# Version 2.0 Rationale

## Final Proposed Hawaii Administrative Rules
## Title 11 Department of Health
## Chapter 200.1 Environmental Impact Statement Rules

March 2019

State of Hawaii Environmental Council
Prepared with the assistance of the Office of Environmental Quality Control (OEQC).

EXHIBIT "56"

# C. Topical Changes

The topical changes discussed in this section address new issues, strategies, and approaches that have emerged since the 1996 Rules were adopted. These changes reflect changing law and public policy, as well as emerging science and technology. These changes typically appear in numerous sections throughout the Final Proposed Rules.

## i. Digitizing the Process

The Final Proposed Rules have been updated to reflect increased access to computers and the internet in 2018. When the 1996 Rules were promulgated, home use of computers and internet was relatively uncommon. Accordingly, the periodic bulletin (i.e., *The Environmental Notice*) was physically mailed to subscribers using the United States Postal Services. Proponents also physically mailed copies of EAs and EISs to requesting parties.

Today, the periodic bulletin (i.e., *The Environmental Notice*) is distributed electronically, and EAs, EISs, and other environmental review documents are publicly available in the 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 Final Proposed Rules, therefore, make modifications in many areas related to digitization. The Final Proposed Rules require agencies and applicants to submit their materials electronically to the OEQC for publication in *The Environmental Notice* and for the OEQC to distribute *The Environmental Notice* electronically. The Final Proposed Rules also require agencies to provide an exemption notice electronically. 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 Final 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 paper copy of the draft and final EA filed with the State Library's Hawaii Documents Center.

## ii. Programmatic Approaches and Defining Project and Program

The Final Proposed Rules recommend programmatic environmental review to evaluate the effects of broad proposals or planning-level decisions that may include: (1) a wide range of individual projects; (2) implementation over a long timeframe; or (3) implementation across a large geographic area. Programmatic environmental review (i.e., "program-level" review), is distinguishable from project-based environmental review (i.e., "site-specific" review). The level of detail in programmatic environmental review should be enough to make an informed choice among program-level alternatives and broad mitigation strategies. Programmatic environmental review allows for analysis of the interactions of a number of planned projects or phases in a program. This broader level of 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-specific or component-specific exemptions, EAs, or EISs that are based on 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 introduced a separate section detailing the requirements for programmatic environmental review for EISs. The Council realized, however, that this approach would have to be replicated, and therefore create redundancy, in the subsequent sections (e.g., exemptions, EAs, and supplemental EISs). This approach would also have resulted in the default process becoming the “project” process and created a bifurcated process for projects and programs. 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 requirements for the environmental review process were integrated into the “Environmental Assessment Style” section and the existing “Environmental Impact Statement Style” section. It became apparent 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 did not, however, define “project” or “program”, which made discussion of “programmatic” environmental review more complicated.

While the Council was drafting Version 0.3, the Hawaii Supreme Court issued its decision in *Umberger v. Department of Land and Natural Resources*, 140 Hawai‘i 500, 507, 403 P.3d 277, 284 (2017). Recognizing that the term “project” and “program” are not statutorily defined under chapter 343, HRS, the Court relied on the definition in the Merriam-Webster Dictionary for the plain-meaning of the 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*, 140 Hawai‘i at 513, 403 P.3d at 290. While the distinction between program and project helped frame the Final Proposed Rules, there remained some ambiguity because the judicial definition for “program” included the word “action”, which is defined in chapter 343, HRS, as “a project or program”. Therefore, the Council sought further clarification.

To provide greater clarity and to be able to discuss the concept of “programmatic” more succinctly, the Council proposed definitions for “project” and “program” in Version 0.3. The Final Proposed Rules substantially retain these proposed definitions from Version 0.3. Version 1.0 retained the use of the word “programmatic” as the adjective of the word program. However, in response to public feedback requesting a separate definition for the term “programmatic”, the Council replaced the word with “program” so that the Final Proposed Rules refer to “program EAs” and “program EISs”. Using the definitions to distinguish between projects and programs, the Final Proposed Rules also allow for the preparation of programmatic exemptions, EAs, and EISs while avoiding complicated and potentially confusing terms.

