice granted under this section, as may be ordered by the board."

SECTION 3. Section 466-3, Hawaii Revised Statutes, is amended by adding two new definitions to be appropriately inserted and to read as follows:

""Principal place of business" means the office location designated by a licensee for purposes of a temporary permit to practice issued under section 466- .

"Temporary permit to practice" means a permit to actively practice public accountancy for a limited period of time in Hawaii issued under section 466- ."

SECTION 4. Section 466-7, Hawaii Revised Statutes, is amended to read as follows:

"**§466-7 Permits to practice.** (a) A license and permit are required to actively engage in the practice of public accountancy. The board may grant or renew a permit to actively engage in the practice of public accountancy. Permits shall be initially issued and renewed for periods of two years but in any event shall expire on December 31 of every odd-numbered year. The board shall prescribe the methods and requirements for application.

(b) An applicant for the initial issuance or renewal of a permit shall have:

(1) A valid license;

(2) Completed continuing professional education hours, the content of which shall be specified by the board which may provide for special consideration by the board to applicants for permit renewal when, in the judgment of the board, full compliance with all requirements of continuing education cannot reasonably be met;

(3) Completed an application;

(4) Paid appropriate fees and assessments; and

(5) In the case of a renewal, undergone and provided proof of having undergone the peer review process pursuant to part II.

~~[(c) The board may grant a temporary permit to actively engage in the practice of public accountancy to any person who:~~

~~(1) Has attained eighteen years of age;~~

~~(2) Possesses a history of competence, trustworthiness, and fair dealing;~~

~~(3) Holds a valid license of certified public accountant or of public accountant issued under the laws of another state, or who holds a valid comparable certificate, registration, or license or degree from a~~

~~foreign country determined by the board to be a recognized qualification for the practice of public accountancy in such other country;~~

~~(4) Incidental to the person's practice in such other state or country, desires to practice public accountancy in this State on a temporary basis; and~~

~~(5) Has completed an application.~~

~~Such permit shall be effective for a period not exceeding three months, and shall specify the nature and extent of the practice so permitted.~~

~~(d)~~] (c) All firms shall obtain a permit to practice. The board may issue or renew a permit to actively engage in the practice of public accountancy to any firm which submits a completed application and demonstrates qualifications as prescribed by the board.

[~~(e)~~] (d) Failure to submit the required fees, continuing education hours, or other requirements for renewal as specified in this section by December 31 of every odd-numbered year, shall constitute forfeiture of the permit. Continued performance in the practice of public accountancy without a permit shall

constitute unlicensed activity and the individual or firm shall be subject to sections 466-9, 466-11, 487-13, and 26-9.

[~~(f)~~] (e) The board may restore forfeited permits to the individual or firm [~~which~~] that satisfies the following:

(1) The requirements of subsection (a), (b), or (c) [~~, or (d) of this section~~]; and

(2) Payment of required fees."

SECTION 5. Section 466-8, Hawaii Revised Statutes, is amended by amending subsections (d) and (e) to read as follows:

"(d) An application for the issuance of a biennial permit to practice for an individual or firm under section 466-7(a) and [~~(d)~~] (c) shall be accompanied by the application and permit to practice fees.

(e) An application for the issuance of a temporary permit to practice under section [~~466-7(c)~~] 466- shall be accompanied by the application and temporary permit to practice fees."

SECTION 6. Section 466-10, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

"(d) Nothing contained in this chapter shall prohibit any person:

(1) Who holds a current license of certified public accountant issued under this chapter from assuming and using the title and designation "certified public accountant" or "CPA"; provided that if the person does not also hold a current permit to practice issued under this chapter, the person shall clearly indicate in assuming and using said title that the person does not hold the person's self out to be in the practice of public accountancy;

(2) Who holds a current license of public accountant issued under this chapter from assuming and using the title and designation "public accountant" or "PA"; provided that if the person does not also hold a current permit to practice issued under this chapter, the person shall clearly indicate in assuming and using the title that the person does not hold the person's self out to be in the practice of public accountancy;

(3) Who holds a temporary practice permit issued under [~~this chapter~~] section 466- from using the title and designation under which the person is generally known

in the state or [~~country~~] jurisdiction from which the person received a valid comparable certificate, registration, or license for the practice of public accountancy;

