

**DECLARATORY RULINGS  
AND THE  
ENVIRONMENTAL COUNCIL**

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## **FOREWORD**

This report on the status of the Environmental Council's authority to issue declaratory rulings is submitted to the Legislature pursuant to Senate Concurrent Resolution No. 178, S.D. 1, which was adopted during the Regular Session of 1989.

This report would not have been possible without the assistance of the many individuals and organizations that contributed their time and effort toward its development. The Bureau wishes to acknowledge the contributions of the Office of the State Attorney General, Chairman and the members of the Environmental Council, the Director and staff of the Office of Environmental Quality Control, the Environmental Center, the University of Hawaii School of Law, and the Office of State Planning. The Bureau also extends its gratitude to Natural Resources Defense Council, the Sierra Club Legal Defense Fund, the Conservation Council, the American Lung Association, the Council on Environmental Quality, the Executive Director of the Minnesota Environmental Quality Board, and the various state environmental impact statement programs that submitted valuable information and offered helpful suggestions toward the development of the recommendations in this report.

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## **Chapter 1**

### **INTRODUCTION**

Senate Concurrent Resolution No. 178, S.D. 1 (Appendix A), adopted by the Legislature during the 1989 Regular Session, requests the Legislative Reference Bureau to study the issues causing uncertainty over the Environmental Council's authority to issue declaratory rulings on its own motion or upon request. The Bureau is requested to submit a report containing possible recommendations to mitigate this uncertainty to the law to the 1990 Legislature.

S.C.R. No. 178 notes that Hawaii's environmental impact statement law<sup>1</sup> was established to create an environmental review process which was designed to integrate the analysis of environmental impacts with the planning process of the State and the counties. The concurrent resolution also notes that the Environmental Council<sup>2</sup> was created to coordinate this process and to adopt, amend, and repeal rules to determine and maintain the quality of Hawaii's environment. Composed of not more than fifteen members appointed by the Governor (including the Director of Environmental Quality Control serving in an ex officio capacity), the Environmental Council was established to administer Hawaii's environmental impact statement (EIS) law.

While the powers of the Council are indeed broad and far-reaching, concern soon arose over the level of oversight often exercised by the Council in matters generally understood to fall under the functional responsibilities of state and county agencies engaged in evaluating the environmental impacts of government-initiated or other regulated actions. Of particular concern was the Council's periodic use of its power--as an administrative agency<sup>3</sup>--to issue declaratory rulings in judgment of decisions made by lead agencies engaged in the process of environmental impact analysis. The concurrent resolution notes that section 11-201-25, Hawaii Administrative Rules--which was adopted by the Council--delineates rules for the issuance of such rulings to "terminate controversies or remove uncertainty" under the environmental impact statement law.

While the Council was seldom called upon to render such judgments, declaratory rulings were, on occasion, issued by the Council to clarify various ambiguities in the law or to settle disputes over issues ranging in significance from relatively minor to highly controversial. Over the years, however, it increasingly became an accepted practice for aggrieved parties and individuals to petition the Council to exercise its "power" to contest or question, on their behalf, the propriety of a state or county agency's decision to issue a negative declaration--a negative declaration being an agency's determination based on an environmental assessment that the subject action will not have a significant effect on the environment and, therefore, will not require the preparation of an environmental impact statement.<sup>4</sup> While the Council's practice of ruling on agency-issued negative declarations became the most visible and certainly the most controversial matter subjected to reexamination by the Council, other

applications of the Council's power to rule were also brought into question.<sup>5</sup> Judgments rendered by the Council in such cases have often resulted in reversals of agency decisions.<sup>6</sup> Whereas the Council found this device to be an efficient and inexpensive alternative to bringing action in court, other parties involved in the process, including applicants and governmental agencies, considered this authority to be unwarranted and generally intrusive upon an agency's affairs.

Controversy over the Council's actions led to questions as to the actual propriety of the Council's use of this power overrule the decisions of agencies during the EIS process. While certain parties contend that the power overrule is a prerogative of the Council's position as the protector of environmental quality, explicit language granting the Council this power under the environmental impact statement law is conspicuously absent. In addition, as the concurrent resolution notes, S.B. No. 2860, S.D. 1, H.D. 1, C.D. 1, one of several measures passed by the Legislature to clarify the Council's authority in this matter, was, like its earlier counterparts, vetoed by the governor in 1988.

The controversy over the Council's authority to exercise such oversight rose to a level such that the opinion of the state Attorney General was solicited. Senate Standing Committee Report No. 1637 (Appendix A) notes that:

The Environmental Commission (sic) was recently advised by a deputy attorney general that it could no longer issue declaratory rulings. This conflicts with the Commission's (sic) past practice of issuing such rulings and poses a serious administrative deficiency in the present environmental process.

While the restrictions in the Attorney General's advice<sup>7</sup> are not as broad as the committee report implies,<sup>8</sup> certain restraints on the use declaratory orders by the Council were recommended. Disagreements over the status of the Council's power to issue declaratory rulings have led to a particularly contentious situation between the Environmental Council and the Office of the State Attorney General. Frustration on behalf of the proponents of the Council's authority has resulted in questions as to the effectiveness of an environmental board that lacks the power to enforce the EIS law. Central to the intensity of this controversy is the belief that this lack of authority is, as the committee report claims, "a serious administrative deficiency".

The purpose of this report is to discuss the issues contributing to the "uncertainty" of the Environmental Council's authority to issue declaratory rulings under the environmental impact statement law. Chapter 2 presents a brief history of the State's environmental impact statement law and reviews the functions of the principal environmental agencies involved in the process. Chapter 3 focuses on the issue of declaratory rulings and reviews, the views of the parties, and the history of the effort by the Council to acquire the authority to exercise this power. Chapter 4 reviews the environmental impact statement programs of several other

## INTRODUCTION

jurisdictions with an emphasis on the roles performed by the agencies in charge of administering these programs. Chapter 5 discusses several of the alternatives available for consideration, and Chapter 6 summarizes and concludes the report.

## ENDNOTES

1. Hawaii Rev. Stat., ch. 343.
2. Hawaii Rev. Stat., sec. 341-3.
3. Hawaii Rev. Stat., sec. 91-8, allows any person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency.
4. Hawaii Rev. Stat., sec. 343-2.
5. For example, petitions requesting the Council to rule on: (1) the adequacy of an EIS; (2) whether and when an environmental assessment and notice of determination may or may not be required; and (3) whether a supplemental EIS was necessary.
6. It should be noted that, in some instances, lead agencies have disregarded the Council's orders.
7. Memorandum from Sonia Faust, Deputy Attorney General, to George J. Krasnick, Chairman, Environmental Council, February 16, 1988, and Memorandum from Leslie Chow, Deputy Attorney General, to George J. Krasnick, Chairman, Environmental Council, December 5, 1988.
8. In Fasi v. Hawaii Public Employment Relations Board, 60 Haw. 443 (1979), the Hawaii Supreme Court ruled that an agency may issue a declaratory ruling on questions which would be relevant to some action which that agency might take in the exercise of its powers.

## **Chapter 2**

### **THE ENVIRONMENTAL IMPACT STATEMENT PROCESS IN HAWAII**

The purpose of this chapter is to provide a brief review of Hawaii's environmental impact statement (EIS) system. Special emphasis will be placed on analyzing the organizational structure of the agencies established to administer the EIS process. A schematic diagram of the EIS process is included as Appendix B.

#### **Hawaii's Environmental Impact Statement Law**

Recognizing that the quality of Hawaii's environment is "important to the welfare of the people" and that maintaining this quality "deserves the most intensive care", the Legislature passed S.B. No. 1132 which was approved by the Governor as Act 132, Session Laws of Hawaii 1970. The purpose of the Act was to "stimulate, expand, and coordinate efforts" to protect the environment. Act 132 established chapter 341, Hawaii Revised Statutes, which in turn established the Office of Environmental Quality Control (OEQC), the Ecology or Environmental Center, and the Environmental Council.

The OEQC was established to serve the Governor in an "advisory capacity on all matters relating to environmental quality control".<sup>1</sup> The Ecology or Environmental Center was created to "stimulate, expand, and coordinate education, research, and service efforts of the University of Hawaii related to ecological relationships, natural resources, and environmental quality".<sup>2</sup>

Under the law,<sup>3</sup> the Environmental Council was established to:

- (1) Serve as a liaison between the director [of the OEQC] and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning ecology and environmental quality through public hearings or any other means and by publicizing such matters as requested by the director; and
- (2) Make recommendations concerning ecology and environmental quality to the director.  
(Bracketed material added.)

Under the law, the Environmental Council consisted of fifteen members.<sup>4</sup> With the exception of the Director of the OEQC, who served as the Council chairperson, the members were appointed by the Governor for terms of not more than four years. To assure a broad and balanced representation of interests and vocations, the law further required that the Council be composed of members skilled in a wide variety of disciplines.<sup>5</sup>



## ENVIRONMENTAL IMPACT STATEMENT PROCESS

In 1974, H.B. No. 2067 was passed by the Legislature and approved by the Governor as Act 246, Session Laws of Hawaii 1974. Act 246 was codified as chapter 343, Hawaii Revised Statutes, which in turn established the state Environmental Quality Commission (EQC) and Hawaii's environmental impact statement process. According to the law, the EQC was established to "make, amend, or repeal rules and regulations" and to administer the chapter.<sup>6</sup> Under the law, the EQC consisted of ten members appointed by the Governor; and, as an ex officio voting member, the Director of the OEQC. The law required the Governor to appoint the Chairperson of the EQC.

As noted earlier, the law also established the state EIS process. The law required state and county agencies proposing to implement certain actions to determine at the earliest practicable time, whether an EIS would be necessary. The law provided, however, that an EIS "shall be required only if the agency finds that the proposed action may have a significant effect on the environment".<sup>7</sup> The law required agencies to file a "notice of determination" with the EQC containing the agency's decision as to whether or not an EIS was needed to study the possible impacts of the action.<sup>8</sup> The law established a sixty day time period for the initiation of judicial proceedings to appeal any agency determination that an EIS was or was not required.<sup>9</sup>

Following public comment on an EIS, the EQC, when requested by an agency, could make a recommendation as to the acceptability of the final EIS.<sup>10</sup> The final authority as to the acceptability of the EIS rested with either the Governor or the Mayor of the county proposing the action.

Similar requirements were established for applicant actions subject to agency approval. In cases where an applicant's EIS was not accepted by an agency, however, the law permitted the applicant to appeal this ruling to the EQC. The law required the agency to abide by the EQC's decision.<sup>11</sup>

The functions of the EQC were outlined as follows:

- (1) Inform the public of notices filed by agencies of determinations that statements are required or not required; and
- (2) Inform the public of the availability of statements for review and comments; and
- (3) Inform the public of the acceptance or non-acceptance of statements.

In response to growing concern and criticism over the complexity of environmental impact statement process, discussions regarding possible improvements to the process began between the Environmental Council and the EQC in the early 1980s.<sup>12</sup> Several measures to reorganize EIS system began appearing before the Legislature during this period.

In August 1982, the Council held an open meeting on the matter of reorganization to solicit comments and suggestions from the public. As a result of these discussions, the environmental agencies of the State unanimously agreed that there was a critical need to consolidate and streamline the functions of the agencies involved in the process.<sup>13</sup> Public testimony on the matter revealed that there existed much confusion over the functions and duties of the three agencies in the EIS process. Additionally, the State Interagency Task Force on Permit Simplification found that, to prevent duplication and confusion, and to lessen the paperwork, there was a need to distinguish between the roles of OEQC, the EQC, and the Environmental Council in the EIS process.<sup>14</sup>

As a result of these meetings, an agreement was established to propose legislation that would abolish the EQC, and transfer its duties to the OEQC and the Council. Under the law, the EQC was responsible for routine administrative functions, rulemaking, and limited decision-making duties. Under the new proposal the routine administrative functions would be transferred to the OEQC, and the rulemaking functions would be transferred to the Council. With this transfer of authority, the role of the Council would be converted from being strictly advisory to one with actual rulemaking and limited decision-making duties over agency-rejected, applicant-prepared final EISs.

Act 140, Session Laws of Hawaii 1983, abolished the EQC and reassigned its responsibilities to the OEQC and the Council. The Act terminated the terms of the members of the EQC and the Council and required that the new membership of the Council include a minimum of ten former members of the EQC and the Council. The Act required the rules of the EQC to remain in effect until superseded by rules adopted by the new Council.

Although the Legislature charged the Council with the responsibility to adopt rules by which the EIS process might be implemented, other agencies were vested, with the exception of applicant-appeals of agency-rejected final EISs, with the power to implement these rules. Section 343-5, Hawaii Revised Statutes, does not empower the Council to implement these rules except in specific factual situations.<sup>15</sup> Nowhere in the law is the Council directed to enforce or make judgments on the EIS law or rules.

Amendments to Hawaii's EIS law have continued on a piecemeal basis over the years. While most amendments to the law carry some degree of significance to the EIS process, these changes may not have particular relevance to this study. The following chapter will focus specifically of the issue of the Environmental Council's authority to issue declaratory orders.

## ENDNOTES

1. Hawaii Rev. Stat., sec. 341-3(a).
2. Hawaii Rev. Stat., sec. 341-3(b).

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3. Hawaii Rev. Stat., sec. 341-6.
4. Hawaii Rev. Stat., sec. 341-3(c).
5. Hawaii Rev. Stat., sec. 341-3(c).
6. Hawaii Rev. Stat., sec. 343-3 (repealed).
7. Hawaii Rev. Stat., sec. 343-4(b).
8. Hawaii Rev. Stat., sec. 343-4(b).
9. Hawaii Rev. Stat., sec. 343-6(b).
10. Hawaii Rev. Stat., sec. 343-4(b).
11. Hawaii Rev. Stat., sec. 343-4(c).
12. Doak C. Cox, Environmental Center, Testimony submitted to the House Committees on Energy, Ecology, and Environmental Protection and Water, Land Use, Development, and Hawaiian Affairs regarding House Bill No. 1573, Hawaii State Legislature, Regular Session of 1983.
13. Jacqueline Parnell, Office of Environmental Quality Control, Testimony submitted to the Senate Committee on Ecology, Environment, and Recreation regarding Senate Bill No. 1279, Hawaii State Legislature, Regular Session of 1983.
14. Ibid.
15. Memorandum from Leslie Chow, Deputy Attorney General, to George J. Krasnick, Chairman, Environmental Council, December 5, 1988.

## **Chapter 3**

### **DECLARATORY RULINGS**

Despite the "uncertainty" surrounding their authority to rule on appeals of agency decisions, declaratory rulings became a common practice of the Environmental Quality Commission (EQC) and the Environmental Council (Council). The notion that clear authority, if not specifically provided for under the environmental impact statement (EIS) law, was at least provided for in general under the state Administrative Procedure Act, continues to be a belief held by some supporters of the Council's authority. While certain events such as a Hawaii Supreme Court ruling in 1979 and several advisories from the Office of the Attorney General have clarified the scope of declaratory rulings for the Council and all agencies in general, the controversy has not subsided.

The purpose of this chapter is provide a brief history of the Council's effort to acquire the power to issue declaratory rulings on agency determinations in the EIS process. Also provided in this chapter is a compilation of the declaratory rulings issued by the EQC and the Council over the years.