### iii. “Green Sheet”

The “green sheet” process informs agency decision-making about whether a proposed action fits within an existing chapter 343, HRS, document or determination or requires additional

environmental review. The “green sheet” process was adapted from 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 the approach to incorporate considerations that the U.S. Bureau of Land Management and U.S. Department of Transportation (“USDOT”) use in their own NEPA adequacy analysis.

During the public comment period, commenters recognized the need for a standardized evaluation process to determine: (1) whether an agency is eligible to prepare a supplemental EIS; (2) whether an agency action is covered by a previous determination or accepted EIS; (3) whether a project is covered by a programmatic exemption, EA or EIS; and (4) whether a federal EA or EIS meets the requirements of chapter 343, HRS. Stakeholders also recommended incorporating the USDOT re-evaluation process for considering when a supplemental EIS may be warranted.

In response to the first issue, the Final Proposed Rules retain the requirement from the 1996 Rules (section 27) that an agency submit a determination of whether a supplemental EIS is required to the OEQC for publication in the bulletin. The Final Proposed Rules moved the supplemental EIS section into the subchapter on EISs but otherwise only make housekeeping edits to the sections. The “green sheet” is a process introduced in section 11-200.1-11.

Section 11-200.1-11 was introduced to provide agencies with guidance on whether an action is covered under an existing exemption, EA, or EIS. Agencies are provided the following criteria:

(1) Whether the proposed action 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 program EIS);
(2) Whether the proposed action 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, whether the proposed action was analyzed within the range of alternatives.

If the criteria apply, the proposed action could be covered under the existing HEPA process. If the criteria do not apply, an agency must conduct a separate chapter 343, HRS, analysis; that is, the agency needs to decide if an exemption, EA, or EIS is appropriate. In either case, the agency may 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 that the federal EIS meets the content and process requirements of chapter 343, HRS, including any provisions related to NEPA as set forth in section 11-200.1-31.

The OEQC is available to assist agencies in developing a standardized form that can serve as a "green sheet". The form will help agencies track determinations that an action is covered by an existing chapter 343, HRS, process. Agencies will be able to track (1) whether a programmatic EIS covers the action; (2) whether a supplemental EIS is required; and (3) whether NEPA is an aspect of the action. The Council notes that the "green sheet" may vary by agency, depending on the agency's specific needs.

## iv. Exemptions

The Final Proposed Rules update the exemption process to (1) clarify which activities agency undertake could be considered *de minimis* versus needing an exemption notice filed; (2) rename the "exemption classes" to "general types" and revise the general types (including adding a provision for affordable housing as described below); (3) obtain Council concurrence on the exemptions lists on a regular basis; and (4) increase timely public access to information about exemptions (see subchapter 8).

Section 11-200.1-16 separates the exemption list into the following two sections: (1) *de minimis* actions (i.e., routine operations and maintenance, ongoing administrative activities, and other similar items); and (2) general types of actions listed in section 11-200.1-15 and agency-specific actions recorded in exemption notices (see section 11-200.1-17). The Final Proposed Rules require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include them in Part 1 of the agency's exemption list. By including *de minimis* actions in the exemption list, an agency can alert staff to situations 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. *De minimis* activities presumptively do not require documentation (i.e., an exemption notice) or consultation. Many of these activities (e.g., repainting buildings to fixing plumbing and purchasing office supplies) are already exempt by agencies because they fall under one or more of the classes in the 1996 Rules.

The Final Proposed Rules removes the proposed language in Version 1.0 that would allow agencies to not consult on an exemption or publish it in the bulletin if the agency had a timely Council-concurred exemption list. The Council removed this language because of comments that the language was inconsistent with the statute. Basing process completion requirements on the status of Council concurrence raises questions about an action appropriately completing environmental review and the Council's role in agency decision making.

After adoption of the Final Rule, agencies would have seven years to reorganize and update their exemption lists to comply with the rules (see section 11-200.1-32). The Council and OEQC can assist agencies with this transition.

## v. 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.