



STATE ENVIRONMENTAL COUNCIL

DEPARTMENT OF HEALTH, STATE OF HAWAII
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Puananionaona Thoene

Vice Chair
Mary Begier

Members
Roy Abe
Stephanie Dunbar-Co
Scott Glenn (*Ex Officio*)
Maka'ala Ka'auomoana
P. Ka'anohi Kaleikini
I. Robin Kaye
Theresita Kinnaman
Robert Parsons
Charles Prentiss
Ron Terry
Michael Tulang
N. Mahina Tuteur

November 13, 2018 Meeting Minutes
Approved on November 27, 2018
Revised on December 18, 2018

Meeting held on
Tuesday, November 13, 2018, 11:00 AM – 3:30 PM
Capitol #1 Building
Room 410, Executive Office of Aging
250 South Hotel Street, Honolulu, Hawaii'i 96813

Members Present (11)

Puananionaona Thoene (Chairperson), Roy Abe, Stephanie Dunbar-Co, Scott Glenn (*ex officio*), Maka'ala Ka'auomoana, Robin Kaye, Tessie Kinnaman, Robert Parsons, Charles Prentiss, Ronald Terry, Michael Tulang

Members Absent (3)

Mary Begier, P. Ka'anohi Kaleikini, Mahina Tuteur

Environmental Council Deputy Attorney General (AG)
Edward Bohlen

Office of Environmental Quality Control (OEQC) Staff
Laura McIntyre, Les Segundo

Public

Rachel Goldberg (UH Law School), Emily Gaskin (UH Law School), Denise Antolini (UH Law School), John Garibaldi

Note: **Bolded** items indicate text from the agenda.

1. **Call to order, roll call and quorum, introductions**

- With a quorum of eleven members present, Chairperson Thoene called the meeting to order at 11:00 AM. No members of the public were present at the beginning of the meeting and introduced themselves as they entered.

2. **Review and approval of prior meeting minutes**

- Meeting minutes approved at the last meeting have been finalized and posted to the OEQC SharePoint site.
- The August 7, 2018 meeting minutes are still being revised.
- Director Glenn asked for clarifications on meeting notes for the October 25, 2018 meeting and that the minutes should be ready for the next Council meeting.

3. **Office of Environmental Quality Control (OEQC) Director's Report**

- OEQC Secretary McNeil resigned. OEQC has submitted a request to fill the position.
- Chair Thoene and Director Glenn gave a presentation to the Land Use Research Foundation on the state of the rules update and Permitted Interaction Group report.

- Director Glenn requested that members review their appointments to the Council. If their term ends on June 30, 2019, let him know if the Councilmember wishes to be reappointed and to re-apply through the Boards and Commission website.
- The Council has one opening so let people know to apply for it. Members of the Council expressed a desire for an appointee with cultural and historic resources experience.

4. Annual Report Committee

a. Discussion of draft articles submitted

- Draft articles are coming in and being reviewed by the committee.

b. Discussion of next steps and timeline

- OEQC provides support for production of the report so the timeline will likely be affected by OEQC no longer having a secretary.
- Articles are requested by December 4, 2018.

c. Discussion of outreach plan, print, social media, and budget

- The AR Committee would like to ask the UH Law School to help with outreach and electronic distribution for the annual report.
- Director Glenn reported that funding for production and printing will have to be re-examined based on OEQC no longer having a secretary.

d. Other Discussion

- The committee voted Member Dunbar-Co to be the Vice Chair.
- The committee discussed the purpose and intent of the annual report. The 2017 and 2018 reports feature articles written by Councilmembers.
- Hawai'i Revised Statutes (HRS) Section 341-6 states that:
"The council shall monitor the progress of state, county, and federal agencies in achieving the State's environmental goals and policies and with the assistance of the director shall make an annual report with recommendations for improvement to the governor, the legislature, and the public no later than January 31 of each year."
- Council consensus is that the articles represent individual member's perspective, not necessarily a Council recommendation. The individual articles do represent topics the Council examined in meetings and forums throughout the year. The Genuine Progress Indicator has been in development over several years as a more effective tool for monitoring the progress of state, county, and federal agencies instead of past approaches such as presenting data from different agencies based on what agencies make available.

5. Information & Outreach Committee

a. Planning for invasive species public information forum

- The committee would like to host a forum on invasive species at the UH Law School in early spring 2019. Member Ka'auomoana will organize it with the Law School and Josh Atwood, who presented to the Council in August 2018 on invasive species.
- The Council requested direction on providing food and drinks at these kinds of events. OEQC will look into this and provide feedback.

b. Discussion of cesspool issues and draft article for 2018 Annual Report

- Member Abe revised his article based on feedback from committee members and counsel. He stated that in certain specific situations cesspools can be the better solution. Member Ka'auomoana expressed concern that the intent of the article may be misunderstood or misapplied by people trying to justify cesspools not in those situations.