#### **Declaratory Rulings: The Perspective of the Environmental Council**

From the perspective of the Council, the Environmental Center, the Office of Environmental Quality Control (OEQC), and presumably, most environmentally-active groups and individuals, the reasons in favor of permitting the Council to rule on agency determinations include:

- (1) The view that as the entity assigned to administer and adopt the rules for the EIS law, the Council should have broad powers of enforcement and oversight over the entire process;
- (2) The fact that most environmental organizations are nonprofit groups that have limited resources to expend on court challenges;
- (3) The view that Hawaii's courts generally classify cases involving the EIS law as "low priority", and that settling these cases out-of-court will relieve the courts of the burden to hear them; and
- (4) The fact that challenging the agency's decision in court is the only formal alternative identified under the law to question or comment on an agency's decision to require or not require an EIS.

## DECLARATORY RULINGS

As noted earlier, although declaratory rulings were used to examine a wide range of agency decisions, the most controversial application of this power by the Council, was its use to overrule agency-issued negative declarations.

The start of the process begins when an agency, in accordance with the EIS law,<sup>1</sup> makes a determination that the proposed action, on the basis of the agency's assessment, will or will not have a "significant effect"<sup>2</sup> on the quality of the environment. On its judgment that the action will have no significant effect, an agency is required to announce its finding through the issuance of a negative declaration.<sup>3</sup> Appendix C compares the number of EISs prepared to the number of negative declarations issued during a four-year period.

In the past, parties aggrieved by an agency's decision were allowed to submit their grievances to the Council for consideration. While agencies and project developers, on occasion, have alleged that these efforts are frequently attempts to interfere with the progress of a proposed project, concerned groups and individuals contend that, without a full review of the possible impacts of the actions intended under certain projects, the project's potential of inflicting costly or perhaps irreparable damage on the environment will remain uncertain. Environmental groups generally take the view that an EIS is a disclosure document that is intended to educate the public and the government of the possible effects of a proposed action. Their intention in requesting the preparation of an EIS is not to stop the project; rather, their objective is to expose the alternatives available to develop the project in an environmentally-sound manner.

Appendix D summarizes the actions brought before the Council over the years. Note that the Council's acceptance of petitions to rule was discontinued in 1988, following its receipt of the advisory opinion from the Attorney General.

Although petitions to rule on agency determinations are no longer being processed by the Council, environmental groups have not relented in their conviction that the public should be permitted to contribute to the formulation of an agency's decision to require or not require an EIS. Without the assistance of the Council to contest agency determinations, however, concerned individuals have resorted to voicing their views in other ways. Appendices E and F contain brief accounts of two recent efforts by concerned parties--including a member of the state House of Representatives--to persuade agencies to prepare EISs to study the impacts of their proposed projects. The cases involve: (1) a negative declaration filed by the City and County of Honolulu Department of Public Works for the proposed "Pan Pacific Plaza"; and (2) a series of twenty-eight negative declarations issued by the state Department of Transportation for the expansion of the Kahului Airport. Included in Appendix F is House Concurrent Resolution No. 137, which was introduced during the 1989 Regular Session, to address the Kahului Airport issue. While it failed to pass the Legislature,<sup>4</sup> the Concurrent Resolution discusses some of the concerns held by environmental groups and individuals

affected by the decisions of state and local agencies to issue negative declarations. The standing committee report<sup>5</sup> also discusses the issue of declaratory rulings by the Council.

Although the arguments in support of allowing the Council to rule on agency decisions are reasonable and completely straight-forward, serious problems have invariably foiled every attempt to empower the Council to exercise this deceptively simple authority. The following section will discuss the effort of the Council to acquire the authority to legitimately rule on agency decisions specifically with regard to the need, or lack thereof, to prepare an EIS.

### **Declaratory Rulings and the Environmental Council**

By virtue of its status as an agency of the State, the Council, like its predecessor, the EQC, is granted certain administrative powers under the state Administrative Procedure Act, chapter 91, Hawaii Revised Statutes. Section 91-8, details the powers and duties of agencies with regard to the use of declaratory rulings, as follows:

**§91-8 Declaratory rulings by agencies.** Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agencies.

As the agency assigned to administer the EIS process, the EQC developed and adopted rules to regulate the system. The EQC's "Rules of Practice and Procedure" outlines the standards, requirements, and operating procedures of the EIS system.<sup>6</sup> Section 1:22, subpart D of the rules details the requirements for the issuance of declaratory rulings by the EQC. While rule 1:22 literally restates the language of section 91-8, Hawaii Revised Statutes, the EQC also included a specific provision to allow rulings on matters concerning "section 4(d) and other applicable provisions of chapter 343, Hawaii Revised Statutes." Section 343-4(d), Hawaii Revised Statutes, which was repealed in 1983, concerned the EQC's responsibility to designate a lead agency in situations where an applicant requested the approval of two or more agencies simultaneously. Inasmuch as the phrase "other applicable provisions of Chapter 343" modifies "section 4(d)," the proviso seems to limit itself in scope to issues relating to the EQC's responsibility to designate the lead agency in situations where this problem arises.

While no provision of the EIS law or rules, with the exception of subsection 343-4(c), Hawaii Revised Statutes,<sup>7</sup> discussed the use of declaratory orders by the EQC to render judgments on the propriety of agency decisions, the use of this power to rule on such matters began quite early in the history of the EQC. It is important to point out, however, that

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submitting petitions to the EQC for rulings to reverse agency determinations has by no means been a tactic exercised exclusively by environmental groups seeking to overturn negative declarations. Indeed, among the first administrative rulings issued by the EQC shortly after it was established in 1974, was one initiated by an applicant aggrieved by an agency's order to prepare an EIS for the proposed action. The EQC ruled that agency had erred in its determination that an EIS was necessary and advised the agency to reverse its order to the applicant.

With the abolition of EQC, the Environmental Council assumed the lead role in administering the EIS process. In accordance with the reorganization, the Council adopted new rules to administer the EIS system under its auspices. Chapter 11-200, Hawaii Administrative Rules, was adopted by the Council and became effective on December 6, 1985.<sup>8</sup> The historical note to the chapter states that the new rules were based substantially on the rules of the EQC.<sup>9</sup> Rules relating to declaratory rulings by the Council appear under sections 11-201-21 to 11-201-25.<sup>10</sup> Subchapter 7 of chapter 11-201 relating to declaratory rulings appears in its entirety as Appendix G. Evident under the new rules, however, is the change made to the wording of the scope of the issues under chapter 343, Hawaii Revised Statutes, subject to determinations by the Council. Quite appropriately, because of the repeal of subsection (d) of section 343-4 in 1983, reference to this subsection was not included in the new rules. Instead, the scope of the Council's authority was redrafted to allow the Council to also make "determinations under chapter 343, Hawaii Revised Statutes." While the new language seems to broaden the scope of the questions subject to declaratory ruling by the Council, the provision appears to remain consistent with section 91-8, Hawaii Revised Statutes, in that it limits the scope of the Council's actions to questions applicable to the statutory provisions of chapter 343. In this regard, it appears that the Council's rule, like the EQC's rule, does not apply to determinations made by other agencies.

The first official action by the Council to clarify its authority under the law to rule on appeals of agency determinations with regard to the need to prepare an EIS was initiated in 1984. House Bill No. 2075-84<sup>11</sup> was introduced on behalf of the Council to authorize any person or agency to appeal an agency's determination that a statement was or was not required to the Council. The bill amended section 343-5, Hawaii Revised Statutes, including the following provision under subsections (b) and (c):

Any person or agency other than the agency which prepared the assessment may appeal a determination that a statement is or is not required to the environmental council pursuant to rules established under section 343-6. The person or agency appealing the determination and the agency which prepared the assessment shall abide by the council's decision subject to judicial appeal under section 342-7. Any administrative proceeding, the subject of which is the determination that a statement is or is not required for a proposed action, shall be initiated within thirty days after the public has been informed of such determination pursuant to section 343-3.

The bill was viewed by the Council as a "housekeeping measure" that would simply establish in the law, the authority it assumed it was permitted to exercise all along.

According to testimony submitted by the Environmental Center,<sup>12</sup> House Bill No. 2075-84 evolved in response to both agency and public concern with the "occasional inappropriate issuance of negative declarations" and the "costly and cumbersome judicial appeal procedure."<sup>13</sup> The Environmental Center noted that under law at the time, the public became aware of a project only after an EIS preparation notice or a negative declaration was printed in the *EC Bulletin*. The Center further noted that the bulletin appeared only after the agency's decision had been made.<sup>14</sup> The only recourse provided under the law was legal action through the judicial system. The Center supported the proposal to authorize a "neutral third party" to determine the propriety of the agency's decision to prepare or not prepare an EIS.<sup>15</sup>

The Council testified that an administrative appeal mechanism would allow both the public and the applicant to appeal an agency's decision to the Council.<sup>16</sup> The Council noted that "it would seem appropriate to provide for an administrative appeal process to the Environmental Council which is by statute responsible for making and amending rules which implement Chapter 343, HRS".<sup>17</sup> The Council further noted that "the Council already has most of the framework in place to assume the responsibility for the additional appeal process."<sup>18</sup> Testimony in support of the measure was also submitted by the OEQC, and several environmental groups.

While it appears that the Council's "housekeeping" bill generated little opposition throughout its legislative review, H.B. No. 2075-84 was vetoed by the Governor on June 12, 1984.<sup>19</sup> Among the reasons offered in the statement for the veto of the bill, was the Legislature's apparent misunderstanding of the existing agency review procedure. According to the statement, appeals of agency determinations could be taken by agencies "in accordance with each agency's administrative appeal procedures."<sup>20</sup> The statement notes that authorizing the Council to consider such appeals would duplicate the agency's appeal procedures unnecessarily.<sup>21</sup> This situation, the statement notes, would engender "vagueness and ambiguity" as it is uncertain whether appeals to the Council would be in lieu of or in addition to the "existing agency appeal procedures."<sup>22</sup>

A second attempt by the Council to acquire the power to examine appeals of agency determinations was initiated during the 1986 Regular Session. Although the previous effort was vetoed by the Governor only one session earlier, House Bill No. 2729-86, a carbon copy of the 1984 bill, was introduced on behalf of the Council. During the 1986 session of the Legislature, however, H.B. No. 2729 was held in its assigned committee.<sup>23</sup>



## DECLARATORY RULINGS

The third attempt by the Council to acquire the power to rule on appeals of agency determinations was initiated during the Regular Session of 1987. Like the 1986 measure, House Bill No. 380 was a carbon copy of the final version of the 1984 bill. The arguments in favor of the bill, not surprisingly, were identical to those that were presented to the Legislature in previous sessions. The sentiment of the supporters of the bill in 1987 is conveyed in the committee report of the Senate Committee on Planning and Environment:<sup>24</sup>

Your Committee finds that the Council has on occasion considered and taken action on agency determinations, but the lack of specific statutory authorization has raised questions regarding the extent to which the Council could act. The only remedy presently available to persons aggrieved by an EIS determination is to appeal the decision in court. This imposes an undue burden on both the party appealing the decision and the court system. It seems particularly unfair to require citizens to hire legal counsel in order to go to court for the sole purpose of insuring that the law is properly administered. They should be first afforded the opportunity of an administrative appeal.

While the bill received the full support of its members, the Senate committee amended the bill by including a proviso which would repeal the measure in five years. The committee found that a trial period of five years would provide sufficient time for the Legislature to determine the propriety of its actions. If, after the lapse of this period, the Legislature found that the action was appropriate, the law would be extended.<sup>25</sup>

On June 22, 1987, H.B. No. 380, H.D. 1, S.D. 1, was vetoed by the Governor.<sup>26</sup> Inasmuch as the 1987 bill was literally a reiteration of the 1984 measure with a repeal date, the veto statement that was attached to the 1984 measure by the Governor in that year was once again used to veto the measure in 1987.

The fourth attempt by the Council to acquire the power to rule on appeals of agency determinations was initiated during the Regular Session of 1988. While the initial version of Senate Bill No. 2860 was essentially a carbon copy of its predecessors, the final version passed by the Legislature adopted a new approach. In lieu of amending sections 343-5(b) and 343-5(c), Hawaii Revised Statutes, the bill opted for establishing a new section (to achieve essentially the same result) under chapter 343.

Testimony presented in support of the 1988 measure reiterated the concerns expressed in support of its predecessors. Testimony in opposition to the effort, however, also began to appear. Testimony presented by the state Chief Planning Officer noted that the system in place at the time was "working and has resulted in [the] responsible consideration of environmental issues."<sup>27</sup>

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On June 14, 1988, S.B. No. 2860 was vetoed by the Governor.<sup>28</sup> In the 1988 statement, however, the Administration cited the ruling rendered by the Hawaii Supreme Court in *Fasi v. Hawaii Public Employment Relations Board*.<sup>29</sup> In its 1979 ruling, the Hawaii Supreme Court noted that under section 91-8, Hawaii Revised Statutes, agencies are empowered to issue declaratory rulings "as to the applicability of any statutory provision or any rule or order of the agency." The Court ruled that this language gives an administrative agency power to rule only upon questions "which would be relevant to some action which the [Hawaii Public Employment Relations] Board might take in the exercise of its powers granted by [statute]."<sup>30</sup> The Governor's veto statement noted that in authorizing the Council to issue declaratory rulings regarding the applicability of any and all statutory provisions of chapter 343, or any and all relevant rules or orders, the bill appeared to be attempting to "authorize the Council to issue declaratory rulings regarding matters over which the Council is otherwise powerless to act."<sup>31</sup>

During 1988, a series of attempts to clarify the "uncertainty" surrounding the Council's standing to issue declaratory orders was initiated by the Council. A minimum of three opinions<sup>32</sup> were solicited by the Council from the Office of the Attorney General to advise the Council on this status. While the advisories essentially reiterated the statements and ruling of the Hawaii Supreme Court, the opinions generated opposition highly critical of the Attorney General's view.

The fifth attempt to authorize the Council to rule on agency determinations was initiated during the 1989 Regular Session. In 1989, however, three bills--House Bill No. 1286, House Bill No. 166, and House Bill No 1685--each approaching the problem from a slightly different angle, were introduced on behalf of the Council to accomplish its objective.

H.B. No. 166 focused on the Council's authority to issue declaratory orders as to whether and when an environmental assessment is or is not required under the law. As expected, the measure received the full support of the Council, the Environmental Center, and several environmental groups. Testimony in opposition to the measure was submitted on behalf of the City and County of Honolulu, the Land Use Research Foundation, and Alexander & Baldwin, Inc.

Testimony presented by the Department of General Planning of the City and County of Honolulu conveyed the typical concerns of the opponents of the measure:

The Environmental Council is an appointive body, ill suited to the role of administrator of a governmental program, particularly one which involves more than one level of government.

The current law sets forth the requirements for preparation of an environmental assessment--state and county agencies know the law and follow the process. If there is some ambiguity in Section 343-5 as to when an assessment is or is not required, then the

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ambiguous language should be improved rather than propose that the judgment of the Environmental Council should be substituted for that of the agency. We also believe that the burden placed upon citizens serving in non-paying, information-oriented councils should not be onerous in terms of either the time to be committed or the responsibilities assigned.

Although H.B. No. 166, passed through the House of Representatives, the measure was held in the Senate.

H.B. No. 1685, however, received more favorable consideration. As originally drafted, the bill's language approximated closely the language of previous bills designed to allow the Council to consider appeals of negative declarations submitted to the Council. During its review, however, the measure was transformed from being a bill that would establish a Council appeal process to one that would establish an agency reconsideration requirement. In essence, the bill allowed any person aggrieved by an agency's decision to require or not require the preparation of an EIS to petition the agency to reconsider its decision.

