

CHAPTER 343
ENVIRONMENTAL IMPACT STATEMENTS

Section

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Note

Broadband services; exemption from certain permitting requirements. L 2011, c 151; L 2013, c 264, §3; L 2016, c 193, §§1, 2.

Department of transportation's bridge rehabilitation and replacement program; temporary exemption from certain construction requirements of this chapter through June 30, 2017 or until completion. L 2012, c 218.

Cross References

Environmental courts, jurisdiction over proceedings arising under this chapter, see §604A-2.

Law Journals and Reviews

Ke Ala Pono--The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions. 33 UH L. Rev. 447 (2011).

The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation. 33 UH L. Rev. 581 (2011).

A Suggested Framework for Judicial Review of Challenges to the Adequacy of an Environmental Impact Statement Prepared under the Hawaii Environmental Policy Act. 18 UH L. Rev. 719.

Determining the Expiration Date of an Environmental Impact Statement: When to Supplement a Stale EIS in Hawai'i. 35 UH L. Rev. 249 (2013).

Case Notes

Environmental impact statement addressed all statutory requirements of chapter, was compiled in good faith, and set forth sufficient information to enable decisionmaker to consider fully the environmental factors involved. 81 H. 171, 914 P.2d 1364.

Chapter does not conflict with Hawaiian homes commission act, has only incidental impact on Hawaiian home lands, and is not inconsistent with interests of the beneficiaries; thus, chapter applies to Hawaiian home lands. 87 H. 91, 952 P.2d 379.

HHCA §204 not violated by application of this chapter. 87 H. 91, 952 P.2d 379.

Where lease was executed in contravention of this chapter, power plant developers were not "existing Hawaiian homes commission act lessees"; trial court's decision that the lease

was void did not deprive developers of any interest they were entitled to under the law. 106 H. 270, 103 P.3d 939.

Appellants established standing where they showed threatened injuries under the traditional injury-in-fact test and procedural injuries based on a procedural right test; the threatened injury in fact was due to defendant's decision to go forward with harbor improvements and allow the superferry project to operate at Kahului harbor without conducting an environmental assessment; the procedural injury was based on various interests appellants identified that were threatened due to the violation of their procedural rights under this chapter. 115 H. 299, 167 P.3d 292.

Where the record showed that the department of transportation did not consider whether its facilitation of the Hawaii superferry project would probably have minimal or no significant impacts, both primary and secondary, on the environment, its determination that the improvements to Kahului harbor were exempt from the requirements of this chapter was erroneous as a matter of law; the exemption thus being invalid, the environmental assessment of §343-5 was applicable. 115 H. 299, 167 P.3d 292.

Where nothing in §607-25 indicated that §607-25 should provide the exclusive means for awarding attorney's fees and costs against a party for a violation of this chapter, §607-25 was not the exclusive means for awarding attorney's fees and costs for violations of this chapter. 120 H. 181, 202 P.3d 1226.

There is nothing in this chapter to indicate that an archeological inventory survey is a "necessary study" for the completion of an environmental impact statement. 128 H. 53, 283 P.3d 60 (2012).

" **§343-1 Findings and purpose.** The legislature finds 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 interrelations 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 may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental

concerns are given appropriate consideration in decision making along with economic and technical considerations. [L 1979, c 197, §1(1); am L 1983, c 140, §4]

" **§343-2 Definitions.** As used in this chapter unless the context otherwise requires:

"Acceptance" means a formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement.

"Action" means any program or project to be initiated by any agency or applicant.

"Agency" means any department, office, board, or commission of the state or county government which is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary consent required from an agency prior to actual implementation of an action.

"Council" means the environmental council.

"Discretionary consent" means a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent.

"Environmental assessment" means a written evaluation to determine whether an action may have a significant effect.

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

"Finding of no significant impact" means a determination based on an environmental assessment that the subject action

will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.

"Helicopter facility" means any area of land or water which is used, or intended for use for the landing or takeoff of helicopters; and any appurtenant areas which are used, or intended for use for helicopter related activities or rights-of-way.

"Office" means the office of environmental quality control.

"Person" includes any individual, partnership, firm, association, trust, estate, private corporation, or other legal entity other than an agency.

