Subchapter 9 Preparation of Environmental Assessments

Subchapter 9 (Preparation of Environmental Assessments) creates a distinct subchapter addressing EAs. This subchapter provides direction to an agency when it has decided that preparation of an EA is the appropriate level of chapter 343, HRS environmental review. The sections are ordered chronologically to show the process that will be followed, starting with the consultation requirement prior to beginning a draft EA, and ending with the determination to issue an EISPN or a FONSI.

Section 11-200.1-18 describes the requirement of early consultation, addresses the scope of analysis and level of detail required in a draft EA, and the content requirements for a draft EA. Section 11-200.1-19 describes the process and content requirements for issuing a notice of an anticipated FONSI based on a draft EA. Section 11-200.1-20 describes the requirements for public review and response to comments for a draft EA. Section 11-200.1-21 describes the contents of a final EA. Section 11-200.1-22 describes the determination to issue an EISPN or FONSI and the FONSI content requirements.

§ 11-200.1-18 Preparation and Content of a Draft Environmental Assessment

This section was formerly section 11-200-10 of the 1996 Rules, which addressed the contents of both a draft and final EA. The provisions related to the contents of a draft EA are retained here, but in line with the intent of the Proposed Rules to order the environmental review steps chronologically, the provisions related to the contents of a final EA were moved into a separate section in the subchapter, section 11-200.1-21.

The revised rule sources language from former section 11-200-9 of the 1996 Rules Version 0.1 proposed definitions for project and program, and this section provides how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

Subsection (b) is a modification of the former section 11-200-19 of the 1996 Rules applying the style guidelines for an EIS to an EA. It mirrors the language included in the proposed 11-200.1-24 for the contents of a draft EIS, and provides that the scope and specificity within an EA will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation. Because a final EA is a draft EA revised to incorporate responses to comments, this section also applies to the style, breadth and specificity of analysis and information contained in a final EA.

This section clarifies that a programmatic EA may omit issues that are not ripe for discussion at a more narrow scale. In the case of such an omission, a subsequent project may require its own

chapter 343, HRS determination. Proposed subchapter 7A assists with understanding this situation.

Because most environmental review focuses on site-specific and discrete projects, the revised rule distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature, and that for projects, which are site-specific and discrete. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction on how to address projects or programs at risk of segmentation and acknowledges the tension between the requirement to conduct environmental review at the earliest practicable time with the want for project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-24 regarding contents of a draft EIS.

The revised rule also focuses on analyzing instead of summarizing impacts. The use of the word “analyze” should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide enough information to support a conclusion. In some cases, summaries tend to be assertions of impact and the degree of significance without presenting a supporting argument.

This section also requires applicants to identify which approval, when combined with a trigger, necessitated chapter 343, HRS environmental review.

This section also requires an indication of when individuals, organizations, or agencies were “consulted with” but had “no comment” if those persons or agencies are included as “consulted” entities in the draft EA. “No comment” can occur in at least two instances. First, when a person or agency responds to a written request for comments that it has “no comment”, and second, when a proponent provides information but does solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations that their names were listed in EAs as having been “consulted with” when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The proposed rules clarify that if the proponent desires to include attendees at informational meetings as those “consulted with” then it should be indicated whether those individuals or organizations gave “no comment.” This also protects individuals and organizations who wish to gather more information through an informational session with a proponent but who that would not be prepared to also provide informed feedback at such a preliminary session from being listed as a “consulted” entity that spoke with the proponent on behalf of oneself or a particular community or interest group.

Lastly, this section incorporates language from former sections 11-200-10(8) and -10(9) requiring a draft EA to include specific agency or approving agency findings in the draft EA supporting agency determinations, including a FONSI.

§ 11-200.1-19 Notice of Determination for Draft Environmental Assessments

This section was formerly section 11-200-11.1 of the 1996 Rules. It aligns the EA process with changes to chapter 343, HRS that enable applicants to prepare their own EAs, as opposed to agencies preparing EAs on behalf of applicants. It separates language from the 1996 Rules into subsections to increase clarity.

Notably, this section simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted electronically. This section also incorporates the filing requirements set forth in subchapter 4, and clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is also acceptable).

The rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided in the document. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be knowledgeable to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

§ 11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments

This section was formerly section 11-200-9.1 of the 1996 Rules. If an agency does not anticipate a FONSI, then it will likely move to or authorize an applicant to directly move to prepare an EIS. This determination requires the approving agency to use its judgment and expertise. In some cases, although an agency may anticipate a FONSI, the FONSI may not be issued until an EA is completed.

The revised rule reflects practice that the applicant, rather than the approving agency, prepares the EA.

This rule further acknowledges that the public review period may differ from the standard 30 days provided under chapter 343, HRS and these rules for certain actions by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EAs (and EISs), per sections 334-2.7 and 353-16.35, HRS, respectively.

The Council found that the requirement to send a response to every individual person commenting on an environmental review document can be extremely burdensome on agencies and applicants, and was not justified by any real benefit to interested stakeholders and the public that could not be satisfied by notifying the commenter via publication of the final EA. The

revised rule allows agencies and applicants to respond to issues raised by comments received on the draft EA within the final EA and deletes the former requirement to send individual responses directly to each commentor. This is intended to modernize and simplify the environmental review process. Commentors must still be identified in the response within the EA. The widespread availability of electronic documents to commentors and interested stakeholders relieves the necessity of sending individual written responses but still ensures that commentors receive notice (through the publication of the draft and final EAs) that their comment has been received, considered, and responded to. These changes reduce the burden on proposing agencies and applicants in responding to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commentor separately, particularly in the wake of the electronic age and the increasing number of form letters and petitions used in this process.

The language proposed in this rule is drawn from the CEQ 40 questions, #29a and aligns with NEPA practice, which allows grouping of identical or similar comments and providing one response that covers the issues raised in identical or similar comments. Because individual responses would no longer be sent, the requirement for the OEQC to receive a copy of the responses to comments is no longer relevant and has been deleted.

This section also incorporates language from the comment response requirements for EISs in section 11-200.1-26 providing guidance on how to discern substantive from non-substantive comments, and the level of detail a proposing agency or applicant should include at a minimum in responses.

This section is also modified to reflect that applicants prepare their own documents. Accordingly, the timely preparation of an EA or EIS by the approving agency is no longer applicable and is deleted.

Lastly, the rule updates references to filing and publication of addenda to a draft EA and public review of draft environmental assessments.

§11-200.1-21 Contents of a Final Environmental Assessment

This section is taken from the former section 11-200-10 of the 1996 Rules and lists the specific content requirements for a final EA. Changes to this section focus on analyzing instead of summarizing impacts. The rule also clarifies that the use of the word “analysis” should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide a discussion detailed enough to support a conclusion. Summaries, in some cases, tend to be assertions of impact and the degree of significance without presenting a supporting argument or evidence. This rule also explicitly requires agencies to identify for applicants which discretionary permit necessitates environmental review under chapter 343, HRS.

§ 11-200.1-22 Notice of Determination for Final Environmental Assessments

Formerly section 11-200-11.2 of the 1996 Rules, this section sources language from section 11-200-9(b)(8) of the 1996 Rules. The revised rule aligns the process with Act 172 (2012), Direct-to-EIS, which requires the applicant to prepare documents instead of the approving agency. It also updates reference to subchapter 9, which encompasses the process and requirements for preparation of an environmental assessment previously included in sections 11-200-9(a) and 11-200-9(b) of the 1996 Rules.

The revised rule simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted to the OEQC electronically. The specific filing and publication requirements are set forth in subchapter 4.

The rule clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is sufficient). For applicant actions, the rule also explicitly requires the agency to issue its determination within 30 days of receiving the final EA.

The revised rule adds language regarding the approving agency for the case of applicants because the accepting authority is applicable only for EISs and, in the case of applicant EISs, the accepting authority and approving agency are the same.

The revisions modernize the requirements to include email as a requirement for contact information. Most written communication today is done by email so providing that is just as important as a physical mail address.

The rule clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be knowledgeable to answer questions regarding the action or refer to someone within the agency or applicant’s organization who can provide answers.

The revised rule further creates a standard set of content requirements for an EISPN regardless of whether the EISPN is a result of a final EA or a direct-to-EIS determination.