Predictably, the testimony presented once again reflected the positions assumed earlier by the parties involved in discussions of the issue. The American Lung Association testified that contrary to the Administration's claim in several earlier veto statements that an agency appeal process already exists, there has never been a "uniform administrative appeal procedure for agency determinations regarding the need for an EIS." During 1987, the Council conducted an informal poll of various state and county agencies to ascertain the existence of formal procedures to reconsider their determinations.<sup>33</sup> The Council found that only one agency had adopted a formal procedure to deal with appeals of its EIS determinations under its rules.<sup>34</sup>

On June 16, 1989, H.B. No. 1685 was vetoed by the Governor.<sup>35</sup> Among the primary concerns expressed in the statement was the fact that the bill was unclear as to whether the reconsideration allowed would only be on the record of the prior proceedings, or completely "de novo" (as if the case originated in that proceeding).<sup>36</sup> The statement noted that if the latter were to be the case, the bill would have the effect of doubling the entire process.<sup>37</sup>

On May 9, 1989, the Environmental Council issued a notice to the public through the *OEQC Newsletter*<sup>38</sup> regarding the status of its authority to issue declaratory rulings. Citing the arguments presented by the Office of the Attorney General in its earlier advisory, the Council announced that:

Strict application of this legal framework has resulted in the Council's declining to issue Declaratory Rulings where jurisdiction was at issue, irrespective of the Council's opinion of the factual contentions of the petition. The Council would like to remind potential petitioners that Council intervention in

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environmental disputes may take forms other than Declaratory Rulings, including:

Letters of opinion;  
Publicizing the issue further within government channels and to the public;  
Publicizing the issue through the Annual Report; and  
Becoming a party to legal proceedings.

The Council would like to encourage Hawaii's citizens and environmental organizations to continue to bring matters of environmental concern to our attention, and hope that with the means we have available, the Council can play a role in preserving and protecting Hawaii's environment.

Despite the events that have occurred over the long history of the Council's effort, proponents of the Council's power remain committed to acquire the authority to exercise a higher level of oversight over agency decisions. Although the Administration has long established its position on the matter, the conflicting view that a "serious administrative deficiency" continues to exist in the EIS process, serves to perpetuate the appearance of a state environmental policy in a state of confusion.

### ENDNOTES

1. Hawaii Rev. Stat., secs. 343-5(b) and 343-5(c).
2. Hawaii Rev. Stat., sec. 343-2 defines "significant effect" as the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law or adversely affect the economic or social welfare.
3. Hawaii Rev. Stat., secs. 343-5(b) and 343-5(c).
4. House Concurrent Resolution No. 137, Fifteenth Legislature, Regular Session of 1989, State of Hawaii, was adopted by the House of Representatives, but failed passage in the Senate.
5. Standing Committee Report 1381 on House Concurrent Resolution 137, Fifteenth Legislature, 1989, State of Hawaii.
6. Hawaii, Environmental Quality Commission, Rules of Practice and Procedure, effective date: June 2, 1975, repealed December 6, 1985.
7. Section 343-4 was repealed by Act 140, Session Laws of Hawaii 1983.
8. Hawaii Admin. Rules, chapter 11-200 (Department of Health), entitled "Environmental Impact Statement Rules."
9. Ibid., see "historical note", p. 200-2.
10. Hawaii Admin. Rules, chapter 11-201 (Department of Health), entitled "Environmental Council Rules of Practice and Procedure."

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11. Senate Bill No. 2136-84 was the companion to H.B. No. 2075-84. Senate Bill No. 2136-84, however, was deferred by the Legislature in light of the passage of the H.B. No. 2075-84.
12. Doak C. Cox, Environmental Center, testimony submitted to the House Committees on Judiciary and Energy, Ecology, and Environmental Protection, regarding H.B. No. 2075-84, Hawaii State Legislature, Regular Session of 1984, February 24, 1984.
13. Ibid.
14. Ibid.
15. Ibid.
16. James Morrow, Chairman, Environmental Council, testimony submitted to the Senate Committee on Health, regarding Senate Bill No. 2136-84, March 8, 1984.
17. Ibid.
18. Ibid.
19. George R. Ariyoshi, Governor of Hawaii, Statement of Objections to House Bill No. 2075-84, June 12, 1984.
20. Ibid., p. 1.
21. Ibid.
22. Ibid.
23. House Bill No. 2729-86 was referred to the House Committee on Planning, Energy, and Environmental Protection. The bill was not reported out of committee.
24. Standing Committee Report 1060 on House Bill 380, Fourteenth Legislature, 1987, State of Hawaii.
25. Ibid.
26. John Waihee, Governor of Hawaii, Statement of Objections to House Bill No. 380, June 22, 1987.
27. Standing Committee Report 2218 on Senate Bill 2860, Fourteenth Legislature, 1988, State of Hawaii.
28. John Waihee, Governor of Hawaii, Statement of Objections to Senate Bill No. 2860, Regular Session of 1988 (hereinafter referred to as Waihee).
29. 60 Haw. 436, 591 P.2d 113 (1979).
30. 60 Haw. 436, at 443.
31. Waihee.
32. Memorandum from Sonia Faust, Deputy Attorney General, to George Krasnick, Chairman, Environmental Council, February 16, 1988; Memorandum from Leslie Chow, Deputy Attorney General, to George Krasnick, Chairman, Environmental Council, February 16, 1988; and, Memorandum from Leslie Chow, Deputy Attorney General, to George Krasnick, Chairman, Environmental Council, December 5, 1988.

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33. Hawaii, Office of Environmental Quality Control, Annual Report of the Environmental Council 1987 (Honolulu, 1987), p. 85.
34. Ibid.
35. John Waihee, Governor of Hawaii, Statement of Objections to House Bill No. 1685, Regular Session of 1989.
36. Ibid.
37. Ibid.
38. OEQC Bulletin, Vol. VI, May 8, 1989, No. 9.

## Chapter 4

### ENVIRONMENTAL IMPACT ANALYSIS PROGRAMS IN OTHER JURISDICTIONS

The National Environmental Policy Act of 1969 (NEPA),<sup>1</sup> established the first formal process for the review and analysis of environmental impacts caused by governmental actions. While the law itself is extremely brief--barely five pages long--NEPA is undoubtedly one of the most far-reaching and controversial laws ever enacted by Congress. Among the most notable effects of the law, was the trend it set in motion in several states to enact similar laws. Thus far, fourteen states and the Commonwealth of Puerto Rico have adopted formal requirements for environmental impact analysis.<sup>2</sup> Eleven other states have limited EIS requirements--often informal programs administered through executive order.<sup>3</sup>

The purpose of this chapter is to present an overview of several important environmental impact assessment programs currently administered elsewhere in the United States. Special emphasis will be placed on evaluating each program's method of addressing appeals of lead agency decisions on the need, or lack thereof, to prepare an EIS. For the purposes of this chapter, EIS programs under fifteen other jurisdictions were analyzed. The program summaries presented in this chapter were selected on the basis of their relevance to the issue being examined in this report.

#### The National Environmental Policy Act

The National Environmental Policy Act of 1969 was signed into law on January 1, 1970, thus becoming the first federal law to be enacted in the decade of the 1970s. The substantive actions of NEPA can be divided into three general categories: (1) declaration of policy; (2) establishment of federal agency requirements; and (3) creation of the Council on Environmental Quality (CEQ).

The sections of NEPA most pertinent to the subject of this study include the sections relating to the roles of federal agencies in the preparation of impact statements and the sections establishing responsibilities of the CEQ. Section 102(2)C provides that every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment shall require a detailed statement by the designated responsible federal agency with respect to the possible impacts of the proposed action. Under the CEQ's guidelines, an agency taking an action must prepare an environmental assessment. If the agency determines that an EIS is necessary, a "Notice of Intent" must be published by the agency in the *Federal Register*.<sup>4</sup> If the agency determines that an EIS would be unnecessary, the agency must issue a "negative declaration".<sup>5</sup>

The key phrase that must be interpreted in section 102(2)C with respect to determining the threshold which, if surpassed, triggers the requirement for an EIS is: "major federal actions significantly affecting the quality of the human environment." Essentially, the responsible agency must first decide whether or not the proposed action is a "major federal action," then it must decide if the action "significantly affects" the environment. Needless to say, the ambiguity of the provision leaves the law open to wide interpretation. Additionally, the guidelines issued by the CEQ to assist agencies in the implementation of the law have not been particularly helpful in this regard.<sup>6</sup> Thus, for the most part, federal agencies preparing impact assessments are left to rely on the opinions of technical staff in formulating their judgments on to whether or not the impacts of any particular action warrants the preparation of an EIS.

Conspicuously absent in the law is any mention of any administrative agency assigned to enforce, or provide oversight over, the NEPA requirements. Essentially, the burden of the enforcement of NEPA ultimately falls upon an alert citizenry--an important principle that has had an influence on the philosophical bases of most state EIS laws. Parties aggrieved by an agency's decision may appeal this decision to the courts--no agency, including the CEQ carries the authority to intervene administratively in any judgment made by a lead agency.<sup>7</sup> Ordinarily, any person or organization aggrieved by an agency's decision will sue the agency in question by contending that the agency did not take a "hard look" at the proposed action.<sup>8</sup> Generally, a reviewing court will reverse a lead agency's decision only if it finds the agency's action to be "arbitrary and capricious, and to have abused discretion, or is otherwise not in accord with the law."<sup>9</sup>

### **The California Environmental Quality Act**

There is no state agency in California that has substantive review authority over another state or local agency's determination of what the appropriate environmental document should be to evaluate the impacts of any particular action.<sup>10</sup> Compliance with the provisions of the California Environmental Quality Act (CEQA), section 21000, et seq., *California Public Resources Code*, rests solely with the agency that is called upon to approve a project or is in the process of undertaking a project on its own behalf.<sup>11</sup>

Under the CEQA, the Secretary for Resources is assigned to adopt regulations and is generally in charge of administering the CEQA. The Office of Permit Assistance under the Office of Planning and Research answers questions and provides assistance to all agencies, the counties, the public, industry, or any other entity that must comply with the requirements of the CEQA. The program responsible for implementing the CEQA keeps track of all projects and maintains a file of all actions and reports.<sup>12</sup>

Under California law, any person (including environmental groups, other agencies, and the Attorney General) aggrieved by an agency's decision or seeking to argue non-compliance



with the CEQA must sue the agency that made the decision.<sup>13</sup> California rules state that if a responsible agency or person believes that an agency determination (such as a negative declaration) is inappropriate, a challenge must be filed in court within 30 days following the lead agency's submittal of a "notice of determination."

In California, challenges to agency decisions are most often initiated in court by environmental groups. Inter-agency disagreements are settled through negotiation between the agencies--never through legal action in the courts or "declaratory orders."<sup>14</sup> According to the California Environmental Affairs Agency, the California courts have been extremely receptive to matters involving the CEQA, and public environmental groups have been highly successful in their efforts to reverse agency decisions. The mere threat of a law suit is often sufficient incentive for agencies to begin preparing an EIS.<sup>15</sup>

### **The Minnesota Environmental Policy Act**

The Minnesota Environmental Policy Act (MEPA), chapter 116D, et seq., Minnesota Statutes Annotated, which established a statewide environmental review procedure and created the Environmental Quality Board (EQB) was signed into law in 1973 (Appendix H). Patterned after NEPA, the law centered around the environmental impact statement process. The EQB, which is composed of the heads of seven state agencies, four citizen representatives, and a representative from the Governor's staff, was given the authority to decide, on a case-by-case basis, which projects were major actions with the potential for significant environmental effects.<sup>16</sup> The board was also given the authority to review and determine the adequacy of completed EISs.

Shortly following the enactment of the law, major problems with the process became apparent.<sup>17</sup> With all decision-making centralized in the EQB, the board was inundated with reports, assessments, and requests to review specific projects. Members of the EQB found the workload to be unmanageable.<sup>18</sup> In an effort to relieve the board of this burden, the EQB adopted rules to transfer some of the decision-making authority to the state and local agency level. The 1976 rule amendments provided that the local, county, or state agency having the most approval authority over a particular project would decide if an EIS was warranted. The agency's decision, however, was subject to review and reversal by the EQB.<sup>19</sup>

The 1976 rule amendments specified that actions falling into any one of 31 categories must undergo some form of environmental impact review.<sup>20</sup> If a project fell into one or more categories, a preliminary review document called an environmental assessment worksheet (EAW) would need to be prepared (Appendix I). An EAW is a twelve-page checklist that requires a project description, and a listing of its anticipated effects.<sup>21</sup> On the last page of the worksheet, the responsible agency indicates whether an EIS should be developed for the project. The EAW is then circulated for public comment for a period of thirty days. During this period, the responsible agency's decision could be challenged by another agency, a

member agency of the EQB, or through a petition containing the signatures of 500 or more people. Such a challenge required the EQB to review the project and make its own decision on the need for an EIS.<sup>22</sup>

While it appeared that some problems had been resolved, new problems emerged and developed into major stumbling blocks.<sup>23</sup> With the 1976 rule amendments, critics of the process became more vocal and more numerous, attacking the system from all sides. Environmental groups criticized the EQB for its unwillingness to order EISs on most of the projects brought to their attention through petitions.<sup>24</sup> According to the Executive Director of the EQB, virtually every EAW being drafted was being challenged either on the basis of inadequacy or on the grounds that an EIS should be ordered.<sup>25</sup> Of all the challenges brought forth through petitions to the EQB, only four EISs were ordered.<sup>26</sup>

Business interests complained of excessive delays caused by the EQB in its review of EAW challenges. In the past, the EQB had taken a minimum of four months for a decision to be reached. In one case, over two years elapsed from the time the challenge was received until a decision was reached.<sup>27</sup> In other cases, excessive costs and delays caused certain projects to die. In addition, local governments expressed resentment that their decisions could be appealed to the EQB.<sup>28</sup> The EQB was often overburdened with examining issues that were clearly appeals of local land use decisions that did not involve any environmental issues of statewide concern.<sup>29</sup>

In the mid-1970s, the membership of the EQB felt that the board should be relieved of its EIS review responsibilities in order to devote more time to directing the environmental policy in the State.<sup>30</sup> In 1979, the EQB proposed comprehensive legislation that would, among other things, place the decision regarding the necessity of an EIS in the hands of the lead agency. The EIS decision-making process would be decentralized by authorizing lead agencies to make the final administrative decisions on the need for and the adequacy of an EIS. The EQB would retain its authority to make rules governing the process and could intervene in EIS review at certain specified times. However, administrative decisions could no longer be appealed to the EQB. Such appeals would be filed directly with the courts.<sup>31</sup>

Another interesting modification to MEPA that was adopted as a result of the recent amendments was a change in the process for citizen input during the preliminary stages of the environmental assessment process. Essentially, the system was converted from one which encouraged confrontation to one which fostered cooperation. Under the operating system, the responsible agency prepared an EAW and made a decision on the need for an EIS. Any citizen or agency could comment on the decision within 30 days, but the only means of provoking an official response from an agency on an EAW was to formally challenge the decision in court.<sup>32</sup> The new amendment to the law required the lead agency to consider all comments received on an EAW prior to making its determination on the need of an EIS. According to the Massachusetts Office of Environmental Affairs (the state office that administers the law that served as the model for the new Minnesota law), these decisions are

rarely appealed to the courts--many compromises occur and many problems are resolved without resorting to judicial challenge.<sup>33</sup>

### **The State Environmental Quality Review Act of New York**

The State Environmental Quality Review Act (EQRA), section 8-0101, et seq., New York Environmental Conservation Law, established the environmental impact analysis requirements for the State of New York. Under EQRA, the New York Department of Environmental Conservation is required to adopt rules, keep records, and generally administer the law.<sup>34</sup>