(4) Who is not a certified public accountant or public accountant from serving as an employee of, or an assistant to, a certified public accountant or public accountant; provided that the employee or assistant works under the control and supervision of a person who holds a current license of certified public accountant or of public accountant and a current permit to practice issued under this chapter; and provided further that the employee or assistant does not issue any statement or report over the person's name except office reports to the person's employer as are customary, and that the employee or assistant is not in any manner held out to the public as a certified public accountant or public accountant;

(5) Who is an officer, employee, partner, or principal of any organization from signing or affixing the person's name to any statement or report in reference to the

affairs of that organization; provided that in so signing or affixing the person's name the person shall clearly indicate that the person is an officer, employee, partner, or principal of the organization, and the position, title, or office which the person holds therein;

(6) Who is a public official or public employee from the performance of the person's duties as such; or

(7) Who is an attorney at law from engaging in practice as such."

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

SECTION 8. This Act shall take effect on January 1, 2019.

S.B. NO. 2059 S.D. 1

Report Title:
Certified Public Accountants; Temporary Permits to Practice; State Board of Public Accountancy

Description:
Specifies who may be granted a temporary permit to practice public accountancy. Specifies the requirements that must be met prior to obtaining a temporary permit to practice. Requires a person to obtain a temporary permit to practice from the board of public accountancy prior to commencing public accountancy services in Hawaii. Specifies a time frame for the temporary permit to practice. Requires persons granted a temporary permit to practice to consent to and certify various obligations, including being under the authority of the board of public accountancy and paying all applicable taxes to the State. Makes conforming amendments to the laws relating to public accountancy. Takes effect on 1/1/2019. (SD1)

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

VI. Administrative Matters

A. Discussion and Action on the Board's Investigative Taskforce's Recommendation for the Redesign of the existing Website

PROPOSAL – SMALL BUSINESS REGULATORY REVIEW BOARD WEBSITE

PROJECT OVERVIEW

The purpose of the project is to redesign the website for the DBEDT Small Business Regulatory Review Board. The new site will allow the agency to easily administer and update their own website content, provide a mobile friendly layout that works across all mobile devices and tablets, and meet ADA requirements.

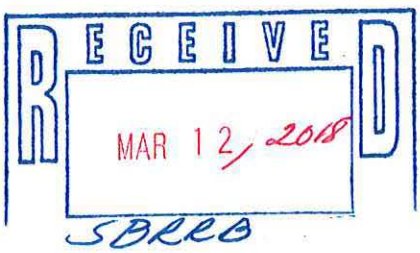
PROJECT DEVELOPMENT COSTS

The total project development cost will be $17,047.11 ($16,280 + $767.11 Hawaii GET).

Task	Fee
Analysis	$2,200
Design prototypes	$3,840
Development	$5,720
Content Migration	$2,160
QA Testing	$1,120
Training	$480
Launch	$760
Total Fees	$16,280 + GET

HIC will invoice SBRRB for the project developments costs per the following schedule.

Deliverable	Invoice Amount
Website deployed to TEST	$3,409.42
Training session complete	$3,409.42
Website deployed to PROD	$3,409.42
90 days post launch (Final payment)	$6,818.85



PROJECT GOALS

SBRRB has an existing website located at: dbedt.hawaii.gov/sbrrb. The ultimate goal of the redesign is to bring awareness of the boards existence to the many small businesses and agencies that it serves. HIC will work closely with SBRRB to collect, develop and design the new website through facilitated meetings. Additional goals include the following:

- Modern design
    - More visuals and photos
    - Less of a government feel
    - Mobile friendly design
    - Social media integration
- Capture email signups for their newsletter
    - Collect additional information including which government departments a user is most interested in so the SBRRB can target email distribution lists by subject area, e.g., those just wanting notification of DLNR rule changes, etc.
    - Integrate site with their existing Mailchimp platform
- Improved, easier to understand language
    - Rebrand the term 'regulation review card' to get more responses and update form fields that are submitted
    - Create visual graphics or improved text explanations for explaining the various ways folks can be involved, such as:
        - How rules are made
        - What you can do as a small business
        - How to submit testimony
- Provide more news on the overall activities of the board
- Recruit speakers/testifiers for meetings
- Recruit new members for the board

PROPOSED SITEMAP

A proposed sitemap may include the following topics (but will be revised as goals are finalized during the design workshops).

a. **About the board**

Mission, history & governance
About the SBRRB
Board meetings
Board meeting minutes – with archive
Meet the board members – with photos & bios
Annual reports
Calendar – Include board meeting dates, public hearing notices, dates for rule changes and other activities as needed.