6. Proposed Rules, Hawai'i Administrative Rules Title 11, Chapter 200.1

a. Discussion of Permitted Interaction Group (PIG) report

- The Council considers the PIG report completed and will not revise it. If the Council finalizes rules language, the Council will prepare its response to comments. At that time, the Council may incorporate the report responses or develop its own.
- Member Ka'aumoana requested that the Honolulu Department of Planning and Permitting "Green Sheet" for tracking Chapter 343, HRS, compliance be included in the final report.

b. Action on proposed amendments to Proposed Rules

- The Council discussed and proposed amendments to the proposed rules.

MOTION: Member Terry moved and Member Parsons seconded that the Council approve the proposed draft rules as final (Version 1.1) subject to amendments, with the final vote to be after the revised document is made available to the public.

DISCUSSION: The Council agreed to proceed section by section asking if any member had amendments to offer. Refer to the table beginning on page 4 for a record of the discussion and amendments. Refer to Attachment 1, "EC Discussion Proposed Edits to Version 1.0 Draft" for the text proposed, discussed, and voted on for each amendment. The text highlighted in green is the language under consideration in an amendment for that section. Member Prentiss prepared an amendment (Attachment 2) and Director Glenn prepared two documents of amendments, one for the rules generally (Attachment 3) and one focused on the exemption subchapter (Attachment 4). For attachments 3 and 4, Director Glenn synthesized language raised by the PIG, other public comments, and his own edits, all of which are highlighted yellow as Director Glenn's proposed edits.

John Garibaldi, member of the public, submitted a letter (Attachment 5) on behalf of Lori Lum requesting the Council reconsider its inclusion of "evidence" and "analysis" to the definition of "environmental assessment". The Council declined to take the matter up at this meeting.

Member Dunbar-Co left at 2:18 pm and Members Terry and Tulang left at 2:56 pm.

MOTION OUTCOME: The Council postponed the vote until the next meeting on November 27, 2018. Discussion will resume at HAR Section 11-200.1-19. Councilmembers will re-examine Section 17 and provide suggestions for language.

7. Adjournment

- The Council plans to meet next on November 27, from 10 am to 4 pm. Members will hold November 28 from 9 am to 3 pm as a backup.
- The Council tentatively plans to meet on December 4.
- January 2019 – the Exemption Committee will likely be ready to meet with the Hawai'i County Department of Environmental Management about its exemption list.
- December 7, 2018 – Council members will attend the Native Hawaiian Legal Training on Maui. Councilmembers will contact OEQC to arrange for attendance.

Note: The Council will take a lunch break from 12:30 PM – 1:30 PM.

- The Council broke for lunch from 12:28-1:18 PM.

Table of Amendments for the Motion to Adopt the Draft Proposed Rules, to be read with Attachment 1, "EC Discussion Proposed Edits to Version 1.0 Draft"

Amend No.	Rules Section 11-200.1-	Motion / Second / Vote	Amendment Rationale / Text / Discussion
1.	1 Purpose	Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn. Second: Maka'ala Ka'auomoana Vote: Unanimously passed 11-0.	Incorporate language raised by the Permitted Interaction Group (PIG) but rephrase the part of paragraph (c) that leads into the list of three items. This change clarifies that the language is meant to express the purpose of the process. It more succinctly captures the goals and moves away from the word "shall".
2.	2 Definitions	Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn. Second: Mike Tulang Vote: Unanimously passed 11-0.	Incorporate language raised by the PIG and make other amendments to the following definitions: <ul style="list-style-type: none"> • Acceptance – Delete the last sentence because it is about process and is not intrinsic to the definition of acceptance itself. • Accepting authority – Insert "action" after "agency" and "applicant" to clarify the difference between agency and applicant regarding accepting authority. Incorporate language raised by the PIG to the following definitions: Addendum, FONSI, Project, Project, and Trigger.
3.	3 Computation of Time	Motion: Ron Terry To adopt amendments as raised by the PIG. Second: Tessie Kinnaman Vote: Unanimously passed 11-0.	Incorporate language raised by the PIG. Version 1.0 uses language from HAR Chapter 11-201, Environmental Council Rules of Practice and Procedure, however the statutory language is more succinct.
4.	4 Periodic Bulletin	Motion: Robin Kaye To adopt amendments as raised by the PIG. Second: Maka'ala Ka'auomoana Vote: Unanimously passed 11-0.	Incorporate language raised by the PIG to clarify that the periodic bulletin is to be published electronically. People may contact the OEQC for a printed copy or access the bulletin at libraries, including printing it there.
5.	5 Filing Requirements for Publication and Withdrawal	Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn. Second: Ron Terry Vote: Unanimously passed 11-0.	Incorporate language raised by the PIG but change the submittal deadline to 5 business days instead of 4 days. The current rule is 8 days. The proposed rules suggested 4 days with the intent to have the submittal deadline and publication date be within a week of each other, but due to staffing issues, the OEQC is concerned that it would not have the ability to make a 4-day turnaround, especially when there are many submittals to be processed and published.