EQRA requires lead agencies at all levels of government in New York--city, town, village, county, and state--which either funds an action, directly undertakes an action, or issues an approval for an action, to make a determination of significance. Under EQRA, the determination of significance, and thus, the decision to require an EIS is the exclusive authority of the lead agency. There is no administrative agency or board in New York that has the power to reverse or question this decision. Any person or agency aggrieved by a lead agency's decision must take the matter to court.<sup>35</sup>

### **The Environmental Impact of Governmental Actions Act of South Dakota**

The Environmental Impact and Governmental Actions Act of 1974 (EIGA) of South Dakota, chapter 34A-9, South Dakota Codified Laws, provides that all agencies may prepare, or have prepared by contract, an environmental impact statement on any major action they propose or approve which may have a significant effect on the environment. In order to avoid duplication, however, the law waives the state EIS requirement if a federal EIS is being prepared for the action.<sup>36</sup>

The South Dakota Department of Natural Resources is required to administer the law and must keep track of all federal and state actions (if any) requiring EISs. Unlike most state laws, the preliminary document required under the EIGA is referred to as a draft environmental impact statement (DEIS) not an "environmental assessment." A DEIS is a preliminary statement without the length and detail of a final EIS. DEISs are required to be circulated and are open to public comments.<sup>37</sup>

In South Dakota, the decision to require or not require an EIS for any particular action is placed with the lead agency. However, this decision is subject to reversal by two state boards composed of lay persons who are appointed by the governor. Contingent upon the type of activity being proposed, the matter being considered is directed to either the Board of Water Management or the Board of Minerals and Environment. The required forum for the

boards' decision-making duties on EIS matters is a public hearing. If a board decides that an action requires an EIS, the board will designate the agency responsible for the coordination of the EIS.<sup>38</sup>

While the law authorizing South Dakota's boards to overrule agency decisions in EIS matters has been in place since 1974, the boards have never been confronted with the opportunity to exercise their powers. In fact, according to the Department of Water and Natural Resources, there has never been a state EIS written in South Dakota over the entire history of the law.<sup>39</sup> According to the Department, there is not a great deal of development in South Dakota that requires environmental impact analysis on the state level. Most of the major developments in South Dakota requiring environmental review are federally-funded actions such as large-scale irrigation projects or housing developments backed by federal mortgage agencies such as the Farmer's Home Administration.<sup>40</sup> Under these circumstances, the law exempts these actions from the state EIS requirement. The boards have no power of oversight over NEPA affairs.

### **The Montana Environmental Policy Act**

Montana's environmental impact statement requirements are enumerated under the Montana Environmental Policy Act, (MEPA) chapter 69-6501, et seq., Montana Revised Codes. MEPA established the Environmental Quality Council (EQC), which serves as the legislative arm over the EIS process and drafts rules governing the system.<sup>41</sup> In Montana, EIS rules are drafted but not adopted by the EQC--draft rules are submitted to each agency for review and individual adoption.<sup>42</sup>

In Montana, the task of determining the level of environmental review necessary for any given action is placed with the lead agency. The EQC has no authority to reverse an agency's determination. Under MEPA, citizens aggrieved by an agency's decision must appeal that decision to the appropriate district court.<sup>43</sup>

### **ENDNOTES**

1. Pub. L. No. 91-190, 83 Stat. 852, 1970, 42 U.S.C. §§4321-4370(a).
2. Peter E. Black, Environmental Impact Analysis (New York: Praeger Publishers, 1981), p. 13.
3. Ibid.
4. Ibid., p. 15.
5. Ibid.
6. Telephone interview with Shaun Cunningham, Council on Environmental Quality, Washington, D.C., September 10, 1989.

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7. Ibid.
8. Ibid.
9. Ibid.
10. Telephone interview with Leslie Krinsk and Christine Sproul, Environmental Affairs Agency, State of California, September 18, 1989.
11. Ibid.
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid.
16. Sharon Decker, "Changing the Environmental Review Procedure in Minnesota," Improving Impact Assessment, Increasing the Relevance and Utilization of Scientific and Technical Information, ed. Stuart L. Hart, Gordon A. Enk, and William F. Hornick (Colorado: Westview Press, 1984), p. 403 (hereinafter referred to as Decker).
17. Ibid., p. 404.
18. Telephone interview with Michael Sullivan, Executive Director, Environmental Quality Board, State of Minnesota, October 23, 1989.
19. Decker, p. 406.
20. Ibid.
21. Ibid., p. 404.
22. Ibid.
23. Ibid., p. 405.
24. Ibid.
25. Telephone interview with Sullivan.
26. Decker, p. 406.
27. Ibid., p. 405.
28. Ibid.
29. Ibid.

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30. Ibid. p. 406.
31. Minnesota, Environmental Quality Board, Guide to the Rules of the Minnesota Environmental Review Program, 1989 Edition, published June 1989.
32. Decker, p. 408.
33. Telephone interview with Sullivan.
34. Telephone interview with Lou Concra, Environmental Quality Office, State of New York, September 25, 1989.
35. Ibid.
36. Telephone interview with Joe Bower, Department of Water and Natural Resources, State of South Dakota, October 23, 1989.
37. Ibid.
38. Ibid.
39. Ibid.
40. Ibid.
41. Telephone interview with Steve Pilcher, Department of Health and Environmental Sciences, State of Montana, October 12, 1989.
42. Ibid.
43. Ibid.

## **Chapter 5**

### **DISCUSSION OF ALTERNATIVES**

The list of new alternatives that can truly be called innovative or realistic following five years of failed attempts to pass legislation to authorize the Environmental Council (Council) to issue declaratory rulings on negative declarations is, quite understandably, very limited. No amount of rewording and reworking legislation to authorize the Council to reverse agency decisions will eliminate the fact that many agencies find this power to be unwarranted and intrusive upon their functional responsibilities. The fate of any measure to grant the Council this authority, more than likely, will parallel that of its predecessors. Indeed, the lack of realistic solutions offered by organizations and individuals interviewed during the course of this study to mitigate the possibility of another veto is a reflection of this understanding.

To ascertain the prevalence of the use of such power by comparable EIS administrative boards or agencies in other jurisdictions, the federal Council on Environmental Quality and several state EIS programs were contacted. When described to EIS agency personnel in other states, the situation in Hawaii was greeted with both surprise and understanding. Surprise with regard to the enormous powers of oversight exercised by the Council in the past, and understanding with regard to the administration's resistance to endorse the use of this power.

While the prospect of passing legislation to authorize the Council to issue declaratory rulings seems bleak, several alternatives may exist to resolve the problem from a different perspective. The purpose of this chapter is to review some of the alternatives available to mitigate the problems associated with the appeal of agency determinations on EIS matters. The alternatives include: (1) legislative override of the Governor's veto; (2) establishment of a board to mediate EIS disputes between aggrieved parties and the lead agency; and (3) the establishment of a public input process during the environmental assessment stage of the process to reduce disputes at the notice of determination stage.

#### **Alternative I: Legislative Override of the Governor's Veto**

If the Legislature is firmly committed to authorizing the Council to issue declaratory rulings, it is likely that the only means available to pass legislation granting this authority is to override the veto that inevitably awaits its next effort. After five years of reintroduction, there is little that can be suggested to improve the possibilities of passage of such a measure. House and Senate bills in the past were not vetoed on the basis of poor drafting or technical, non-substantive errors. It was the basic intent and purpose of each bill--to authorize the Council to rule on agency decisions with regard to the need to prepare an EIS--that caused their veto. The basic intent of the bills has been found to be inconsistent with the law established under section 91-8, Hawaii Revised Statutes. Without amendments to Hawaii's

Administrative Procedure Act to allow agencies to make determinations on questions which may arise on other agencies' functional responsibilities (which is not recommended), the intent and purpose of these bills will remain inconsistent with the law.

With the passage of such legislation, however, the Legislature should be prepared to adequately staff the Council to support it in its analysis of petitions for rulings to ensure accurate decision-making. Without sufficient staff support, the Council, which meets only on a periodic basis, may find it difficult to develop responsible decisions on these issues.

**Alternative II: Develop a Mediation Panel to Mediate Disputes  
Between Aggrieved Parties and Agencies**

One suggestion that offers a novel approach to dealing with the problem of appeals of agency decisions is the development of a mediation panel to resolve disputes that arise over agency decision regarding EIS requirements. The panel, composed of an undetermined number of experts trained in the art of mediation, would intervene in disputes over the need to draft an EIS. The decision would be binding among the parties involved in the dispute.

While this alternative is refreshing in that it focuses on an approach not concerning declaratory ruling powers for the Council, this method may also suffer from unwanted problems if several details are not worked out. Some problems may include:

- (1) The effect the mediation process may have on lengthening the timetable of the current EIS process;
- (2) The fact that the panel's decision, like the Council's, would be just another intermediate ruling subject to reversal by the courts;
- (3) The fact that the dispute in question is to require or not to require an EIS--there is no middle ground to such an issue--whatever decision the panel arbitrates, an aggrieved party will emerge from the process;
- (4) The fear that this mechanism will promote frivolous challenges to agency decisions;
- (5) The fear that mediators may not possess the technical skills and background of agency personnel trained to evaluate the impacts of their actions on the environment; and
- (6) The fact that this mechanism expands the bureaucracy involved in the environmental review process and the belief that the administration's



opposition to the issue will not be eliminated by simply placing the authority to overrule with a mediation panel rather than with the Council.

**Alternative III: Establish a Public Notification/Comment Procedure to Facilitate Citizen Involvement During the Environmental Assessment Stage of the EIS Process.**

Because the focus of the debate over the past five years has centered on the Council's authority to issue declaratory orders, inadequate emphasis has been placed on solving the true cause of the problem--the inability of citizens groups to participate in the decision-making process of state and county agencies.

One of the principal objectives of Hawaii's EIS law is to facilitate public involvement in the environmental impact review process. Logically, the most effective means of promoting awareness and involvement in this process is through timely public notification of the actions under consideration. An important benefit of promoting public participation in the decision-making process is the effect such involvement invariably has on reducing the public's resentment over decisions made behind closed doors.

While the law requires notification and allows comment at various other stages of the EIS process, the only legal mechanism made available to the public to voice its opinion on an agency's determination is to contest that determination in court within the period allotted under the law. In addition, public notice of an agency's assessment or consideration of any given agency or applicant-generated proposal is not required until the assessment has been concluded. Often, the first notice made to the public that an assessment was even underway is through the publication of a negative declaration in the *OEQC Bulletin*. The natural tendency of any concerned individual would be to immediately contest the decision in question--regardless of the nature or magnitude of the person's disagreement with the agency's analysis. In this regard, the only mechanism presently available to any individual or organization interested in contributing to an agency's decision during the assessment process, promotes, rather than reduces confrontation.

In light of the lessons learned in Minnesota (see chapter 4), an excellent alternative to promoting aggressive administrative confrontations in the EIS process is to allow interested parties to comment on an agency's proposed action at the stage most vital to the formulation of the agency's decision--the environmental assessment stage. Early notification and expanded awareness of actions in the process of agency assessment may:

- (1) Decrease the frequency of frivolous challenges filed against agency decisions, including challenges to "buy time" to study agency decisions;

## DECLARATORY RULINGS AND THE ENVIRONMENTAL COUNCIL

- (2) Decrease the delays and costs associated with appeals to the Council and to the court;
- (3) Serve to neutralize the position of the Council in the EIS process in that the power to influence the outcome of an agency's determination is contingent upon an aggrieved party's initiative to submit comments, rather than the Council's decision to follow through with the party's petition to act.

The negative aspects of a notification/comment requirement during the environmental assessment stage may include:

- (1) Increases in the workload for agency personnel contingent on the volume of comments received from the public;
- (2) Delays in agency decision-making due to the volume of new data that may need to be considered; and
- (3) Increases in costs to agencies and applicants due to delays and workload increases.

This concept may also be applied at any other point in the EIS process where public input is found to be poorly facilitated.

While there were as many as eight bills submitted to the Legislature to allow the Council to issue declaratory rulings on negative declarations, the Bureau found no measure seeking to establish a public notification requirement in the law.

## **Chapter 6**

### **CONCLUSION**

#### **Summary**

Hawaii's environmental impact statement process was established to create a system to elevate the public's awareness of the impacts of governmental and other regulated actions on the environment. The Legislature assigned the Environmental Quality Commission, and subsequently, the Environmental Council (Council), to assume the lead role in administering the State's environmental impact statement law. Hawaii's law, like those of several other states, was patterned after the National Environmental Policy Act of 1969 (NEPA). One important principle of NEPA that has had an important influence on the philosophical bases of most state laws is that the burden of the law's enforcement is placed upon the alert citizenry.

Hawaii's Environmental Council has long sought the authority to enforce certain elements of the law. Following several failed attempts to pass legislation to authorize the Council to rule on agency issued "negative declarations", the advice of the state Attorney General was solicited to clarify the Council's standing. Based on its finding that a statutory mandate did not exist and the ruling of the Hawaii Supreme Court in a recent related case, the Office of the Attorney General returned an advisory to the Council to restrict its use of its power issue rulings to matters involving their own statutes and rules. While the Attorney General's advisory was far from a complete prohibition on the use of declaratory orders, the opinion created a highly contentious situation between the Office of the Attorney General and the Council. Frustration on behalf of the advocates of the Council's authority has resulted in questions as to the effectiveness of an environmental board that lacks such authority.

Senate Concurrent Resolution No. 178 requests the Legislative Reference Bureau to study the issues causing uncertainty over the Environmental Council's authority to issue declaratory rulings. The Concurrent Resolution requests the Bureau to submit a report on possible alternatives to mitigate this uncertainty, including specific amendments to the law. The Bureau's findings and recommendations are presented in this chapter.

#### **Findings**

Based on the information gathered in this study, the Bureau finds little evidence to support the notion that Council's lack of authority to overrule agency determinations constitutes a "serious administrative deficiency"<sup>1</sup> in the environmental review process. The Bureau also finds that it is somewhat inappropriate to characterize the status of the Council's authority to exercise such powers as "uncertain".<sup>2</sup> In light of the Attorney General's recent advisory opinion, the Hawaii Supreme Court's ruling in *Fasi v. HPERB*, the long history of vetoes of legislative measures specifically establishing the Council's powers in this area over

the years, and the fact that despite all of this effort, the law continues to remain silent on the matter, it can be argued with certainty that a state law and policy on the use of this power by the Council does not exist. The state Attorney General is the highest legal counsel of the State. Questions as to the authority of the Council to rule on EIS matters have already been answered in several advisories issued by the office.

Some proponents of the Council's power contend that because the Legislature granted the Council decision-making powers in situations wherein an applicant is aggrieved by an agency's rejection of the applicant's final EIS, the Legislature probably intended to allow the Council to exert similar powers over agencies during the environmental assessment stage. This argument is not particularly convincing, and in fact, more appropriately supports the point of view that the Legislature more than likely never intended--under the original Act--to extend this power and responsibility to the Council. While all other powers and duties of the Council are explicit, the authorization to overrule agency decisions on matters regarding the necessity of an EIS does not exist.

