
A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL PROTECTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. (a) The legislature finds that the quality of
2 the natural environment is critical to humanity's well-being,
3 that humanity's activities have broad and profound effects upon
4 the interrelations of all components of the environment, and
5 that an environmental review process integrates the review of
6 environmental concerns with existing planning processes of the
7 State and counties and alerts decision makers to significant
8 environmental effects that may result from the implementation of
9 certain actions. At times, however, the review process may not
10 achieve the intended effect, and the environment may be
11 threatened, existing planning processes may stop, and the
12 people's interests may not be served.

13 The legislature further finds that chapter 343, Hawaii
14 Revised Statutes, (relating to environmental impact statements),
15 was enacted in 1974 to establish a system of environmental
16 review to ensure that environmental concerns are given
17 appropriate consideration in decision making, along with
18 economic and technical considerations. This law was patterned



1 after the National Environmental Policy Act of 1969, 42 United
2 States Code section 4321-4370(f).

3 Specifically, chapter 343, Hawaii Revised Statutes,
4 requires that environmental assessments and environmental impact
5 statements be prepared for development projects that meet
6 certain criteria. The basic framework of chapter 343 consists
7 of various stages of assessments by the proposing or accepting
8 agency, each of which may entail additional review procedures.

9 First, it must be determined whether a project or program
10 is subject to the environmental review process. A project is
11 subject to the law if it is either initiated by a government
12 agency or by a private party that requires government approval
13 for the project to proceed and the project proposes one or more
14 of nine enumerated land uses or administrative acts, known as
15 "triggers". If a triggering event occurs, an environmental
16 assessment must be prepared unless the program or project is
17 declared exempt.

18 Exemption determinations are governed by section 343-6(7),
19 Hawaii Revised Statutes, which delegates to the environmental
20 council the responsibility to "adopt, amend, or repeal" rules
21 that "establish procedures whereby specific types of actions,
22 because they will probably have minimal or no significant



1 effects on the environment, are declared exempt from the
2 preparation of an assessment". Section 11-230(8), Hawaii
3 Administrative Rules (Department of Health), provides for ten
4 classes of exempt action.

5 Section 11-230(8), Hawaii Administrative Rules (Department
6 of Health), allows an agency to declare an action exempt from
7 the preparation of an environmental assessment provided that the
8 agency obtains the advice of "other outside agencies or
9 individuals having jurisdiction or expertise as to the propriety
10 of the exemption". This section further states that the
11 exemption classes do not apply when "the cumulative impact of
12 planned successive actions in the same place, over time, is
13 significant, or when an action that is normally insignificant in
14 its impact on the environment may be significant in a
15 particularly sensitive environment".

16 When no exemption applies and one of the triggers of
17 section 343-5(a), Hawaii Revised Statutes, is met, environmental
18 review begins with the development of a draft environmental
19 assessment.

20 (b) In 2004, the department of transportation consulted
21 with the office of environmental quality control regarding the
22 appropriateness of an exemption from the environmental review



1 process for proposed improvements at Kahului harbor.
2 Specifically, the department of transportation transmitted a
3 letter to the office of environmental quality control requesting
4 confirmation that the project's intended improvements fell
5 within the approved exemption classes established for the
6 department of transportation. Identical letters were also sent
7 to the department of public works and waste management for the
8 county of Maui and the department of planning for the county of
9 Maui.

10 In a reply letter dated November 23, 2004, the office of
11 environmental quality control director wrote that that "OEQC
12 believes that the proposed improvements fall within the scope of
13 work described in the department of transportation's approved
14 exemption list". On February 23, 2005, the department of
15 transportation expressed its determination that the project
16 "meets conditions that permit exemption from environmental
17 review at such location based on the method of operation
18 planned. . ." and authorized the project to proceed without the
19 preparation of an environmental assessment.

20 On March 21, 2005, the Sierra Club, Maui Tomorrow, Inc.,
21 and the Kahului Harbor Coalition filed suit before the circuit
22 court of the second circuit challenging the exemption



1 determinations made by the department of transportation. On May
2 12, 2005, the department of transportation filed a motion to
3 dismiss the case on the bases that the Sierra Club, Maui
4 Tomorrow, Inc., and the Kahului Harbor Coalition lacked standing
5 and that the State was entitled to dismissal or summary judgment
6 on the merits because the department of transportation's
7 determination was correct and should be accorded deference. On
8 July 12, 2005, the circuit court issued an order granting the
9 department of transportation's motion, which was appealed by the
10 Sierra Club, Maui Tomorrow, Inc., and the Kahului Harbor
11 Coalition to the Hawaii supreme court.