Subchapter 10 Preparation of Environmental Impact Statements

Subchapter 10 (Preparation of Environmental Impact Statements) creates a distinct subchapter that addresses EISs. This subchapter provides direction to an agency when it has decided that an EIS is the appropriate level of review, whether by the direct-to-EIS pathway as addressed in Subchapter 7 (Determination of Significance) or by the issuance of an EISPN after a final EA, as addressed in Subchapter 9 (Preparation of Environmental Assessments). The sections in this subchapter are ordered chronologically to show the process that will be followed, starting with the publication of an EISPN, and ending with the matter of supplemental EISs.

Section 11-200.1-23 describes the contents of an EISPN, as well as the requirement of full and complete consultation, the EIS public scoping meeting, and the comment period following the publication of an EISPN. Section 11-200.1-24 describes the content requirements for a draft EIS, the scope of analysis and level of detail required in a draft EIS, and the response requirements to comments received during the 30-day scoping period. Section 11-200.1-25 describes the public review requirements for a draft EIS. Section 11-200.1-26 sets forth the requirements for responding to comments received on a draft EIS.

Section 11-200.1-27 describes the content requirements for a final EIS. Section 11-200.1-28 specifies the criteria for deeming a final EIS an acceptable document and outlines the steps following an acceptance or nonacceptance determination. Section 11-200.1-29 describes how an applicant may appeal an agency determination of nonacceptance to the council. Section 11-200.1-30 addresses circumstances when a supplemental EIS may be required after acceptance of an EIS.

§ 11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement

This section was formerly section 11-200-15 in the 1996 Rules and governs the content requirements for an EISPN. As discussed in the rationale for section 11-200.1-10, this section requires the identification of all permits and approvals expected for the project, and for applicants specifically which discretionary approval that, combined with a trigger from HRS section 343-5, necessitated the applicant to undergo environmental review. This is a requirement in preparation of an EA and included here as a content requirement of an EISPN to ensure that the public and decision makers are provided this information because an agency may begin with, or authorize an applicant to begin with, an EISPN without preparation of an EA wherein that information would have been disclosed. The content requirements for the EISPN are standard regardless of how one arrives at conducting an EIS (*e.g.*, resulting from an EA or directly preparing an EIS).

The revised rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its

environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be knowledgeable to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

The revised rule removes the requirement for an individual to become a consulted party in order to engage directly in providing and receiving public documents and determinations related to the proposed action. All documents and determinations are now published online and available through the OEQC's website: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/

Most notably, this section makes the public scoping meeting a requirement and emphasizes that the meeting is about what the scope of the draft EIS should be. Proposing agencies and applicants acting within the spirit of chapter, HRS should engage meaningfully with individuals, organizations, and agencies early and often throughout the environmental review process.

The revised rule also shifts the focus to written comments submitted during the EISPN comment period and public scoping meeting and removes the requirement for the EIS preparer to transcribe individual oral comments. Instead, the revised rule provides that oral comments must be recorded, and a summary of the oral comments must be included as a separate section in the draft EIS. Written comments require responses to the comments in the draft EIS pursuant to section 11-200.1-24.

While the 1996 Rules allowed for a public scoping meeting, it was not required. The Council received comments both in favor of and opposed to requiring a public scoping meeting. The changes to the oral and written comments treatment were made after extensive consultation with interested stakeholders on this provision and as an effort to balance this new requirement for public scoping meetings and increased consultation, with the burden on the agencies and applicants preparing statements.

This section also allows the approving agency or accepting authority, with good cause, to extend the comment period on its own initiative or at the request of another party.

The draft EIS content requirements that were formerly in this section were relocated to section 11-200.1-24.

§ 11-200.1-24 Content Requirements; Draft Environmental Impact Statement

This section was formerly section 11-200-17 in the 1996 Rules and sets forth the content requirements for draft EISs. Other language in this section is sourced from sections 11-200-16 and 11-200-19 of the 1996 Rules.

A number of language edits in this section were made to bring it in line with NEPA language. This rule also provides that the scope and specificity within an EIS will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation.