Although the advisory to the Council from the state Attorney General advises the Council against engaging in its former practice of overruling agency actions, the notion that the advisory has, in effect, rendered the Council "powerless" is an overstatement. The Council's power to issue declaratory rulings on questions that are relevant to actions the Council may undertake in the exercise of its powers has not been removed. Under its broad mandate to determine and maintain the quality of the State's environment, the Council possesses broad powers to educate and inform the public of governmental actions affecting the environment. In addition, the Council continues to retain standing under the law to be adjudged an aggrieved party in bringing any judicial action against a determination that an EIS is or is not required for any given action.<sup>3</sup>

Comparatively speaking, the power of oversight exercised by the Council over state and county agency determinations until its receipt of the state Attorney General's advisory was quite extraordinary. Aside from the program in South Dakota, which, practically speaking, has little relevance in terms of applicability to Hawaii's program, no other state agency contacted during this study possessed the power to question or overrule lead agency determinations at any point in the EIS process. In fact, an example highly supportive of the notion that such power may be somewhat inappropriate was found in Minnesota.

While it is insufficient to simply argue--on the basis of the Minnesota example--that the powers and duties that led to the problems experienced by Minnesota would lead to similar difficulties in Hawaii, several lessons can be learned through the Minnesota case. Throughout the history of Hawaii's law, the Council functioned somewhat identically (albeit without comparable authority under the law) to the Minnesota Environmental Quality Board (EQB). Clearly, however, the management problems that seemed to plague the Minnesota program did not seem to affect Hawaii's operation. Quite understandably, therefore, the perspective held by Hawaii's Council on this issue differs substantially from the perspective

## CONCLUSION

held by Minnesota's EQB. In fact, the views of the agencies are literally reversed--the statutory element of its powers and duties found to be most problematic by the Minnesota EQB, is the very element of the law Hawaii's Council has fought so persistently to take on officially.

As stated earlier, the problems encountered by Minnesota's program with regard to declaratory orders do not assure failure for programs elsewhere. However, the approach taken in Minnesota to resolve the EQB's problems seems to be the most rational answer to the Council's current dilemma. Essentially, by recognizing the true cause of the problem--the inability of citizens to comment on agency actions during the environmental assessment process--the Minnesota EQB rendered moot the issue of administrative enforcement during the EIS process. Because of this action, the true objective of the all parties involved--to have a voice in the process--was achieved. Problems relating to high legal fees, wasted time, and an unsympathetic judiciary may also be mitigated to some degree. Likewise, agencies may also find that their determinations may be received with less astonishment when the public is aware of their activities from the outset.

Although there is sufficient evidence to support the claim that negative declarations are often issued inappropriately by state and county agencies, this problem is not a function of the Council's lack of power to overturn them. More than likely, it is a problem of the agencies' inability to interpret the law and rules of the environmental impact statement process. The problem of defining "significance" is a hurdle faced by many EIS programs in the United States. While the clarification of "significance" under Hawaii's law is beyond the scope of this study,<sup>4</sup> it is important that the Legislature recognize the basic cause of the problem being addressed.

## Recommendation

In light of the Administration's opposition to legislation authorizing the Environmental Council to exercise broad powers of oversight over agency decisions made during the environmental assessment process, the Bureau recommends that the Legislature consider other alternatives. While no alternative carries a guarantee to satisfy all parties, it is recommended that the Legislature seek to mitigate rather than exacerbate the problem of inter-agency conflicts in the EIS process. It is apparent that the true objective of most concerned individuals is to have the opportunity to contribute to the decision-making process of state and county agencies, not to threaten the progress of their projects through appeals to the Council. The legal mechanism to contest the findings of lead agencies has existed since the enactment of the law, duplication of this function at the administrative level regardless of whether it is placed within the Council or a mediation panel will serve to polarize the agencies and entrench them in their positions at the outset of the process. In this regard, the Bureau recommends that the Legislature consider amendments to the EIS law to facilitate public notification and comment during the environmental assessment process.

ENDNOTES

1. Standing Committee Report 1637 on Senate Concurrent Resolution 178, Fifteenth Legislature, 1989, State of Hawaii.
2. Ibid.
3. Hawaii Rev. Stat., sec. 343-7(b).
4. House Concurrent Resolution No. 267, adopted by the Legislature during the Regular Session of 1987, requested the Environmental Council, the OEQC, and the Environmental Center require the categories of action that require environmental review under chapter 343, Hawaii Revised Statutes. Recommendations were submitted to the Legislature to improve the process.

Appendix A

STANDING COMMITTEE REPORT NO. 1637

Honolulu, Hawaii

APR 14, 1989

Honorable Richard S. H. Wong  
President of the Senate  
Fifteenth State Legislature  
Regular Session of 1989  
State of Hawaii

Sir:

RE: S.C.R. No. 178

Your Committee on Agriculture, to which was referred S.C.R. No. 178 entitled:

"SENATE CONCURRENT RESOLUTION REQUESTING A STUDY ON THE  
ISSUANCE OF DECLARATORY RULINGS BY THE ENVIRONMENTAL  
COUNCIL,"

begs leave to report as follows:

The purpose of this concurrent resolution is to have the Office of State Planning study the issues causing uncertainty over the authority of the Environmental Council to issue declaratory rulings and to report its findings and recommendations to the 1990 legislature. The study should also propose ways to mitigate this dilemma and include proposed amendments to the law.

The Environmental Commission was recently advised by a deputy attorney general that it could no longer issue declaratory rulings. This conflicts with the Commission's past practice of issuing such rulings and poses a serious administrative deficiency in the present environmental process.

Your Committee received supporting testimony from the Office of State Planning, the Environmental Center of the University of Hawaii at Manoa and the American Lung Association.

In accordance with the Office of State Planning's recommendation, your Committee has amended this concurrent resolution to have the Legislative Reference Bureau conduct the study. Therefore, the Legislative Reference Bureau has been

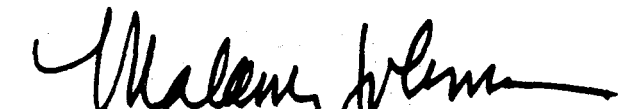
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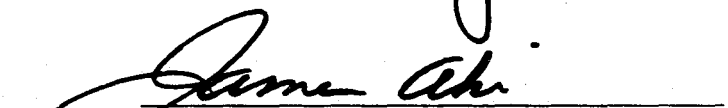
substituted for the Office of State Planning in the first "BE IT RESOLVED" clause and the second and third "BE IT FURTHER RESOLVED" clauses.

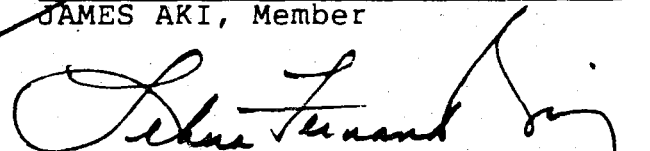
Your Committee on Agriculture concurs with the intent and purpose of S.C.R. No. 178, as amended herein, and recommends its adoption in the form attached hereto as S.C.R. No. 178, S.D. 1.

Respectfully submitted,

  
DONNA R. IKEDA, Chairman

  
MALAMA SOLOMON, Vice Chairman

  
JAMES AKI, Member

  
LEHUA FERNANDES SALLING, Member

  
GERALD T. HAGINO, Member

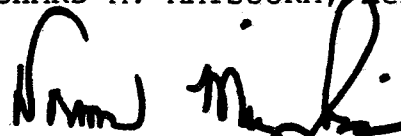
  
BERTRAND KOBAYASHI, Member



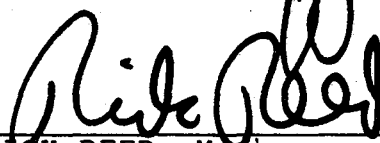
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RICHARD M. MATSUURA, Member



NORMAN MIZUGUCHI, Member



RICK REED, Member

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## SENATE CONCURRENT RESOLUTION

REQUESTING A STUDY ON THE ISSUANCE OF DECLARATORY RULINGS BY THE  
ENVIRONMENTAL COUNCIL.

WHEREAS, through the enactment of the environmental impact statement law, the Legislature established an environmental review process to integrate the review of environmental concerns with the planning processes of the State and counties and to alert decision makers of potential significant environmental effects that might result from the implementation of certain actions; and

WHEREAS, this review process is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, public participation during the review process benefits all parties involved and society as a whole, and potential adverse impacts may be reduced; and

WHEREAS, the Environmental Council was created as part of a system to stimulate, expand, and coordinate efforts to determine and maintain the optimum quality of Hawaii's environment; and

WHEREAS, the Environmental Council is empowered to make, amend, and repeal the rules administering the environmental impact statement law; and

WHEREAS, section 11-201-21, Hawaii Administrative Rules, was adopted by the Environmental Council and authorizes the Council to issue declaratory orders on the applicability of any statutory provision or any rule or order of the Council and to make determinations under the environmental impact statement law; and

WHEREAS, section 11-201-25, Hawaii Administrative Rules, authorizes the Council to issue a declaratory order, on its own motion or upon request but without notice or hearing, to terminate a controversy or to remove uncertainty; and

WHEREAS, the Legislature passed S.B. No. 2860, S.D. 1, H.D. 1, C.D. 1, during the 1988 Regular Session, which authorized the Council to issue, on petition of an interested person or

agency or on its own motion, a declaratory ruling or advisory opinion on the applicability of any statutory provision of the environmental impact statement law or of any rule or order adopted by the Council on matters pursuant to the law; and

WHEREAS, the Governor vetoed S.B. No. 2860 on June 14, 1988; and

WHEREAS, the Environmental Council has received five petitions for declaratory rulings since December 1987, and has not ruled on any of them; now, therefore,

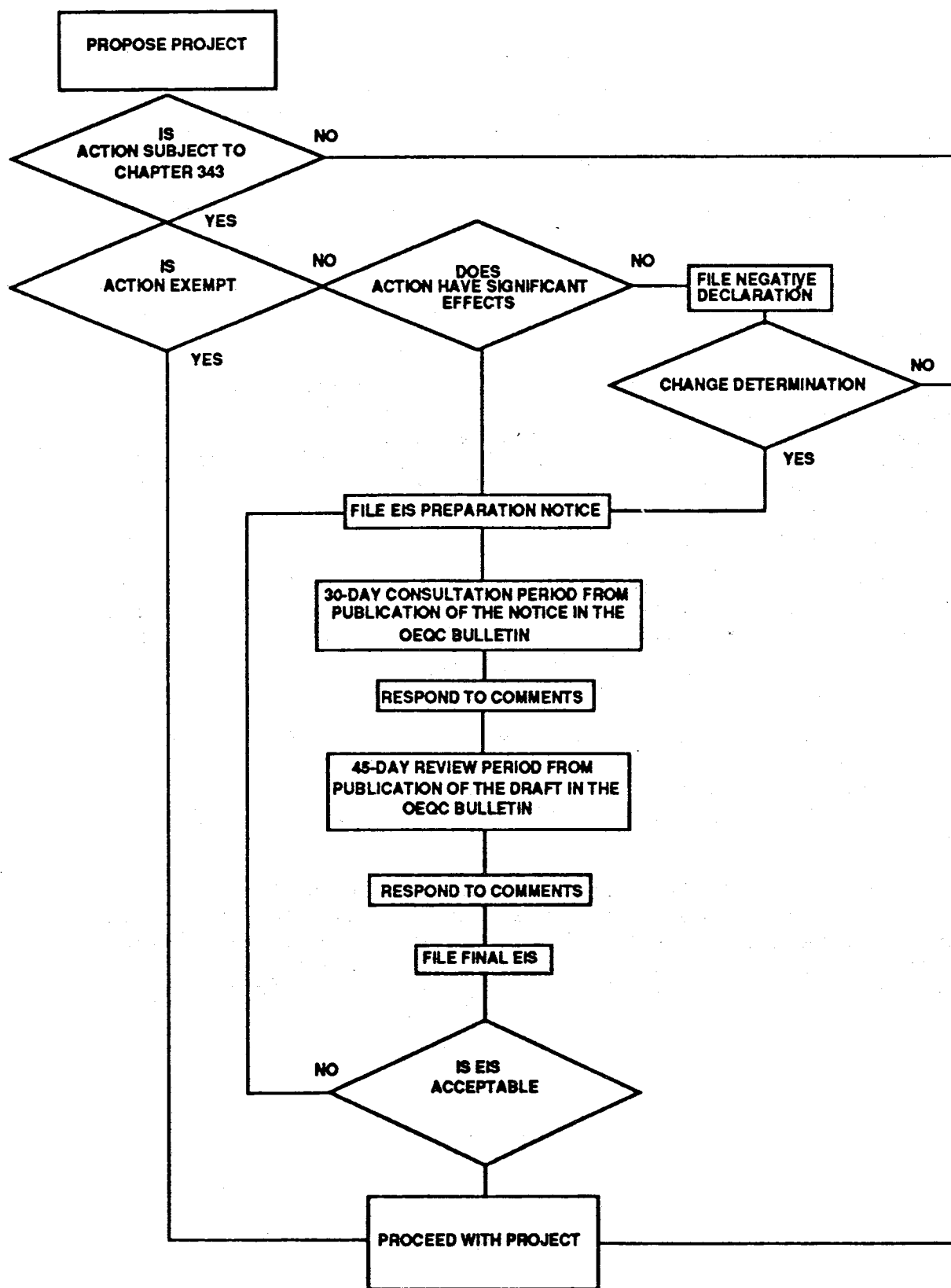
BE IT RESOLVED by the Senate of the Fifteenth Legislature of the State of Hawaii, Regular Session of 1989, the House of Representatives concurring, that the Legislative Reference Bureau is requested to study the issues causing uncertainty over the Environmental Council's authority to issue declaratory rulings and to propose ways to mitigate that uncertainty, including specific amendments to the law; and

BE IT FURTHER RESOLVED that the study be conducted in consultation with the Environmental Council, Department of the Attorney General, Environmental Center, Office of Environmental Quality Control, the Mayor of each county, and interested public and private organizations; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to submit a report of its findings, recommendations, and if necessary, proposed legislation to the Legislature not later than twenty days prior to the convening of the Regular Session of 1990; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Director of the Legislative Reference Bureau, the Attorney General, the Director of the Environmental Council, the Director of the Office of Environmental Quality Control, and the Mayor of each county.

## Appendix B



## Appendix C

### Chapter 343, HRS, Environmental Documents Processed (By Calendar Year)

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987*</u>
Negative Declarations	216	232	256	135
Preparation Notices	15	19	38	15
Draft Environmental Impact Statements	34	19	29	13
Final Environmental Impact Statements	22	17	24	18
Acceptance/	21(13)	16(7)	23(6)	19(7)
Non-Acceptance	4(02)	0(0)	2(0)*	0(0)*

\*Published between January 1, 1987 and July 31, 1987

( ) Governor's Acceptance/Non-acceptance

## Appendix D

### CHAPTER 343 MATTERS BROUGHT TO THE ENVIRONMENTAL COUNCIL, 1984-1988

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought by</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
<u>1984</u>				
Keopu Heights Subdivision Improvements	Letter to previous Environmental Quality Commission objecting to the acceptability of the environmental assessment; notice of existence and intent to protect ancestral burial sites adjacent to or within the path of the proposed flood control drainage channel,	Affected landowner	HI DPW	Acknowledged receipt of notice and explained role of Council.
Kahuku Shrimp Farms	Negative declaration challenge.	UHEC	DLU	Rendered opinion that negative declaration was inappropriate; according to significance criteria, project will have a significant impact because the size and nutrient loading of the discharge would affect coastal waters.
GP Amend.; Ag. to Ind.	Negative declaration challenge.	Community residents	Kauai Planning Dept.	Rendered opinion that notice of determination did not fully comply with the rules and that the determination was

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
				questionable because the agency did identify a significant potential impact.
Lahaina Shopping Center	Council staff questioned sequence of evaluation in making negative declaration determination.	Environmental Council staff	Maui PC	Rendered opinion that the negative declaration was based on an assessment which did not fully comply with the EIS rules in that recommended technical studies should have been conducted <u>prior to</u> rendering the determination.
Aliomanu Vista Hui GP Amendment	For information.	Private individual	Kauai Planning Dept.	No action.
Abandoned Vehicles Collection Center	For information.	Kawai Nui Heritage Foundation	DPW	No action.
Makena Road	Petition for Declaratory Ruling regarding whether an action is being implemented prior to the preparation of an EA and the filing of a notice of determination.	County Council member	DLNR, Maui	Dec. Ruling No. 84-03: Agencies advised that no further administrative actions should be taken until an EA has been completed and a determination made and filed.
Kokee Logging	Whether EA should have been done.	Conservation Council	DLNR	Letter to DLNR stating position that activity does not appear to be exempt from EA.