12 In *Sierra Club, et al. v. the Department of Transportation*,
13 115 Haw. 299 (2007), the Hawaii supreme court vacated the July
14 12, 2005, circuit court judgment, holding that the department of
15 transportation's determination that the improvements to the
16 Kahului harbor were exempt from the requirements of chapter 343
17 was erroneous as a matter of law.

18 The supreme court noted that "an agency making an exemption
19 determination must look beyond an action's facial compliance
20 with an exemption class, and also determine that the activity
21 will probably not have a significant effect". *Sierra Club*, 115
22 Haw. at 340 (citing *McGlone v. Inaba*, 64 Haw. 27 (1981)).



1 Furthermore, the court determined that "the agency must consider
2 not just the effect of an action on the direct site to which the
3 exemption applies (the "primary impact"), but also secondary
4 impacts that are 'incident to and a consequence of the primary
5 impact'". *Id.* (quoting *McGlone*, 64 Haw. at 38 n. 15). The
6 court concluded that the "exemption was erroneously granted"
7 because the department of transportation "considered only the
8 physical improvements to Kahului harbor in isolation" and failed
9 to take into account "the secondary impacts on the environment
10 that may result from the use of the Hawaii Superferry in
11 conjunction with harbor improvements". *Sierra Club*, 115 Haw. 15
12 343.

13 (c) The legislature finds that the *Sierra Club* decision
14 clearly shows that the state administration failed to enforce
15 the letter and spirit of chapter 343, Hawaii Revised Statutes.
16 As such, questions have been raised as to whether potential
17 future litigation may hold the State liable for damages
18 resulting from the department of transportation's failure to
19 enforce chapter 343. Numerous inquiries by the legislature were
20 made as to whether the department of transportation consulted
21 with the attorney general for legal analysis prior to the
22 issuance of the exemption determination. These inquiries were



1 declined by both the department of transportation and the
2 attorney general who cited attorney-client privilege.

3 Section 662-2, Hawaii Revised Statutes, provides that the
4 State "waives its immunity for liability for the torts of its
5 employees and shall be liable in the same manner and to the same
6 extent as a private individual under like circumstances . . .".

7 However, section 662-15, provides in pertinent part:

8 This chapter shall not apply to . . . any claim based
9 upon an act or omission of an employee of the State,
10 exercising due care, in the execution of a statute or
11 regulation, whether or not such statute or regulation
12 is valid, or based upon the exercise or performance or
13 the failure to exercise or perform a discretionary
14 function or duty on the part of a state officer or
15 employee, whether or not the discretion involved has
16 been abused; . . . (See section 662-15(1), Hawaii
17 Revised Statutes).

18 (d) The legislature finds that:

19 (1) The current procedures used to exempt projects from
20 chapter 343, Hawaii Revised Statutes, place too much
21 discretionary authority with the agency seeking the
22 exemption;



- 1 (2) As a matter of law, the State is required to analyze
2 an activity's potential connected actions, secondary
3 impacts, significant effects, and cumulative impacts
4 before the activity may be exempted from chapter 343;
- 5 (3) The State's failure to analyze an activity's potential
6 connected actions, secondary impacts, significant
7 effects, and cumulative impacts before approving an
8 exemption from chapter 343 could be deemed as failure
9 by the State to exercise due care in the execution of
10 a statute or rule; and
- 11 (4) Failure to exercise due care in the execution of a
12 statute or rule may preclude the State from claiming
13 an exception from tort liability.
- 14 (e) The purpose of this Act is to clarify chapter 343,
15 Hawaii Revised Statutes, in light of the ruling in *Sierra Club*,
16 by:
- 17 (1) Establishing statutory categorical exemptions from
18 chapter 343;
- 19 (2) Requiring agencies and applicants for a proposed
20 action to apply to the director of the office of
21 environmental quality control for a categorical
22 exemption;



- 1 (3) Providing that approval of the application for a
2 categorical exemption requires the director's
3 discretionary consent;
- 4 (4) Repealing the office of environmental quality
5 control's authority to establish categorical
6 exemptions pursuant to administrative rulemaking; and
- 7 (5) Clarifying that the director's approval of a
8 categorical exemption be construed as prima facie
9 evidence of due care in the execution of a statute or
10 rule under chapter 662, Hawaii Revised Statutes.