b. Regulation review card – Name to be changed but mimic similar functionality.

c. Small business impact statements – Pre and post hearing – Allow state and county agencies to upload the "small business impact statements" and "small business statements after public hearing" and then submit the completed statements along with any other related information as well as copies of the administrative rules.

d. News

e. How rules are made

How process works
What you can do as a small business
How rules are made
Submit testimony
Legislative links

f. Contact Us

Links to SBA, Chamber of commerce, other orgs

g. Legislature

Spotlight new bills
Legislation that impacts small business

STAGE 1: ANALYSIS

USER NEEDS ARE RESEARCHED AND IDENTIFIED

This initial phase includes conducting a content review of all existing sites, analyzing similar 'competitor' sites such as other SBRRB boards in various states, initial stakeholder meetings and consolidating our findings.

Description	Role	Hours	Rate (h)	Total
Content review of existing website / related sites	Sr PM	4	$120	$480
	Designer	2	$80	$160
Initial stakeholder meetings + discussions - all stakeholders	Sr PM	6	$120	$720
	Designer	4	$80	$320
Consolidate & present stakeholder findings	Sr PM	3	$120	$360
	Designer	2	$80	$160
Sub total		**21**		**$2,200**

STAGE 2: DESIGN PROTOTYPES

A PROTOTYPE IS BUILT TO MEET THE MAIN USER NEEDS

The site will be designed per the SBRRB's requirements gathered during the initial website discussion meetings. A goal of this project is to give the site a more modern design, with more visuals and photos, and provide less of a "government" look and feel. The site will be responsive and work across a variety of mobile devices and tablets. Wireframes or visual mockups will be created as needed and presented as each is completed for feedback.

Description	Role	Hours	Rate (h)	Total
Website design	Sr PM	2	$120	$240
	Designer	18	$80	$1,440
Document / present work	Sr PM	2	$120	$240
	Designer	3	$80	$240
Iterations based on feedback	Sr PM	2	$120	$240
	Designer	12	$80	$960
Document / present work	Sr PM	2	$120	$240
	Designer	3	$80	$240
Sub total		**44**		**$3,840**

STAGE 3: DEVELOPMENT

STAGE AND TEST WORKING SOFTWARE ON THE PUBLIC WEB FOR USE BY THE TARGET AUDIENCE

Development accounts for building the website within the WordPress system. The site will adhere to the ADA accessibility requirements listed in the Comptroller's memorandum 2010-28 dated August 25, 2010.

Description	Role	Hours	Rate (h)	Total
Initial dev setup (GIT, project folder/assets)	Developer	4	$80	$320
	Sys Admin	2	$100	$200
Create WordPress parent theme (search, 404, etc)	Developer	25	$80	$2,000
Build site (Set up child theme, styles, install plugins, create CPT's, add features)	Developer	40	$80	$3,200
Sub total		**71**		**$5,720**

STAGE 4: CONTENT MIGRATION

MIGRATING TEXT AND IMAGES TO THE NEW SITE

HIC will create all pages and migrate all content to provide a finished website ready for launch.

Description	Role	Hours	Rate (h)	Total
Migrate all text and documents from current site to new site. Reformat content to remove unused markup.	Sr PM	14	$120	$1,680
	Designer	6	$80	$480
Sub total		20		$2,160

STAGE 5: QA TESTING

FINAL QUALITY ANALYSIS TESTING

Description	Role	Hours	Rate (h)	Total
Final testing prior to launch (usability, ADA, function)	Sr PM	4	$120	$480
	Developer	8	$80	$640
Sub total		12		$1,120

STAGE 6: TRAINING

LEARN TO MANAGE YOUR WEBSITE AFTER LAUNCH

1 hands on training session provided for up to 12 users at HIC's office. Users will learn how to manage website and make all updates. A help guide will be provided.

Description	Role	Hours	Rate (h)	Total
1 training session	Sr PM	2	$120	$240
Write user help manual	Sr PM	2	$120	$240
Sub total		4		$480

STAGE 7: LAUNCH

THE WEBSITE IS LIVE TO THE PUBLIC

Description	Role	Hours	Rate (h)	Total
Coordinate launch with SBRRB & ETS. Site to be hosted at ETS.	Sr PM	2	$120	$240
	Developer	4	$80	$320
	Sys Admin	2	$100	$200
Sub total		**8**		**$760**

HOSTING & MAINTENANCE

Typically, agencies prefer to host their site with the state at ETS for no cost. No ongoing support will be provided by HIC (outside 90-day window after launch) and all ongoing maintenance would be provided by the ETS team .