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
Puu Lani Ranch (1984-1985)	Whether EA should have been done.	Conservation Council	DLNR; DOH	Letter to DLNR regarding compliance with Chapter 343, HRS.
Haleakala Dish	Whether EA should have been done.	Sierra Club	DLNR	Since EA/Negative Declaration had been completed, DLNR sent a letter encouraging follow-up on mitigation measures.
Kakaako; HCDA	Petition for Declaratory Ruling regarding whether a supplemental EIS should be done.	Private citizen	OEQC/ Gov.	Dec. Ruling No. 84-01: HCDA shall prepare and submit a supplemental statement for the Makai Area Plan.
Rulemaking	Petition for Declaratory Ruling regarding whether rulemaking constituted an "action" therefore subject to assessment.	Private citizen	---	No ruling issued; more appropriate to address through EIS rules revision.
Maui Water System	Petition for Declaratory Ruling regarding whether an action was being implemented prior to the acceptance of the EIS.	Community association	---	Dec. Ruling No. 84-02: County of Maui advised to halt all further activity implementing the action until the EIS is accepted.
Farms of Kapua	Request for Recommendation re: EIS acceptability.	LUC	LUC	Refused to issue formal recommendation, but forwarded results of staff review of conformance with procedural and content requirements, emphasizing that review did not address substantive or technical accuracy.



<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
Lanikai Hale	Request for Recommendation re: EIS acceptability.	DLNR	DLNR	Refused to issue formal recommendation, but forwarded results of staff review of conformance with procedural and content requirements, emphasizing that review did not address substantive or technical accuracy.
Makaha Wells	Whether project implemented prior to EIS acceptance.	UHEC	BWS	No action, but staff directed to look into matter.
<u>1985</u>				
BWS Master Plan for Windward Oahu	Whether EIS too voluminous to review.	Kawai Nui Heritage Foundation	BWS	No action.
Keopu Heights Subdivision	Negative declaration challenge.	Subdivision landowner	HI DPW	Reiterated and clarified purpose of EA and agency's responsibilities under Chapter 343.
Hyatt Regency Waikoloa	Negative declaration challenge.	UHEC	HI PC	Expressed concern that negative declaration determination appears deficient because it did not take into account the entire project and therefore did not fully address the cumulative effect of the project.
Hyatt Regency Waikoloa	Negative declaration challenge.	DLNR request for comments	DLNR	Requested a formal opinion from AG regarding whether agency limited by permit

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
				jurisdiction in assessing proposed action.
South Kohala Resort (1985-1986)	Negative declaration challenge.	Private citizen	HI PC	Informed agency that entire project should have been assessed, not only portion that triggered Chapter 343 review. Requested AG assistance in supporting Council participation in plaintiff's appeal.
Yacht Harbour Plaza	Whether Supplemental EIS required.	Private citizen & Neighborhood Board	DLU	Informed agency that rules did not provide for addendums to incorporate additional information or the introduction of new materials. Council did not find adequate basis for questioning determination.
HCDA	Clarification of 1984 Dec. Ruling.	HCDA	---	Informed agency that EA required for projects that fall within applicable categories.
Mahinahina Airport	Concern with impact on environment.	Private citizen	---	No jurisdiction.
Olomana-Maunawili Sewer	Concern with alignment of sewer line	Kawai Nui Heritage Foundation	---	No action.
Hydroelectric Project: Wailuaiki Stream, Maui	Whether project being implemented prior to EIS acceptance.	Sierra Club	---	Informed agency that project should not be implemented prior to

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
				completion of EIS process.
<b><u>1986</u></b>				
Queen's Beach	Petition for Declaratory Ruling regarding applicability of Chapter 343 to City and County of Honolulu general plan and development plan amendments.	Life of the Land	DGP	Dec. Ruling No. 86-01: EIS process must be completed prior to Chief Planning Officer making a recommendation on general plan and development plan amendment applications, which would result in designation other than agriculture, or preservation.
47 General Obligation Bonds	Whether EA required.	OEQC	HI Planning Dept.	Deputy AG advised that project funded with general obligation bonds must be environmentally assessed.
Mokuleia Development Corp.	Whether EA required.	Private individuals	DGP	Reiterated that an EA is required for a general plan amendment.
Na Pali Coast Tour Boats	Whether EA required.	Private citizen	---	No action, other agencies handling problem.
Waiehu Beach Revetment	Concern with impact on environment.	Conservation Council	---	No action.

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
Makena Road	Petition for Declaratory Ruling challenging negative declaration.	Hui Alanui O Makena	Maui PC	Dec. Ruling No. 86-02: Directed the County to withdraw its negative declaration and to prepare an EIS because agency EA recognized the cultural value of the road.
Water Lease (License)	Petition for Declaratory Ruling challenging negative declaration.	Life of the Land	DLNR	Dec. Ruling No. 86-03: Information provided by agencies should be considered in EA and determination.
Yacht Harbour Plaza	Whether second EA required.	Private citizen	DLU	Ruled that a second EA not required for the project.
Kahawainui Stream	Whether City and County can accept Federal EIS to satisfy Chapter 343.	OEQC	DLU	Ruled that agency cannot accept Federal EIS to satisfy Chapter 343.
South Kohala Marina	Whether Supplemental EIS could be prepared when details are known.	HI Planning Dept.	HI Planning Dept.	Confirmed OEQC advice that supplemental EIS could be prepared when specific details known.
<u>1987</u>				
Resort Development at Mokuleia, Oahu	Review the procedures required by DGP in drafting the EIS.	Private citizen	DGP	No action.
Draft EIS	Ruling on the propriety of including incomplete reports in DEISs.	UHEC	---	Dec. Ruling No. 87-1: Incomplete reports in DEISs compromise the intent and purpose of Chapter 343.

<u>Matter</u>	<u>Reason Before Council</u>	<u>Question Brought By</u>	<u>Accepting Agency</u>	<u>Action by Council</u>
<u>1988</u>				
Chinatown Gateway Project	Ruling on negative declaration.	American Lung Assn.	Dept. of Housing and Community Development, C&C of Honolulu	AG advised the Council that it had no jurisdiction to rule.
Adoption of Instream Flow Standards	Applicability of Chapter 343.	Life of the Land	DLNR	AG advised the Council that it had no jurisdiction to rule.
Hawaiian Riviera Resort	Rule on the adequacy of the EIS.	Private citizen	---	AG advised the Council that it had no jurisdiction to rule.
Neil Blaisdell Parking Structure	Appeal of negative declaration.	American Lung Assn.	C&C of Honolulu	AG advised the Council that it had no jurisdiction to rule.

Source: Office of Environmental Control Records.

# Fasi declares war on lung association

By Andy Yamaguchi

*Advertiser Government Bureau*

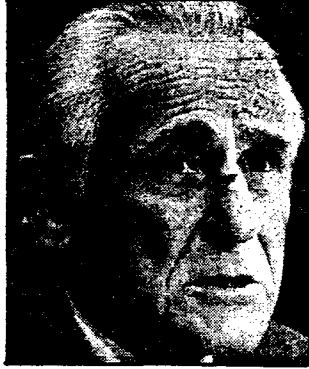
Mayor Frank Fasi this week called two American Lung Association of Hawaii officials "repugnant zealots" and vowed to torpedo the group's fund-raising efforts.

In a letter Thursday to association President Austin Dias, Fasi accused the group of "blackmailing" developers and city government by insisting on expensive environmental studies.

Association officials Monday criticized city and state agencies for not requiring environmental impact statements for several downtown construction projects, saying more stringent air-quality studies were needed.

The association has two ongoing lawsuits against the city.

"The Lung Association's misguided strategies are producing



**Mayor Frank Fasi**  
*Lots of olfactory adjectives*

only negative results," Fasi wrote, "making no real or significant change in the environment, but costing millions of dollars and slowing badly need-

ed housing construction."

Fasi also said Jim Morrow, the association's environmental health director, has a conflict of interest because he also does private consulting work, preparing impact statements for developers.

Fasi called Morrow and Helene Takemoto, the association's environmental health chairwoman, "repugnant zealots." Morrow and Takemoto did the criticizing of the city Monday.

"I will make it a point to work against your fund-raising efforts, and tell my friends and associates to do the same," the mayor wrote.

Fasi used the terms, "foul odor," "stink," "strange aroma" and "fetid and irresponsible" in his strongly worded letter.

Dias said, "It's unfortunate that he chooses to respond that way. It kind of clouds the is-

sue." He said if their fund-raising is hurt, it is the public that will suffer.

Takemoto said the group is "not anti-development" but is nonetheless an environmental watchdog. "If we weren't doing this job, who would?" she said in a written statement.

Takemoto said Morrow is often hired as a private consultant. "At those times, he does not act in the capacity of a lung association employee, nor does he compromise his belief that Hawaii should maintain the highest standards of air quality," she said. She also said his consultancy is beside the point of whether the city should conduct stricter air-quality studies.

Morrow said he would let Takemoto's statement speak for him as well.

Source: Honolulu Advertiser, October 25, 1989.

# **NOTICE OF ENVIRONMENTAL IMPACTS OF THE PAN PACIFIC PLAZA**

On August 8, 1988, a Negative Declaration was published in the State's OEOC Bulletin for the proposed Pan Pacific Plaza project (then known as the FSA Galleria/Union Mall project) in downtown Honolulu. By that notice, the City & County of Honolulu Department of Public Works declared that the proposed project would have no significant impact on the local environment.

The State Office of Environmental Quality Control wrote to the City and stated that it believed there were numerous impacts including air quality, air movement, and historic sites. The OEOC Director concluded by stating that the scope of the project was large enough to warrant an environmental impact statement. The American Lung Association of Hawaii also notified the City of its conclusion that the City's determination was erroneous and that an environmental impact statement was required. It pointed out that a highrise office building with an 800-stall parking garage would invariably attract more traffic into the already congested downtown area and that air quality would deteriorate further. The Lung Association also notified the City that field measurements at Tamarind Park showed that existing air quality in the project area was already worse than the "worst case" future pollutant levels predicted in the environmental assessment utilized by the City in making its determination. The Association's analysis indicated that "worst case" carbon monoxide levels would exceed State air quality standards and possibly exceed Federal health standards.

Despite the clear indications of impacts which, under state law, would trigger the requirement for an environmental impact statement, the City still refused to reverse its determination. Due to the City's failure to resolve the issue, the Association and the project developer have discussed the impacts associated with the project and agreed upon a number of mitigation measures which the developer will implement. These are being presented in another public notice published by the developer.

## **AMERICAN LUNG ASSOCIATION OF HAWAII**

245 North Kukui Street  
Honolulu, Hawaii 96817

Source: Honolulu Advertiser, October 25, 1989.

# Suit demands an EIS on Maui airport expansion

By Edwin Tanji

*Advertiser Maui County Bureau*

WAILUKU — Two Maui citizens groups and the Sierra Club yesterday filed a lawsuit seeking to force the state airports division to prepare an environmental impact statement on its plans for expanding Kahului Airport.

The suit notes that the airports division has received permits for a number of individual projects in the overall expansion plan — including construction of a runway safety area and construction of sections of a new terminal building.

In each case, the state filed a notice of no significant environmental effect from the individual projects.

Attorney Isaac Hall, who filed the suit in 2nd Circuit Court on behalf of the Sierra Club Legal Defense Fund, said there is a native Hawaiian burial site in an area where an airport parking apron is planned.

Native Hawaiians should have an opportunity to comment on and demand a response from the airports division on the impact of the project on the cultural sites, said attorney Arnold Lum of the Legal Defense Fund.

State airports officials were

not available to comment on the suit yesterday.

The suit follows an action filed in February by residents of the Spreckelsville area demanding that the airports division limit night flights and take other steps to reduce the noise impact from aircraft operations.

The Maui Air Traffic Association, which includes many Spreckelsville residents, is a complainant in both suits.

Stephen Pitt, a member of the association, said there has been no response from the state on providing noise abatement from Kahului Airport operations.

"We are concerned about the uncontrolled growth of the airport. We would like to see the state follow the laws like anyone else," he said.

While an environmental impact statement would not stop the expansion, Pitt said it would mean the state would have to address issues of noise and the potential for increased air traffic. The state also would need to respond to objections raised by residents, he said.

The state House also has urged that an impact statement be prepared before further airport expansion occurs. A House resolution asking for an impact statement was approved in April.



STAND. COM. REP. NO.

1381

Honolulu, Hawaii

APRIL 12, 1989

RE: H.C.R. No. 137

Honorable Daniel J. Kihano  
Speaker, House of Representatives  
Fifteenth State Legislature  
Regular Session of 1989  
State of Hawaii

Sir:

Your Committees on Planning, Energy, and Environmental Protection and Transportation, to which was referred H.C.R. No. 137 entitled:

"HOUSE CONCURRENT RESOLUTION REQUESTING AN ENVIRONMENTAL IMPACT STATEMENT FOR THE EXPANSION OF THE KAHULUI AIRPORT,"

beg leave to report as follows:

The purpose of this concurrent resolution is to direct the Department of Transportation (DOT) to prepare an Environmental Impact Statement (EIS) for the expansion of the Kahului Airport pursuant to Chapter 343, Hawaii Revised Statutes.

In enacting Chapter 343 the legislature found that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision-makers to significant environmental effects which result from the implementation of certain actions.

Your Committees are hesitant to use legislative directive with regards to the preparation of EIS's. However, responsibility for enforcement of EIS rules have been controversial ever since the 1983 revisions of Chapters 341 and 343. Legislative actions since 1983 have repeatedly expressed the intent to clarify these ambiguities by making it clear that the Environmental Council has the ability to issue Declaratory rulings with regard to the application of certain rules relative to Chapter 343. This issue also brings to light the need for an

HSCR PEP HCR137

administrative appeal procedure of an agency's determination. While your Committees are concerned with the precedent of legislative initiation of specific EIS preparation, the particular issue now in question is too serious to suggest a delay for legislative clarification of the Council's authority.

Your Committees finds that the DOT has issued well over fifteen negative declaration since 1978 concerning various development and expansion projects at the Kahului Airport. Section 200-12, State Environmental Impact Statement Rules, explicitly directs agencies to consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as short and long-term effects of the action. Various aspects of expanding Kahului Airport, individually and collectively, may have a significant effect on the environment; consequently the preparation of an EIS is required by law.

Your Committees on Planning, Energy, and Environmental Protection and Transportation concur with the intent and purpose of H.C.R. No. 137 and recommend its adoption.