11 SECTION 2. Chapter 343, Hawaii Revised Statutes, is
12 amended by adding a new section to be appropriately designated
13 and to read as follows:

14 "§343- Exemptions. (a) The director may declare a
15 proposed action exempt from the preparation of an environmental
16 assessment if the proposed action proposes:

- 17 (1) Operations, repairs, or maintenance of existing
18 structures, facilities, equipment, or topographical
19 features, involving negligible or no expansion or
20 change of use beyond that previously existing;
- 21 (2) Replacement or reconstruction of existing structures
22 and facilities where the new structure will be located



1 generally on the same site and will have substantially
2 the same purpose, capacity, density, height, and
3 dimensions as the structure replaced;

4 (3) Construction and location of single, new, small
5 facilities or structures and the alteration and
6 modification of the facilities or structures,
7 including but not limited to:

8 (A) Single-family residences less than two thousand
9 five hundred square feet not in conjunction with
10 the building of two or more such units;

11 (B) Multi-unit structures designated for not more
12 than four dwelling units if not in conjunction
13 with the building of two or more such structures;

14 (C) Stores, offices, and restaurants designated for
15 total occupant load of twenty persons or less per
16 structure, if not in conjunction with the
17 building of two or more such structures;

18 (D) Water, sewage, electrical, gas, telephone, and
19 other essential public utility services
20 extensions to serve such structures or
21 facilities, accessory or appurtenant structures
22 including garages, carports, patios, swimming



- 1 pools, and fences, and acquisition of utility
- 2 easements;
- 3 (4) Minor alterations in the conditions of land, water, or
- 4 vegetation;
- 5 (5) Basic data collection, research, experimental
- 6 management, and resource evaluation activities that do
- 7 not result in a serious or major disturbance to an
- 8 environmental resource;
- 9 (6) Construction or placement of minor structures
- 10 accessory to existing facilities;
- 11 (7) Interior alterations involving things such as
- 12 partitions, plumbing, and electrical conveyances;
- 13 (8) Demolition of structures, except those structures
- 14 located on any historic site as designated in the
- 15 national register or Hawaii register, as provided for
- 16 in the National Historic Preservation Act of 1966,
- 17 Public Law 89-665, 16 United States Code section 470,
- 18 as amended, or chapter 6E;
- 19 (9) Zoning variances except shoreline setback variances;
- 20 and



1 (10) Continuing administrative activities, including but
2 not limited to purchase of supplies and personnel-
3 related actions.

4 (b) An agency or applicant proposing an action may apply
5 to the director for an exemption from this chapter if the
6 proposed action proposes any of the activities listed in
7 subsection (a). The application shall be on forms prescribed by
8 the director by rule adopted pursuant to this section and
9 chapter 91, which shall include, at a minimum, the following:

10 (1) A description of the proposed action;

11 (2) The exemption classification, as listed in subsection
12 (a), under which the agency or applicant seeks the
13 exemption;

14 (3) An analysis of the proposed action's potential
15 connected actions, secondary impacts, significant
16 effects, and cumulative effects; and

17 (4) The parties consulted during the agency's or
18 applicant's preliminary review of the environmental
19 effects of the proposed action.

20 (c) The director shall review the application and
21 determine whether the proposed action probably will have minimal
22 or no significant effect on the environment. Upon a



1 determination that the proposed action will probably have
2 minimal or no significant effect on the environment, the
3 director shall approve the application. If the director is
4 unable to make this determination, the director shall deny the
5 application. The director shall not approve an exemption to a
6 planned action for which the cumulative impact of planned
7 successive actions in the same place, over time, is significant
8 or when an action that is normally insignificant in its impact
9 on the environment may be significant in a particularly
10 sensitive environment. The director's determination approving
11 or denying an application shall be in writing.

12 (d) The director's approval of a categorical exemption
13 shall be construed as prima facie evidence of due care in the
14 execution of a statute or rule under section 662-15.

15 (e) In the event the governor declares a state of
16 emergency, the governor may exempt any affected program or
17 action from complying with this chapter.

18 (f) The application for categorical exemption and the
19 director's written response approving or denying the application
20 shall be made available to the public in accordance with section
21 343-3. Each agency shall maintain records of all applications
22 for categorical exemptions submitted to the director and all



1 written responses received from the director approving or
2 denying an application and shall produce the records for review
3 upon request."

4 SECTION 3. Section 343-2, Hawaii Revised Statutes, is
5 amended as follows:

6 1. By adding eight new definitions to be appropriately
7 inserted and to read:

8 "Cumulative impact" or "cumulative effect" means the
9 impact on the environment that results from the incremental
10 impact of the action when added to other past, present, and
11 reasonably foreseeable future actions regardless of what agency
12 or person undertakes such other actions. Cumulative impacts
13 include results from individually minor but collectively
14 significant actions taking place over a period of time.