"Power-generating facility" means:

- (1) A new, fossil-fueled, electricity-generating facility, where the electrical output rating of the new equipment exceeds 5.0 megawatts; or
- (2) An expansion in generating capacity of an existing, fossil-fueled, electricity-generating facility, where the incremental electrical output rating of the new equipment exceeds 5.0 megawatts.

"Renewable energy facility". DELETED.

"Significant effect" means 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 welfare, social welfare, or cultural practices of the community and State.

"Wastewater treatment unit" means any plant or facility used in the treatment of wastewater. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(2); am L 1983, c 140, §5; am L 1986, c 186, §1; am L 1987, c 187, §1 and c 325, §2; am L 1996, c 61, §1; am L 2000, c 50, §2; am L 2004, c 55, §2; am L 2005, c 130, §2; am L 2008, c 207, §3; am L 2016, c 27, §4]

Attorney General Opinions

"Action" includes a subdivision proposal. Att. Gen. Op. 75-14.

"Action" includes issuance of building permits. Att. Gen. Op. 75-15.

Law Journals and Reviews

Determining the Expiration Date of an Environmental Impact Statement: When to Supplement a Stale EIS in Hawai'i. 35 UH L. Rev. 249 (2013).

Case Notes

Sufficiency of an environmental impact statement. 59 H. 156, 577 P.2d 1116.

Sufficiency of an environmental impact statement is a question of law. 81 H. 171, 914 P.2d 1364.

The proper inquiry for determining the necessity of an environmental impact statement (EIS) based on the language of §343-5(c) is whether the proposed action will "likely" have a significant effect on the environment; as defined in this section, "significant effect" includes irrevocable commitment of natural resources; where the burning of thousands of gallons of fuel and the withdrawal of millions of gallons of groundwater on a daily basis would "likely" cause such irrevocable commitment, an EIS was required pursuant to both the common meaning of "may" and the statutory definition of "significant effect". 106 H. 270, 103 P.3d 939.

Where record in the case showed no substantive change in the project, nor any evidence that the subdivision application proposed "any use within a shoreline area as defined in §205A-41", as required in §343-5(a)(3), thereby making the subdivision application an "action" under this section that required a supplemental environmental impact statement, once the environmental impact statement had been accepted, no other statement for the proposed project was required under §343-5(g). 120 H. 457 (App.), 209 P.3d 1271.

" **§343-3 Public records and notice.** (a) All statements, environmental assessments, and other documents prepared under this chapter shall be made available for inspection by the public during established office hours.

(b) The office shall inform the public of notices filed by agencies of the availability of environmental assessments for review and comments, of determinations that statements are required or not required, of the availability of statements for review and comments, and of the acceptance or nonacceptance of statements.

(c) The office shall inform the public of:

- (1) A public comment process or public hearing if a federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take license pursuant to the federal Endangered Species Act;
- (2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter

into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment;

- (3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement; and
- (4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean.

(d) The office shall inform the public by the publication of a periodic bulletin to be available to persons requesting this information. The bulletin shall be available through the office and public libraries. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(3); am L 1983, c 140, §6; am L 1992, c 241, §1; am L 1997, c 380, §8; am L 1998, c 237, §7; am L 2003, c 73, §3]

Case Notes

Where there was no evidence that the city department of planning and permitting filed a notice with the office of environmental quality control pursuant to HAR §11-200-11.1 of its determination that a supplemental environmental impact statement was not required, there was no date from which to measure the thirty day limitation prescribed by §343-7(b) and §343-7(b) was thus inapplicable; in addition, given the plain and unambiguous language of §343-7 and this section, coupled with the related administrative rules, actual knowledge cannot be substituted for the public notice requirement. 123 H. 150, 231 P.3d 423 (2010).

" **§343-4 REPEALED.** L 1983, c 140, §7.