	6 Republication of Notices, Documents, and Determinations	No motion, no amendment.	No discussion.
6.	7 Identification of Approving Agency and Accepting Authority	Motion: Scott Glenn To adopt amendments as raised by the PIG. Second: Robin Kaye Vote: Unanimously passed 11-0.	The term “proposed” is inappropriate here and should be removed.
7.	8 Application of Chapter 343, HRS, to Agency Actions	Motion: Ron Terry To adopt amendments as raised by the PIG. Second: Mike Tulang Vote: Unanimously passed 10-0. Charles Prentiss temporarily away.	Incorporate language raised by the PIG. The sentence at the end of (a)(2) is unnecessary. An EA or EIS is already required when a significant impact is anticipated. Item (a)(3) is unnecessary for an agency action because an agency proposing something related to this would already be using state or county lands or funds.
8.	9 Application of Chapter 343, HRS, to Applicant Actions	Motion: Robin Kaye To adopt amendments as raised by the PIG. Second: Tessie Kinnaman Vote: Unanimously passed 10-0. Charles Prentiss temporarily away.	Incorporate language raised by the PIG which shows recommended edits from the State Office of Planning to express the application of this trigger more accurately.
9.	10 Multiple or Phased Actions	Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn. Second: Robin Kaye Vote: Unanimously passed 11-0.	Incorporate language raised by the PIG and delete “proposed by an agency or applicant” because this language is repetitive. An action means something proposed by an agency or applicant.

10.	<p>11 Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS, for Proposed Activities</p>	<p>Motion: Ron Terry To adopt amendments as proposed by Scott Glenn, as amended by Ron Terry, as amended by Onaona Thoene. Second: Robin Kaye Vote: Unanimously passed 11-0.</p>	<p>Incorporate language raised by the PIG but correct the typos in the PIG report of paragraph (a).</p> <p>Amendment by Ron Terry to paragraph (a):</p> <ul style="list-style-type: none"> • Change “considerable” to “careful” – not looking for quantity, but quality of analysis. • Change “pre-examination” to “examination” • Delete “similar to and” so the sentence reads “...substantially relevant...” • Re-order paragraph (a) and (b). <p>Amendment by Onaona Thoene:</p> <ul style="list-style-type: none"> • Move paragraph (a) to the end so that it becomes paragraph (d) to keep positive language up front. <p>Note that Sections 11 and 12 are separated because they have different purposes. Sections 11 is about the use is to see if something that is being proposed is already covered by Chapter 343, HRS. Section 12 is about incorporating material from previous Chapter 343, HRS, actions into a new action.</p>
11.	<p>12 Consideration of Previous Determinations and Accepted Statements</p>	<p>Motion: Ron Terry To adopt amendments as raised by the PIG. Second: Robin Kaye Vote: Unanimously passed 11-0.</p>	<p>The issue of “programmatic” versus “program” continues to be raised by commenters. To reduce confusion, remove the word “programmatic” and only use the word “program”.</p>
12.	<p>13 Significance Criteria</p>	<p>Motion: Robin Kaye To adopt amendments as proposed by Scott Glenn. Second: Rob Parsons Vote: Unanimously passed 11-0.</p>	<p>Incorporate language raised by the PIG. The use of “substantial” is not defined nor given thresholds. The environmental review process rests on the rule of reason and court decisions that use phrases like “take a hard look”. HEPA has not historically used thresholds and introducing them at this point would require much more deliberation on the appropriate thresholds to set for when an exemption or EIS is warranted. Furthermore, having thresholds applicable to all islands and contexts is difficult. Using phrases like “substantial” allows for agencies to apply the law to the varied contexts of Hawai‘i.</p>