Alternately you can choose to host with us. HIC would administer and manage the WordPress installation for this site. **The rate would be $1,200 + GET annually**. Hosting includes:

- Website traffic statistics using Google analytics
- Weekly backups and system administration (updates, plugins, etc)
- File storage
- Licensing
- Support by HIC staff
- Backups & security scans

SCHEDULE ESTIMATES

The project will be carried out according to a Milestone Schedule, which will be agreed upon by HIC and SBRRB. Four week phases are estimated due to the fact that the board meets once per month and any necessary approvals that have to happen may be done during this time.

It is understood that the milestones and timeline below are estimated, and may be changed to accommodate new requirements of SBRRB or HIC, or to comply with guidance received by HIC from the Access Hawaii Committee. All time estimates can be extended if mutually agreed upon.

Milestone Schedule		
Estimated Completion Date	**Description**	**Deliverable**
TBD	Complete Statement of Work	Signed SOW
4 weeks	Design workshop phase	Site map
4 weeks	Approval to proceed (From SBRRB)	Sign off
4 weeks	Design prototype phase	Design prototype
4 weeks	Approval to proceed (From SBRRB)	Sign off
3 weeks	Development phase	Website deployed in TEST environment
2 weeks	Approval to proceed (From SBRRB)	Sign off
2 weeks	SBRRB training and review	One training session for SBRRB personnel
5 days	Deployment request (From SBRRB)	Sign off
1 week	Website live	Website deployed in PROD environment
90 days	Final acceptance (From SBRRB)	Final payment and signoff from SBRRB

VI. Administrative Matters

B. Discussion on Governor's Administrative Directive No. 18-02, dated January 1, 2018

EXECUTIVE CHAMBERS
HONOLULU

DAVID IGE
GOVERNOR

January 1, 2018

ADMINISTRATIVE DIRECTIVE NO. 18-02

To: Department Directors

Subject: Policy and Procedure for the Adoption, Amendment, or Repeal of Hawaii Administrative Rules

This administrative directive updates the policy and procedure by which departments or agencies shall request executive approval of any proposed adoption, amendment, or repeal of administrative rules. It replaces Administrative Directive No. 09-01, Policy and Procedure for the Adoption, Amendment, or Repeal of Administrative Rules, dated October 29, 2009.

Legal References:

1. Hawaii Revised Statutes Chapter 91
2. Hawaii Revised Statutes Chapter 201M, the "Hawaii Small Business Regulatory Flexibility Act," requires that if a proposed rule "affects small business," the department or agency shall submit a "small business impact statement" and a "small business statement" to the Small Business Regulatory Review Board. Chapter 201M does not apply to emergency rulemaking or rules adopted to comply with a federal requirement.

Policy:

1. All requests regarding Hawaii Administrative Rules must be submitted through Hawaii Administrative Rules Processing Site (HARPS).

   https://hawaiioimt.sharepoint.com/sites/gov/adminrules/

   Prior to all submittals, the department must obtain the Attorney General's approval "as to form".

2. **Small Business Regulatory Flexibility Act**

   In accordance with Chapter 201M, the department must complete the following

steps before submitting a request to conduct public hearing if the proposed rule affects small business:

a. Complete Small Business Impact Statement

    i. See HRS Section 201M-2

b. Submit Small Business Impact Statement and proposed rules to the Small Business Regulatory Review Board

3. Public Hearing Approval

In the request to conduct public hearing, the department will provide response to the following:

a. Summary of changes

    i. Why is this section of Hawaii Administrative Rules being amended?

    ii. What problem is the rule change meant to solve?

    iii. List all changes that are being made.

b. Impact of changes

    i. How does this rule change address the problem?

    ii. Who are the stakeholders? Positive and negative.

    iii. What are the potential problems with the rule change?

    iv. What is the fiscal impact?

    v. What is the economic impact to the State?

c. Consequences if changes are not made

    i. What are the consequences if the rule change does not get adopted, amended or repealed?

4. Public Hearings

Upon approval of public hearing request, the department must enter all public hearing dates, times, and locations into HARPS.

a. The department must be considerate of all parties being affected and schedule public hearings to allow for adequate feedback.

b. The department must accept written testimony from all parties who are unable to attend the public hearing.

c. The department will be responsible for transcribing the testimony from the public hearing into a public hearing summary document that will be required upon submittal of Final Rule.