Respectfully submitted,

COMMITTEE ON TRANSPORTATION

COMMITTEE ON PLANNING,  
ENERGY, AND ENVIRONMENTAL  
PROTECTION

  
PAUL T. OSHIRO, Chairman

  
MARK J. ANDREWS, Chairman

  
ED BYBEE, Vice Chairman

  
EZRA R. KANOHO, Vice Chairman

  
ROSALYN BAKER, Member

  
PETER K. ABO, Member

  
ROMY M. CACHOLA, Member

  
REB BELLINGER, Member

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## HOUSE CONCURRENT RESOLUTION

REQUESTING AN ENVIRONMENTAL IMPACT STATEMENT FOR THE EXPANSION OF  
THE KAHULUI AIRPORT.

WHEREAS, in enacting Chapter 343, Hawaii Revised Statutes, the Legislature found that the quality of humanity's environment is critical to humanity's well-being, that humanity's activities have broad and profound effects upon the interrelationships of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision-makers to significant environmental effects, which result from the implementation of certain actions; and

WHEREAS, Section 343-5, Hawaii Revised Statutes, defines the circumstances under which environmental assessments will be required for agency and applicant actions in order to determine potential environmental impact; and

WHEREAS, Section 200-12, State Environmental Impact Statement Rules, directs agencies to consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as short and long-term effects of the action; and

WHEREAS, the Department of Transportation is responsible for airport development within the State and has prepared master plans and environmental impact statements for most state airports; and

WHEREAS, there have been at least fifteen negative declarations issued since 1978 concerning various development and expansion projects at the Kahului Airport and no environmental impact statement has yet been released by the Department of Transportation; and

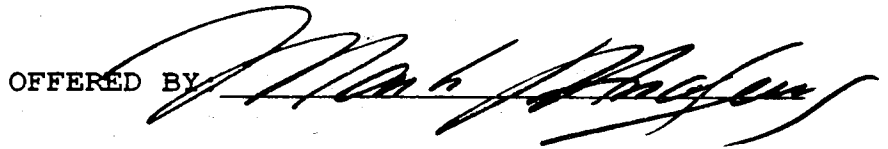
WHEREAS, there have been expressions of citizen concern on Maui about the ongoing expansion of the Kahului Airport without the prior preparation and public review of an environmental impact statement; now, therefore,

BE IT RESOLVED by the House of Representatives of the Fifteenth Legislature of the State of Hawaii, Regular Session of 1989, the Senate concurring, that the Department of Transportation is directed to prepare a comprehensive environmental impact statement pursuant to Chapter 343, Hawaii Revised Statutes, for the short and long-term development of the Kahului Airport; and

BE IT FURTHER RESOLVED that the draft environmental impact statement shall be prepared and made available for public review not later than January 1, 1990; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Director of Transportation, the Director of the University of Hawaii Environmental Center, the Director of the Office of Environmental Quality Control, the Chairperson of the State Environmental Council, the Mayor of Maui, and the Chairman of the Maui County Council.

OFFERED BY

A large, stylized handwritten signature in black ink, appearing to read "Mark J. McGowan", is written over the "OFFERED BY" text and extends to the right.

MAR 17 1989

## SUBCHAPTER 7

## DECLARATORY RULINGS

§11-201-21 Petitions for declaratory rulings.

(a) On petition of an interested person or agency, the council may issue a declaratory order as to the applicability of any statutory provision or any rule or order of the council and may also make determinations under chapter 343, Hawaii Revised Statutes. The petition shall conform to the requirements of section 11-201-9 and shall contain:

- (1) The name, address, and telephone number of each petitioner;
- (2) The signature of each petitioner;
- (3) A designation of the specific provision, rule, or order in question, together with a statement of the controversy or uncertainty involved;
- (4) A statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition;
- (5) A statement of the petitioner's position or contention; and
- (6) A memorandum of authorities, containing a full discussion of reasons and legal authorities, in support of the position or contention.

(b) The council shall inform the public regarding petitions for declaratory rulings in the office's periodic bulletin. Within thirty days after the submission of a petition for declaratory ruling, the council shall either deny the petition in writing, stating the reasons for the denial, or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in section 11-201-23, provided that if the matter is set for hearing, the council shall render its findings and decision within fifteen days after the close of the hearing. Any determination by the council regarding the petition for declaratory ruling shall be published in the office's periodic bulletin.

(c) The council, without notice or hearing, may dismiss a petition for declaratory ruling that fails in material respect to comply with the requirements

of this section. [Eff. DEC 06 1985 ] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

§11-201-22 Refusal to issue a declaratory order. The council, for good cause, may refuse to issue a declaratory order with specific reasons for the determination. Without limiting the generality of the foregoing, the council may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future;
- (2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if judicial relief is sought;
- (3) The issuance of the declaratory order may affect the interests of the council in a litigation that is pending or may reasonably be expected to arise; and
- (4) The matter is not within the jurisdiction of the council. [Eff. DEC 06 1985 ] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

§11-201-23 Request for hearing. Although in the usual course of disposition of a petition for a declaratory ruling no formal hearing shall be granted to the petitioner or to a party in interest, the council may order the proceeding set down for hearing. Any petitioner or party in interest who desires a hearing on a petition for a declaratory ruling shall set forth in detail in the request the reasons, together with supporting affidavits or other written evidence and briefs or memoranda of legal authorities, why the matters alleged in the petition will not permit the fair and expeditious disposition of the petition. To the extent that the request for a hearing is dependent upon factual assertion, the request shall be accompanied by affidavits establishing these facts. In the event a hearing is ordered by the council, chapter 91, Hawaii Revised Statutes, shall govern the proceedings. [Eff. DEC 06 1985 ] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

§11-201-24

§11-201-24 Applicability of order. An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. [Eff. DEC 06 1985 ] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

§11-201-25 Declaratory ruling on council's own motion. Notwithstanding this chapter, the council, on its own motion or upon request but without notice or hearing, may issue a declaratory order to terminate a controversy or to remove uncertainty. [Eff. DEC 06 1985 ] (Auth: HRS §§91-2, 91-8, 343-6) (Imp: HRS §§91-2, 91-8, 343-6)

## Appendix H

### MINNESOTA ENVIRONMENTAL POLICY ACT

(Minnesota Statutes Annotated, Volume 9: Environmental Protection, Chapter 116D — State Environmental Policy; Enacted by Laws of 1973, Chapter 412; Amended by Laws of 1975, Chs. 204, 271; Laws of 1976, Ch. 344; Laws of 1980, Chs. 447, 614; Laws of 1982, Ch. 424; Laws of 1983, Ch. 216)

Administering Agency: Minnesota Environmental Quality Board  
100 Capital Square Building  
550 Cedar Street  
St. Paul, Minn. 55101

**116D.01. Purpose.** The purposes of Laws 1973, Chapter 412 are: (a) to declare a state policy that will encourage productive and enjoyable harmony between man and his environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

**116D.02. Declaration of state environmental policy.**

**Subdivision 1.** The legislature, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technical advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill

the social, economic, and other requirements of present and future generations of the state's people.

**Subd. 2.** In order to carry out the policy set forth in Laws 1973, Chapter 412, it is the continuing responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources to the end that the state may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Discourage ecologically unsound aspects of population, economic and technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner;

(d) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever practicable, an environment that supports diversity and variety of individual choice;

(e) Encourage, through education, a better understanding of natural resources management principles that will develop attitudes and styles of living that minimize environmental degradation;

(f) Develop and implement land use and environmental policies, plans, and standards for the state as a whole and for major regions thereof through a coordinated program of planning and land use control;

(g) Define, designate, and protect environmentally sensitive areas;

(h) Establish and maintain statewide environmental information systems sufficient to gauge environmental conditions;

(i) Practice thrift in the use of energy and maximize the use of energy efficient systems for the utilization of energy, and minimize the environmental impact from energy production and use;

(j) Preserve important existing natural habitats of rare and endangered species of plants, wildlife, and fish, and provide for the wise use of our remaining areas of natural habitation, including necessary protective measures where appropriate;

(k) Reduce wasteful practices which generate solid wastes;

(l) Minimize wasteful and unnecessary depletion of nonrenewable resources;

(m) Conserve natural resources and minimize environmental impact by encouraging extension of product lifetime, by reducing the number of unnecessary and wasteful materials practices, and by recycling materials to conserve both materials and energy;

(n) Improve management of renewable resources in a manner compatible with environmental protection;



(o) Provide for reclamation of mined lands and assure that any mining is accomplished in a manner compatible with environmental protection;

(p) Reduce the deleterious impact on air and water quality from all sources, including the deleterious environmental impact due to operation of vehicles with internal combustion engines in urbanized areas;

(q) Minimize noise, particularly in urban areas;

(r) Prohibit, where appropriate, flood plain development in urban and rural areas; and

(s) Encourage advanced waste treatment in abating water pollution.

**116D.03. Action by state agencies. Subdivision 1.** The legislature authorizes and directs that, to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06.

**Subd. 2.** All departments and agencies of the state government shall:

(a) On a continuous basis, seek to strengthen relationships between state, regional, local and federal-state environmental planning, development and management programs;

(b) Utilize a systematic, interdisciplinary approach that will insure the integrated use of the natural and social sciences and the environmental arts in planning and in decision making which may have an impact on man's environment; as an aid in accomplishing this purpose there shall be established advisory councils or other forums for consultation with persons in appropriate fields of specialization so as to ensure that the latest and most authoritative findings will be considered in administrative and regulatory decision making as quickly and as amply as possible;

(c) Identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical consideration;

(d) Study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(e) Recognize the worldwide and long range character of environmental problems and, where consistent with the policy of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize interstate, national and international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(f) Make available to the federal government, counties, municipalities, institutions and individuals, information useful in restoring, maintaining, and enhancing the quality of the environment, and in meeting the policies of the state as set forth in Laws 1973, Chapter 412;

(g) Initiate the gathering and utilization of ecological information in the planning and development of resource oriented projects; and

(h) Undertake, contract for or fund such research as is needed in order to determine and clarify effects by known or suspected pollutants which may be detrimental to human health or to the environment, as well as to evaluate the feasibility, safety and environmental effects of various methods of dealing with pollutants.

#### **116D.04. Environmental impact statements.**

**Subd. 1a.** For the purposes of sections 116D.01 to 116D.07, the following terms have the meanings given to them in this subdivision.

(a) "Natural resources" has the meaning given it in section 116B.02, subdivision 4.

(b) "Pollution, impairment or destruction" has the meaning given it in section 116B.02, subdivision 5.

(c) "Environmental assessment worksheet" means a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.

(d) "Governmental action" means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government including the federal government.

(e) "Governmental unit" means any state agency and any general or special purpose unit of government in the state including, but not limited to, watershed districts organized under chapter 112, counties, towns, cities, port authorities and housing authorities, but not including

courts, school districts and regional development commissions other than the metropolitan council.

#### **Subd. 2. [Repealed]**

**Subd. 2a.** Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.

(a) The board shall by rule establish categories of actions for which environmental impact statements and for which environmental assessment worksheets shall be prepared as well as categories of actions for which no environmental review is required under this section.

(b) The responsible governmental unit shall promptly publish notice of the completion of an environmental assessment worksheet in a manner to be determined by the board and shall provide copies of the environmental assessment worksheet to the board and its member agencies. Comments on the need for an environmental impact statement may be submitted to the responsible governmental unit during a 30 day period following publication of the notice that an environmental assessment worksheet has been completed. The responsible governmental unit's decision on the need for an environmental impact statement shall be based on the environmental assessment worksheet and the comments received during the comment period, and shall be made within 15 days after the close of the comment period. The board's chairman may extend the 15 day period by not more than 15 additional days upon the request of the responsible governmental unit.

(c) An environmental assessment worksheet shall also be prepared for a proposed action whenever material evidence accompanying a petition by not less than 25 individuals, submitted before the proposed project has received final approval by the appropriate governmental units, demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects. Petitions requesting the preparation of an environmental assessment worksheet shall be submitted to the board. The chairman of the board shall determine the appropriate responsible governmental unit and forward the petition to it. A decision on the need for an environmental assessment worksheet shall be made by the responsible governmental unit within 15 days after the petition is received by the responsible governmental unit. The board's chairman may extend the 15 day period by not more than 15 additional days upon request of the responsible governmental unit.

(d) The board may, prior to final approval of a proposed project, require preparation of an environmental assessment worksheet by a responsible governmental unit selected by the board for any action where environmental review under this section has not been specifically provided for by rule or otherwise initiated.

(e) An early and open process shall be utilized to limit the scope of the environmental impact statement to a discussion of those impacts, which, because of the nature or location of the project, have the potential for significant environmental effects. The same process shall be utilized to determine the form, content and level of detail of the statement as well as the alternatives which are appropriate for consideration in the statement. In addition, the permits which will be required for the proposed action shall be identified during the scoping process. Further, the process shall identify those permits for which information will be developed concurrently with the environmental impact statement. The board shall provide in its rules for the expeditious completion of the scoping process. The determinations reached in the process shall be incorporated into the order requiring the preparation of an environmental impact statement.

(f) Whenever practical, information needed by a governmental unit for making

final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement.

(g) An environmental impact statement shall be prepared and its adequacy determined within 280 days after notice of its preparation unless the time is extended by consent of the parties or by the governor for good cause. The responsible governmental unit shall determine the adequacy of an environmental impact statement, unless within 60 days after notice is published that an environmental impact statement will be prepared, the board chooses to determine the adequacy of an environmental impact statement. If an environmental impact statement is found to be inadequate, the responsible governmental unit shall have 60 days to prepare an adequate environmental impact statement.

#### **Subd. 3. [Repealed]**

**Subd. 3a.** Within 90 days after final approval of an environmental impact statement, final decisions shall be made by the appropriate governmental units on those permits which were identified as required and for which information was developed concurrently with the preparation of the environmental impact statement. Provided, however, that the 90 day period may be extended where a longer period is required by federal law or state statute or is consented to by the permit applicant. The permit decision shall include the reasons for the decision, including any conditions under which the permit is issued, together with a final order granting or denying the permit.

#### **Subd. 4. [Repealed]**

**Subd. 4a.** The board shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.

#### **Subd. 5. [Repealed]**

**Subd. 5a.** The board shall, by January 1, 1981, promulgate rules in conformity with this chapter and the provisions of chapter 15, establishing:

(a) The governmental unit which shall be responsible for environmental review of a proposed action;

(b) The form and content of environmental assessment worksheets;

(c) A scoping process in conformance with subdivision 2a, clause (e);

(d) A procedure for identifying during the scoping process the permits necessary for a proposed action and a process for coordinating review of appropriate permits with the preparation of the environmental impact statement;

(e) A standard format for environmental impact statements;

(f) Standards for determining the alternatives to be discussed in an environmental impact statement;

(g) Alternative forms of environmental review which are acceptable pursuant to subdivision 4a;

(h) A model ordinance which may be adopted and implemented by local governmental units in lieu of the environmental impact statement process required by this section, providing for an alternative form of environmental review where an action does not require a state agency permit and is consistent with an applicable comprehensive plan. The model ordinance shall provide for adequate consideration of appropriate alternatives, and shall ensure that decisions are made in accordance with the policies and purposes of Laws 1980, Chapter 447;

(i) Procedures to reduce paperwork and delay through intergovernmental cooperation and the elimination of unnecessary duplication of environmental reviews;

(j) Procedures for expediting the selection of consultants by the governmental unit responsible for the preparation of an environmental impact statement; and

(k) Any additional rules which are reasonably necessary to carry out the requirements of this section.