Some new concepts were introduced in the Proposed Rules:

Project Specific and Programmatic EISs. Version 0.3 proposed definitions for “project” and “program”, and this section provides how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

This section clarifies that the programmatic EIS may omit issues that are not ripe for discussion at a more narrow, project-specific level. In the case of such an omission, a subsequent project may require its own chapter 343, HRS determination or environmental review. Proposed subchapter 7A assists with understanding this situation.

The revised rule also distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature and that for projects, which are site-specific and discrete. Most environmental review focuses on site-specific and discrete projects. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction on how to address projects or programs at risk of being viewed as segmented and acknowledges the trade-off between earliest practicable time to begin environmental review with project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-18 regarding contents of a draft EA.

Response to Comments. This section emphasizes that the comments are written comments that are submitted during the consultation period. Revised language in this section aligns with language in section 11-200.1-26 that changes the requirement in responding to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately. It further clarifies that responses shall be made and included within the draft EIS itself. Responses no longer need to be sent separately to each commenter.

The rule requires that when batching comments and responses, the preparer must include the names of the individual commenters who provided comments on that topic and who have been

grouped, so that those commenters can see whether their comment was addressed and what the response is.

The general summary of oral comments from the public scoping meeting does not need to be an exhaustive or verbatim transcript, but does need to be a written summary included in the draft EIS. It is intended to capture generally the comments made at the scoping meeting. Oral comments are not required to be responded to directly in the EIS, but must be taken into consideration in identifying likely effects. A court report or transcriber is not required at the public scoping meeting.

The revised rule also requires that a representative sample of the handouts prepared for and distributed at any public scoping meeting, including the agenda, must be included in the draft EIS. Handouts not related to the action need not be included. For example, general promotional materials for the applicant need not be included, but a fact sheet outlining the proposed action should be included.

The revised rule also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. The revised rule includes requirements for when individuals, organizations, or agencies were "consulted with" but had "no comment." This can occur in at least two instances. First, when an agency responds to a written request for comments that it has "no comment", and second, when a proponent provides information but does solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations that their names were listed in EISs as having been "consulted with" when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The proposed rules clarify that if the proponent desires to include attendees at informational meetings as those "consulted with" then it should be indicated whether those individuals or organizations gave "no comment." This also protects individuals and organizations who wish to gather more information through an informational session with a proponent but who that would not be prepared to also provide informed feedback at such a preliminary session from being listed as a "consulted" entity that spoke with the proponent on behalf of oneself or a particular community or interest group.

The rule makes explicit that only one representative copy of the agency consultation letter is required, similar to requiring only one reproduction of identical comments, such as form letters.

Public Scoping Meeting Location: The Council discussed where public scoping meetings would be required to be held. The Council sought to balance community input and engagement with reducing the burden on proposing agencies and applicants. Different options were considered, including requiring a public scoping meeting in the "county," or "island" or on the "islands" where the action will have the greatest effect. The Council noted the importance of holding the scoping meeting closest to where there will be an effect and should be held on the island of those likely

Subchapter 12 Retroactivity and Severability

Subchapter 12 (Retroactivity and Severability) creates a distinct subchapter addressing the retroactivity of the Proposed Rules when enacted and the severability of the Proposed Rules.

Section 11-200.1-32 describes when HAR Chapter 11-200.1 takes effect. Section 11-200.1-33 includes the severability clause.

§ 11-200.1-32 Retroactivity

This is an entirely new section on when the Proposed Rules take effect and how the Proposed Rules apply to actions that have already completed the environmental review process or are undergoing it at the time the Proposed Rules take effect. This section was added in response to public comments concerning actions currently pending. This provision ensures that an action is not prevented from proceeding under the 1996 Rules when it otherwise would but is delayed due to a judicial proceeding or other reasons.

This section also provides a period of time for agencies to update their existing exemption lists from “classes” to “types” of action, to designate those activities that would fall under “Part 1” of the list, and to reassign exemptions to the appropriate general types.

As used in this section, publication by OEQC requires that the document was submitted and met all requirements for publication.

§ 11-200.1-33 Severability

This section was formerly section 11-200-30 in the 1996 Rules and provides that each provision in the Proposed Rules are severable and that the invalidity of any provision in this chapter does not affect the validity of the others. No amendments are proposed to this section.

Note

The historical note will be revised following public hearing on the Proposed Rules and finalization for enacting the final Proposed Rules into law.