5. **Final Rule**

   In the request for approval of Final Rule, the department will provide response to the following:

   a. Changes in Final Rule

      i. What changes were made in the Final Rule?

      ii. Why were these changes made?

   b. Other

      i. Describe how the department has worked with stakeholders to gain support for the rule?

      ii. Have potential problems been addressed? Do the same problems exist with the Final Rule?

      iii. Does the Office of the Governor staff need to meet with any people/organizations before the Governor signs this Final Rule?

6. **Filing of Final Rule**

   Upon approval of Final Rule through HARPS, the Department will send 3 hard copies to Office of the Governor. When approved, these copies will be filed with the Office of the Lieutenant Governor. Rule will take effect 10 days after filing.

7. **Department of Budget and Finance (BUF) and Department of Business, Economic Development and Tourism (BED)**

   BUF and BED will receive electronic notification upon submittal of public hearing request. Both departments will have the ability to submit comments and concerns through HARPS. Response will be due 10 business days after Final Rule is submitted. Comments will be optional unless the following applies:

   a. BUF will be required to provide response if the proposed rule has fees or other fiscal impacts.

   b. BED will be required to provide response if the proposed rule has economic impact or affects small business.

Procedure:

1. See attached PowerPoint

VI. Administrative Matters

C. Discussion and Action on the Board's Proposed Letter to Governor Ige regarding the current Pilot Project that allows Uber and Lyft Drivers to Operate at the Honolulu International Airport

SMALL BUSINESS REGULATORY REVIEW BOARD

Department of Business, Economic Development & Tourism
No. 1 Capitol District Bldg., 250 South Hotel St., 5th Fl., Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804
Email: DBEDT.sbrrb.info@hawaii.gov
Website: dbedt.hawaii.gov/sbrrb
Tel 808 586-2594

March 22, 2018 - DRAFT

Governor David Y. Ige
State Capitol
Honolulu, Hawaii

Subject: Hawaii Department of Transportation (HDOT) - Airport Pilot Program

Dear Governor Ige:

Recently, the Small Business Regulatory Review Board (SBRRB) received the attached December 9, 2017 letter from Ms. Dale Evans, CEO, Charley's Taxi and Limousine.

The concerns in Ms. Evans' letter relate to a recently created pilot project that allows Uber and Lyft drivers to operate at the Honolulu International Airport (HNL), which Ms. Evans claims causes an unfair, inequitable and detrimental impact to a specific group of small businesses; i.e., current taxi operators, because HDOT is allowing Uber and Lyft to operate at HNL without being subject to the same State rules, regulations, and requirements as the taxi operators.

In compliance with Section 201M-5(a), HRS, SBRRB considered Ms. Evan's request and raised the complaint about inequitable treatment with HDOT. SBRRB respectfully requested that HDOT explain what administrative rules applied to Uber and Lyft operations at HNL or, if no rules applied, that HDOT consider adopting rules as such rules were needed to allow for equitable treatment of Uber, Lyft, and the taxi operators."

In response, HDOT stated that this is a "pilot program" and that HDOT has no plans to adopt administrative rules to provide the same regulations and requirements to Uber and Lyft drivers as applied to other vehicular transport businesses operating at HNL.

Since there are no rules or regulations on this pilot program, and SBRRB has already recommended and been refused the adoption of such rules, there is nothing further SBRRB can do in this matter.

A few weeks ago, HDOT announced an extension of the pilot program for another six months. While we are all for the growth and success of small businesses here in Hawaii, which is the backbone of our economy, we also believe that every business needs to compete on equal terms and conditions to provide a level playing field for all small businesses, especially when providing goods and services to State agencies.

As SBRRB can take no further action on this matter, we respectfully request that you review the concerns presented by Ms. Dale Evans to identify any other potential resolutions.

Thank you for your consideration.

Sincerely,

Anthony Borge
Chairperson

c: Michael McCartney, Chief of Staff, Governor's Office
Jade Butay, HDOT, Director
Dale Evans, CEO, Charley's Taxi

VI. Administrative Matters

D. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS

1. Discussion and Action on Hawaii Small Business Conference to be held at Maui Arts & Cultural Center on May 2 – 3, 2018

Any handouts will be distributed at the Board Meeting