15 "Director" means the director of the office of
16 environmental quality control.

17 "Effects" or "impacts" as used in this chapter have the
18 same meaning and include ecological effects (such as the effects
19 on natural resources and on the components, structures, and
20 functioning of affected ecosystems), aesthetic effects, historic
21 effects, cultural effects, economic effects, social effects, or
22 health effects, whether primary, secondary, or cumulative.



1 Effects may also include those effects resulting from actions
2 that may have both beneficial and detrimental effects, even if
3 on balance the agency believes that the effect will be
4 beneficial.

5 "Environment" means humanity's surroundings, inclusive of
6 all the physical, economic, cultural, and social conditions that
7 exist within the area affected by an action, including land,
8 human and animal communities, air, water, minerals, flora,
9 fauna, ambient noise, and objects of historic or aesthetic
10 significance.

11 "Environmental impact" means an effect of any kind, whether
12 immediate or delayed, on any component of the environment.

13 "Ministerial consent" means consent, sanction, or
14 recommendation from an agency upon a given set of facts, as
15 prescribed by law or rule without the use of judgment or
16 discretion.

17 "Primary impact" or "primary effect" means effects that are
18 caused by the action and occur at the same time and place.

19 "Secondary impact" or "secondary effect" means effects that
20 are caused by the action and are later in time or farther
21 removed in distance, but are still reasonably foreseeable."



1 2. By amending the definition of "significant effect" to
2 read:

3 "Significant effect" or "significant impact" means the sum
4 of effects on the quality of the environment, including actions
5 that irrevocably commit a natural resource, curtail the range of
6 beneficial uses of the environment, are contrary to the State's
7 environmental policies or long-term environmental goals as
8 established by law, or adversely affect the economic welfare,
9 social welfare, or cultural practices of the community and
10 State."

11 SECTION 4. Section 343-6, Hawaii Revised Statutes, is
12 amended by amending subsection (a) to read as follows:

13 "(a) After consultation with the affected agencies, the
14 council shall adopt, amend, or repeal necessary rules for the
15 purposes of this chapter in accordance with chapter 91
16 including, but not limited to, rules which shall:

17 (1) Prescribe the contents of an environmental impact
18 statement;

19 (2) Prescribe the procedures whereby a group of proposed
20 actions may be treated by a single statement;

21 (3) Prescribe procedures for the preparation and contents
22 of an environmental assessment;



- 1 (4) Prescribe procedures for the submission, distribution,
2 review, acceptance or nonacceptance, and withdrawal of
3 a statement;
- 4 (5) Prescribe procedures to appeal the nonacceptance of a
5 statement to the environmental council;
- 6 (6) Establish criteria to determine whether a statement is
7 acceptable or not;
- 8 ~~[(7) Establish procedures whereby specific types of~~
9 ~~actions, because they will probably have minimal or no~~
10 ~~significant effects on the environment, are declared~~
11 ~~exempt from the preparation of an assessment;~~
- 12 ~~(8)]~~ (7) Prescribe procedures for informing the public of
13 determinations that a statement is either required or
14 not required, for informing the public of the
15 availability of draft statements for review and
16 comments, and for informing the public of the
17 acceptance or nonacceptance of the final statement;
18 and
- 19 ~~[(9)]~~ (8) Prescribe the contents of an environmental
20 assessment."



1 SECTION 5. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun, before its effective date.

4 SECTION 6. If any provision of this Act, or the
5 application thereof to any person or circumstance is held
6 invalid, the invalidity does not affect other provisions or
7 applications of the Act that can be given effect without the
8 invalid provision or application, and to this end the provisions
9 of this Act are severable.

10 SECTION 7. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 8. This Act shall take effect upon approval.

13

INTRODUCED BY:


JAN 15 2008



Report Title:

Environmental Protection; Categorical Exemptions; Tort Liability

Description:

Establishes statutory categorical exemptions from chapter 343, Hawaii Revised Statutes. Requires agencies and applicants for a proposed action to apply to the director of the office of environmental quality control for a categorical exemption. Provides that approval of the application for a categorical exemption requires the director's discretionary consent. Repeals office of environmental quality control's authority to establish categorical exemptions pursuant to administrative rulemaking. Clarifies that the director's approval of a categorical exemption be construed as prima facie evidence of due care in the execution of a statute or rule under the State Tort Liability Act.