**Subd. 6.** No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and

welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

**Subd. 6a.** Prior to the preparation of a final environmental impact statement, the governmental unit responsible for the statement shall consult with and request the comments of every governmental office which has jurisdiction by law or special expertise with respect to any environmental effect involved. Copies of the drafts of such statements and the comments and views of the appropriate offices shall be made available to the public. The final detailed environmental impact statement and the comments received thereon shall precede final decisions on the proposed action and shall accompany the proposal through an administrative review process.

**Subd. 7.** Regardless of whether a detailed written environmental impact statement is required by the board to accompany an application for a permit for natural resources management and development, or a recommendation, project, or program for action, officials responsible for issuance of aforementioned permits or for other activities described herein shall give due consideration to the provisions of Laws 1973, Chapter 412, as set forth in section 116D.03, in the execution of their duties.

**Subd. 8.** In order to facilitate coordination of environmental decision making and the timely review of agency decisions, the board shall establish by regulation a procedure for early notice to the board and the public of natural resource management and development permit applications and other impending state actions having significant environmental effects.

**Subd. 9.** Prior to the final decision upon any state project or action significantly affecting the environment or for which an environmental impact statement is required, or within ten days thereafter, the board may delay implementation of the action or project by notice to the agency or department and to interested parties. Thereafter, within 45 days of such notice, the board may reverse or modify the decisions or proposal where it finds, upon notice and hearing, that the action or project is inconsistent with the policy and standards of sections 116D.01 to 116D.06. Any aggrieved party may seek judicial review pursuant to chapter 14.

**Subd. 10.** Decisions on the need for an environmental assessment worksheet, the need for an environmental impact statement and the adequacy of an environmental impact statement may be reviewed by a declaratory judgment action in the district court of the county wherein the proposed action, or any part thereof, would be undertaken. Judicial review under this section shall be initiated within 30 days after the governmental unit makes the decision, and a bond may be required under section 562.02 unless at the time of hearing on the application for the bond the plaintiff has shown that the claim has sufficient possibility of success on the merits to sustain the burden required for the issuance of a temporary restraining order. Nothing in this section shall be construed to alter the requirements for a temporary restraining order or a preliminary injunction pursuant to the Minnesota Rules of Civil Procedure for District Courts. The board may initiate judicial review of decisions referred to herein and may intervene as of right in any proceeding brought under this subdivision.

**Subd. 11.** If the board or governmental unit which is required to act within a time period specified in this section fails to so act, any person may seek an order of the district court requiring the board or governmental unit to immediately take the action mandated by subdivisions 2a and 3a.

**Subd. 12.** No attempt need be made to tabulate, analyze or otherwise evaluate the potential impact of elections made pursuant to section 116C.63, subdivision 4, in environmental impact statements done for large electric power facilities. It is sufficient for purposes of this chapter that such statements note the existence of section 116C.63, subdivision 4.

**116D.045 Environmental impact statements; costs. Subdivision 1.** The board shall, no later than January 1, 1977, by rule adopt procedures to assess the proposer of a specific action, when the proposer is a private person, for reasonable costs of preparing and distributing an environmental impact statement on that action required pursuant to section 116D.04. Such costs shall be determined by the responsible agency pursuant to the rules promulgated by the board in accordance with subdivision 5 and shall be assessed for projects for which an environmental impact statement preparation notice has been issued after February 15, 1977.

**Subd. 2.** In the event of a disagreement between the proposer of the action and the responsible agency over the cost of an environmental impact statement, the responsible agency shall consult with the board, which may modify the cost or determine that the cost assessed by the responsible agency is reasonable.

**Subd. 3.** The proposer shall pay the assessed cost to the board. All money received pursuant to this subdivision shall be deposited in the general fund.

**Subd. 4.** No agency or governmental subdivision shall commence with the preparation of an environmental impact statement until at least one-half of the assessed cost of the environmental impact statement is paid pursuant to subdivision 3. Other laws notwithstanding, no state agency may issue any permits for the construction or operation of a project for which an environmental impact statement is prepared until the assessed cost for the environmental impact statement has been paid in full.

**Subd. 5.** For actions proposed by a private person there shall be no assessment for preparation and distribution of an environmental impact statement for an action which has a total value less than one million dollars. For actions which are greater than one million dollars but less than ten million dollars, the assessment to the proposer as determined by the agency shall not exceed .3 percent of the total value except that the total value shall not include the first one million dollars of value. For actions the value of which exceed ten million dollars but are less than 50 million dollars, an additional charge may be made to the proposer by the agency which will not exceed .2 percent of each one million dollars of value over ten million dollars. For actions which are greater than 50 million dollars in total value, an additional charge may be made to the proposer by the agency which will not exceed .1 percent of each one million dollars of value over 50 million dollars. The proposer shall pay the assessed cost to the board when a state agency is designated the responsible agency. All money received by the board pursuant to this subdivision shall be deposited in the general fund. The proposer shall pay the assessed cost to the designated lead agency when such agency is a local unit of government.

**116D.05. Review of authority, report.** All agencies of the state government shall

review their present statutory authority, administrative rules, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein that prohibit full compliance with the purposes and provisions of sections 116D.01 to 116D.06, and shall propose to the governor not later than July 1, 1974, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in Laws 1973, Chapter 412.

**116D.06. Effect of existing obligations.** **Subdivision 1.** Nothing in section 116D.03 to 116D.05 shall in any way affect the specific statutory obligations of any state agency to (a) comply with criteria or standards of environmental quality, (b) coordinate or consult with any federal or state agency, or (c) act or refrain from acting contingent upon the recommendations or certification of any other state agency or federal agency.

**Subd. 2.** Policies are supplemental. The policies and goals set forth in sections 116D.01 to 116D.06 are supplementary to those set forth in existing authorizations of state agencies.

**116D.07. Governor, report required.** The governor shall transmit to the legislature and make public by November 15 of each year an environmental quality report which shall set forth:

(1) The status and condition of the major natural, manmade, or altered environmental classes of the state, including, but not limited to, the air, the aquatic, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment;

(2) Current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic and other requirements of the state;

(3) The adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(4) A review of the programs and activities, including regulatory activities, of the federal government in the state, the state and local government, and non-governmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources;

(5) A program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation;

(6) A review of identified, potentially feasible programs and projects for solving existing and future natural resources problems;

(7) Measures as may be necessary to bring state government statutory authority, administrative regulations and current policies into conformity with the intent, purposes, and procedures set forth in Laws 1973, Chapter 412;

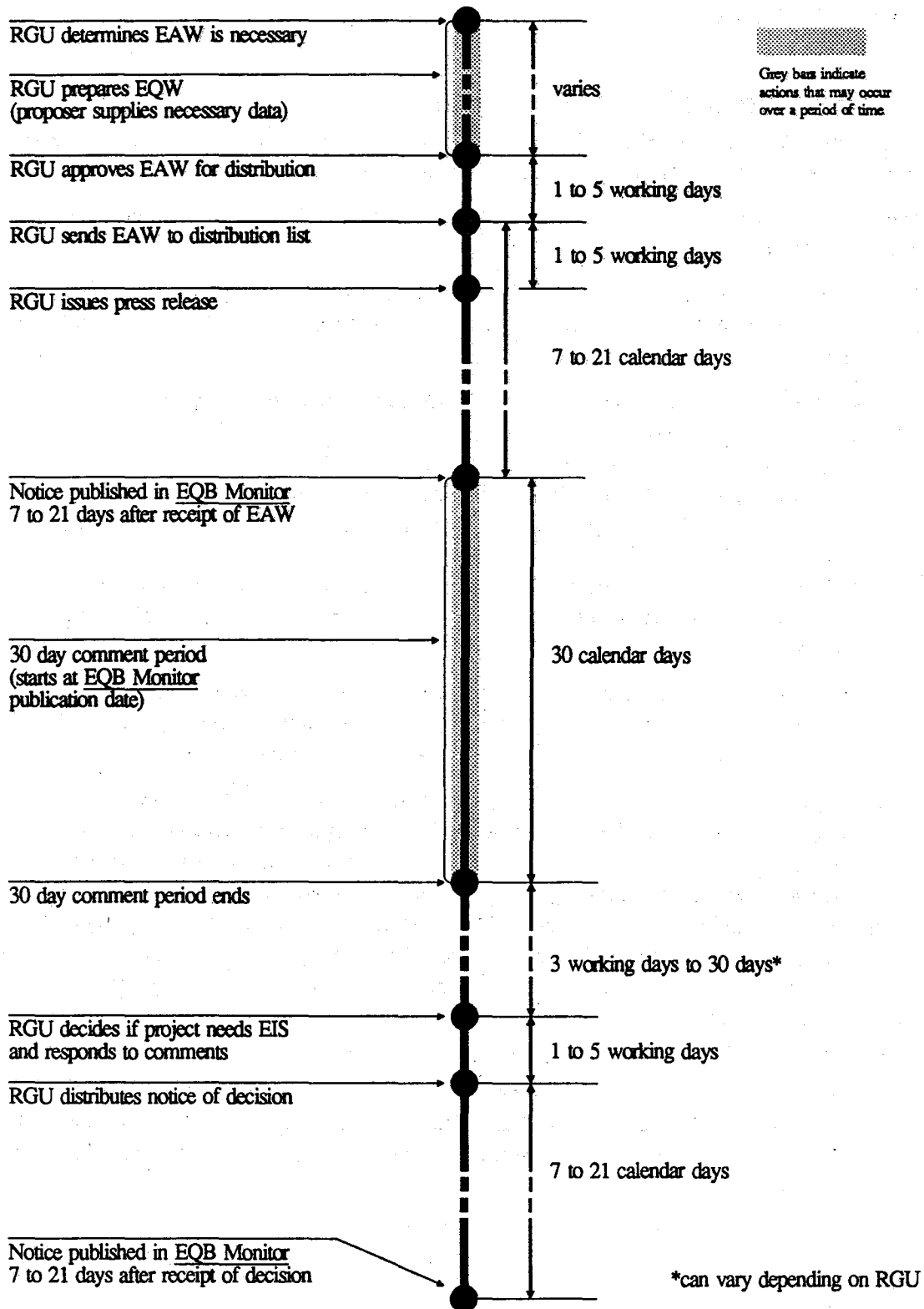
(8) The status of statewide natural resources plans; and

(9) A statewide inventory of natural resources projects, consisting of (a) a description of all existing and proposed public natural resources works or improvements to be undertaken in the coming biennium by state agencies or with state funds, (b) a biennial tabulation of initial investment costs and operation and maintenance costs for both existing and proposed projects, (c) an analysis of the relationship of existing state projects to all existing public natural resources works of improvement undertaken by local, regional, state-federal, and federal agencies with funds other than state funds, and (d) an analysis of the relationship of proposed state projects to local, regional, state-federal, and federal plans.

The purpose of this environmental quality report by the governor is to provide the information necessary for the legislature to assess the existing and possible future economic impact on state government of capital investments in and maintenance costs of natural resources works of improvement.

## Appendix I

# EAW Process



The EQB staff will be revising the EAW form in 1989. In this revision we will be trying to make a clearer separation of the "data portions" from the "conclusions" so that the division of responsibilities between the proposer and RGU is clearer.

## Deciding on the Need for an EIS

**Standard and Criteria.** As indicated at the beginning of this chapter, the primary purpose of the EAW process is to provide the facts needed to determine if an EIS is necessary for the project.

**"An EIS shall be ordered for projects that have the potential for significant environmental effects."**

(Part 4410.1700, subpt. 1.)

**"In deciding whether a project has the potential for significant environmental effects the RGU shall compare the impacts that may reasonably be expected to occur from the project with the criteria in this rule." (Subpt. 6.)**

**"Criteria.** In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. *Type, extent, and reversibility of environmental effects;*
- B. *Cumulative potential effects of related or anticipated future projects;*
- C. *The extent to which environmental effects are subject to mitigation by ongoing public regulatory authority; and*
- D. *The extent to which environmental effects can be anticipated and controlled as a result of other environmental studies undertaken by public agencies or the project proposer, or of EIS's previously prepared. (Subpt. 7.)*

It is *not* sufficient to rely on the absence of adverse comments to justify a decision not to order an EIS. The RGU has a legal obligation to examine the facts and draw its own conclusions about the significance of potential environmental effects.

**Record of Decision.** To be legally defensible, the RGU's decision must be documented in a written record containing "specific findings of fact" regarding the above four factors and the information on the project's potential environmental effects as revealed in the EAW and any comments received. There is no specific format that must be used for this record; it may be a specially prepared document or a section of the minutes or other record routinely maintained by the RGU. The important thing is that there be evidence that the RGU took a "hard look" at each reasonably likely environmental effect of the project as disclosed by the EAW and comments, drew a reasonable conclusion about the significance of each effect based on the facts disclosed and the four criteria listed above, and at the end made a reasonable conclusion about whether the project had the potential for significant environmental effects.

One way to organize the findings of fact in the record of decision is according to the various types of environmental effects listed in the EAW form. (The EQB staff will attempt in the 1989 revision of the EAW form to give a clearer identification of each type of effect addressed by each item, and to improve their order in the EAW form.)

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## Procedural Changes in the Decision Process Made in 1988

**Timing of the Decision.** If the decision is made by a board or council, it is now necessary only to wait three working days after the end of the comment period to make the decision instead of 10 working days. Since the comment period normally ends on a Wednesday, the decision may be made as early as the following Monday.

**Postponing a Decision in the Event Important Information Is Lacking.** A new provision has been added (subpt. 2a) which provides for up to a 30-day delay in making the EIS decision in the event that the RGU concludes that "...information necessary to a reasoned decision about the potential for, or significance of, one or more environmental impacts is lacking, but could be reasonably obtained...." Note that a delay may occur only if information *critical to the EIS need decision* is lacking and not simply because some information which could have been included was not in the EAW. The new provision acknowledges that alternatively the RGU may conclude that the project has the potential for significant environmental effects - in the absence of information demonstrating the contrary - and perform studies as part of the EIS to gather information about the uncertain impacts.

**Responding to Comments.** Provisions were added in 1988 requiring the RGU to make a specific written response to each substantive and timely comment received on the EAW as part of the record of decision, and to send a copy (of at least the relevant portions) to the commenter. (This has been routine practice for many RGUs over the years anyway, but now is a legal requirement.) In responding to comments, similar comments may be grouped together and given a single, joint response.

## Commenting on an EAW

Part 4410.1600 states that commenters should address: the accuracy and completeness of the material; potential impacts that warrant further investigation before the project is commenced; and the need for an EIS.

It is the experience of the EQB staff that commenters often mistakenly place their emphasis on the EAW *document* rather than on the EAW *process*. Commenters are reminded that there are no "draft" and "final" versions of an EAW. Consequently, it is not helpful to point out errors or omissions in the text of an EAW unless these comments are accompanied by statements about what should be done about the errors or omissions. Furthermore, the commenter must recognize that the courses of action available to the RGU within the EAW process are limited to the following:

- Decide on the need for an EIS within 30 days of the end of the comment period based on the EAW and the comments received;
- Postpone a decision for up to 30 days to gather additional information which is *critical* to the EIS decision; or
- In an extreme circumstance withdraw the EAW and start over - this can only be justified if the *project description* in the EAW is so incomplete or inaccurate that reviewers are not given a fair chance to review the true project.

It is the opinion of the EQB staff that there is a burden upon each commenting agency to make a reasonable effort to arrange with the RGU or proposer to get any information missing in the EAW which it feels is important to its review within the 30 day comment period. Any reviewer who finds that information needed for his or her review is lacking should call the contact person listed in the EAW as soon as possible to discuss getting further information.