13.	14 Determination of Level of Environmental Review	<p>Motion: Ron Terry To adopt amendments as proposed by Scott Glenn.</p> <p>Second: Mike Tulang</p> <p>Vote: Unanimously passed 11-0.</p>	<p>Incorporate language raised by the PIG and apply the same edit to paragraph (a) to remove redundant language. Note that cumulative impacts are already tied into the concept of impact in the definition of “impact” so anytime there is use of the word “impact” then secondary and cumulative impacts are included. While the existing rules use these phrases as emphasis, these changes clarify language.</p>
14.	15 General Types of Actions Eligible for Exemption	<p>Motion: Ron Terry To adopt amendments as proposed by Scott Glenn.</p> <p>Second: Robin Kaye</p> <p>Vote: Unanimously passed 11-0.</p>	<p>Incorporate language raised by the PIG and amend other language. The language “meet the criteria for listing” introduces too much uncertainty into the exemption process as agency staff would likely defer to the State Historic Preservation Division to make a determination whether the proposed action met the eligibility criteria. Removing this language makes the standard clearer for agency staff. Removing this language means that structures that might be eligible could still be exempted, but the Council is also proposing that lists of exemption determinations be published every month so the public can monitor if a structure is inappropriately exempted.</p> <p>The other part of the amendment is to change “as set forth” in (b)(10)(D) to “as stated” to account for the list of examples of environmentally sensitive areas in section 11-200.1-13 to clarify when the affordable housing exemption would be unavailable.</p>
	16 Exemption Lists	No motion, no amendment	<p>The Council discussed the use of the word “activities” in this section, noting that the Council proposed amendments to previous sections to remove the word. The Council is trying to give direction to agencies when there is ambiguity about whether something is an action or not without creating rules for activities that are not actions. There are some things that should not even be discussed as actions, likely are not actions, but in an abundance of caution, agencies will want to put them on their exemption list. That is the purpose of Part 1 of the exemption list – to capture what agencies think are <i>de minimis</i> and gives the Council the opportunity to review what an agency considers <i>de minimis</i>.</p>

<p>15.</p>	<p>17 Exemption Notice</p>	<p>Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn, as amended by Charles Prentiss. Second: Rob Parsons Vote: Postponed - unanimously 10-0.</p>	<p>Delete the sentence at the end of paragraph (b), delete all of paragraph (c), and change paragraph (d) to (c). The rules would still require agencies to obtain Council concurrence for their exemption list every 7 years, file exemption notices and produce them to the public and agencies upon request, and provide a list of exemption determinations every month to the OEQC for publication in the bulletin. While no public comments on this section were received, OEQC is concerned that if too many lists no longer have concurrence, then it could be inundated with publishing 100s of exemption determinations. Furthermore, OEQC is concerned about the unknown effects on applicants who obtain exemption declarations when the 7 years passes and potentially be in limbo about the appropriate process steps to take for moving forward. Councilmembers expressed concern that this amendment would keep the process we have currently, which is burdensome to the public. Now, the public must request the exemption declaration from the agency, who can set up barriers to make it difficult for the public to access it, such as requiring someone on another island to come to O'ahu in person to receive a hard copy of the file. While the public could also file a UIPA (public records) request, that still does not make the exemption determination immediately available.</p> <p>Amendment by Charles Prentiss: Amend the new paragraph (c) to require agencies to provide an electronic link in the list of exemption determinations to each exemption notice on file at the agency. This would absolve OEQC of publishing each exemption notice while still making the exemption notice immediately available to the public. This would also make the rules consistent with digitizing government. Councilmembers noted that this could still be a problem and a burden on agencies to set up such a system. The OEQC is the clearing house so should be the one with the link not the agency as the agency might not keep the link alive. OEQC's links stay up. OEQC though does not have the capacity to maintain a database of all agency exemption determinations. Making agencies set up online links to all of their exemption determinations may be a substantive change to the rules, requiring another round of public hearings. Perhaps the rules could tell the agency to make the exemption notice available electronically upon request. Member Prentiss and Director Glenn will suggest possible language at the next meeting.</p> <p>Council decided to postpone discussion and move on to the next section.</p>
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16.	18 Preparation and Contents of a Draft Environmental Assessment	<p>Motion: Scott Glenn To adopt amendments as raised by the PIG. Second: Rob Parsons Vote: Unanimously 8-0</p>	<p>Incorporate language raised by the PIG. The Council discussed the proposed requirement for adding in sea level rise exposure maps. Members expressed concern that the level of detail at the parcel level is inaccurate and unhelpful. Others noted that many of the maps such as flood zone and tsunami zone are not quite accurate at the small scale, however they are useful for the big picture and looking at indirect and cumulative impacts. Also, the maps are cited as examples and the map information is updated regularly.</p>
17.	18 Preparation and Contents of a Draft Environmental Assessment	<p>Motion: Scott Glenn To adopt amendments as proposed by Scott Glenn. Second: Rob Parsons Vote: Unanimously 8-0</p>	<p>Retain the first sentence in paragraphs (b) and (c), and to delete the phrase in paragraph (c) regarding conceptual information. Comments recommended deleting these sentences as not necessary. However, it is important to state the difference between a program or project. Remove “conceptual information” in paragraph (c) because there is too much ambiguity around what is considered conceptual and how much one can predict for impacts in a meaningful way.</p>