" **§343-5 Applicability and requirements.** (a) Except as otherwise provided, an environmental assessment shall be required for actions that:

- (1) Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b);

- (2) Propose any use within any land classified as a conservation district by the state land use commission under chapter 205;
- (3) Propose any use within a shoreline area as defined in section 205A-41;
- (4) Propose any use within any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E;
- (5) Propose any use within the Waikiki area of Oahu, the boundaries of which are delineated in the land use ordinance as amended, establishing the "Waikiki Special District";
- (6) Propose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or amendments to any existing county general plan initiated by a county;
- (7) Propose any reclassification of any land classified as a conservation district by the state land use commission under chapter 205;
- (8) Propose the construction of new or the expansion or modification of existing helicopter facilities within the State, that by way of their activities, may affect:
 - (A) Any land classified as a conservation district by the state land use commission under chapter 205;
 - (B) A shoreline area as defined in section 205A-41;
or
 - (C) Any historic site as designated in the National Register or Hawaii Register, as provided for in the Historic Preservation Act of 1966, Public Law 89-665, or chapter 6E; or until the statewide historic places inventory is completed, any historic site that is found by a field reconnaissance of the area affected by the helicopter facility and is under consideration for placement on the National Register or the Hawaii Register of Historic Places; and
- (9) Propose any:
 - (A) Wastewater treatment unit, except an individual wastewater system or a wastewater treatment unit serving fewer than fifty single-family dwellings or the equivalent;
 - (B) Waste-to-energy facility;
 - (C) Landfill;

- (D) Oil refinery; or
- (E) Power-generating facility.

(b) Whenever an agency proposes an action in subsection (a), other than feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or other than the use of state or county funds for the acquisition of unimproved real property that is not a specific type of action declared exempt under section 343-6, the agency shall prepare an environmental assessment for the action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may choose not to prepare an environmental assessment and instead shall prepare an environmental impact statement that begins with the preparation of an environmental impact statement preparation notice as provided by rules.

(c) For environmental assessments for which a finding of no significant impact is anticipated:

- (1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;
- (2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3;
- (3) The agency shall respond in writing to comments received during the review and prepare a final environmental assessment to determine whether an environmental impact statement shall be required;
- (4) A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment; and
- (5) The agency shall file notice of the determination with the office. When a conflict of interest may exist because the proposing agency and the agency making the determination are the same, the office may review the agency's determination, consult the agency, and advise the agency of potential conflicts, to comply with this section. The office shall publish the final determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the agency and submitted to the office. The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-

3. The agency shall respond in writing to comments received during the review and prepare a final statement.

The office, when requested by the agency, may make a recommendation as to the acceptability of the final statement.

(d) The final authority to accept a final statement shall rest with:

- (1) The governor, or the governor's authorized representative, whenever an action proposes the use of state lands or the use of state funds, or whenever a state agency proposes an action within the categories in subsection (a); or
- (2) The mayor, or the mayor's authorized representative, of the respective county whenever an action proposes only the use of county lands or county funds.

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. Upon acceptance or nonacceptance of the final statement, the governor or mayor, or the governor's or mayor's authorized representative, shall file notice of such determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance pursuant to section 343-3.

(e) Whenever an applicant proposes an action specified by subsection (a) that requires approval of an agency and that is not a specific type of action declared exempt under section 343-6, the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an environmental assessment of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required; provided that if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may authorize the applicant to choose not to prepare an environmental assessment and instead prepare an environmental impact statement that begins with the preparation of an environmental impact statement preparation notice as provided by rules. The final approving agency for the request for approval is not required to be the accepting authority.

For environmental assessments for which a finding of no significant impact is anticipated:

- (1) A draft environmental assessment shall be made available for public review and comment for a period of thirty days;
- (2) The office shall inform the public of the availability of the draft environmental assessment for public review and comment pursuant to section 343-3; and
- (3) The applicant shall respond in writing to comments received during the review and the applicant shall

prepare a final environmental assessment to determine whether an environmental impact statement shall be required. A statement shall be required if the agency finds that the proposed action may have a significant effect on the environment. The agency shall file notice of the agency's determination with the office, which, in turn, shall publish the agency's determination for the public's information pursuant to section 343-3.

The draft and final statements, if required, shall be prepared by the applicant, who shall file these statements with the office.

The draft statement shall be made available for public review and comment through the office for a period of forty-five days. The office shall inform the public of the availability of the draft statement for public review and comment pursuant to section 343-3.

The applicant shall respond in writing to comments received during the review and prepare a final statement. The office, when requested by the applicant or agency, may make a recommendation as to the acceptability of the final statement.

The authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval. The final decision-making body or approving agency for the request for approval is not required to be the accepting authority. The planning department for the county in which the proposed action will occur shall be a permissible accepting authority for the final statement.

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. Upon acceptance or nonacceptance of the final statement, the agency shall file notice of the determination with the office. The office, in turn, shall publish the determination of acceptance or nonacceptance of the final statement pursuant to section 343-3.

The agency receiving the request, within thirty days of receipt of the final statement, shall notify the applicant and the office of the acceptance or nonacceptance of the final statement. The final statement shall be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days.

In any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination. An applicant, within sixty days after

nonacceptance of a final statement by an agency, may appeal the nonacceptance to the environmental council, which, within thirty days of receipt of the appeal, shall notify the applicant of the council's determination. In any affirmation or reversal of an appealed nonacceptance, the council shall provide the applicant and agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

(f) Whenever an applicant requests approval for a proposed action and there is a question as to which of two or more state or county agencies with jurisdiction has the responsibility of determining whether an environmental assessment is required, the office, after consultation with and assistance from the affected state or county agencies, shall determine which agency has the responsibility for determining whether an environmental assessment by the applicant is required, except in situations involving secondary actions under section 343-5.5; provided that in no case shall the office be considered the approving agency.

(g) In preparing an environmental assessment, an agency may consider and, where applicable and appropriate, incorporate by reference, in whole or in part, previous determinations of whether a statement is required and previously accepted statements. The council, by rule, shall establish criteria and procedures for the use of previous determinations and statements.

(h) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

(i) A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for the proposed action shall be required. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(5), (6); am L 1980, c 22, §1; am L 1983, c 140, §8; gen ch 1985; am L 1987, c 187, §2, c 195, §1, c 283, §23, and c 325, §1; am L 1992, c 241, §2; am L 1996, c 61, §2; am L 2004, c 55, §3; am L 2005, c 130, §3; am L 2006, c 250, §4; am L 2008, c 110, §2 and c 207, §5; am L 2009, c 11, §4; am L 2012, c 172, §2 and c 312, §2; am L 2016, c 27, §5]

Attorney General Opinions

Amendments to county development plans; when environmental assessments required. Att. Gen. Op. 85-30.

Applicable to housing developed under chapter 359G. Att. Gen. Op. 86-13.

Law Journals and Reviews

The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation. 33 UH L. Rev. 581 (2011).

Determining the Expiration Date of an Environmental Impact Statement: When to Supplement a Stale EIS in Hawai'i. 35 UH L. Rev. 249 (2013).

Case Notes

Law contemplates consideration of secondary and nonphysical aspects of proposal, including socio-economic consequences. 63 H. 453, 629 P.2d 1134.

Requirements not applicable to project pending when law took effect unless agency requested statement. 63 H. 453, 629 P.2d 1134.

Construction and use of home and underground utilities near Paiko Lagoon wildlife sanctuary. 64 H. 27, 636 P.2d 158.

Environmental assessment required before land use commission can reclassify conservation land to other uses. 65 H. 133, 648 P.2d 702.

Participation by plaintiffs at contested case hearing did not excuse preparation of environmental assessment. 86 H. 66, 947 P.2d 378.

For Hawaiian home lands, the department of Hawaiian home lands is the accepting authority for applicant proposals under subsection (c); because the governor is not involved, there is no conflict with Hawaiian homes commission act. 87 H. 91, 952 P.2d 379.

"State lands" in subsection (a)(1) includes Hawaiian home lands. 87 H. 91, 952 P.2d 379.

In order to achieve the salutary objectives of the Hawaii environmental policy act, and because developer's proposed underpasses had been, from the start, an integral part of the project, developer's proposed construction of two underpasses under highway constituted "use of state lands" within the meaning of subsection (a)(1). 91 H. 94, 979 P.2d 1120.

The proper inquiry for determining the necessity of an environmental impact statement (EIS) based on the language of subsection (c) is whether the proposed action will "likely" have a significant effect on the environment; as defined in §343-2, "significant effect" includes irrevocable commitment of natural resources; where the burning of thousands of gallons of fuel and the withdrawal of millions of gallons of groundwater on a daily basis would "likely" cause such irrevocable commitment, an EIS was required pursuant to both the common meaning of "may" and the statutory definition of "significant effect". 106 H. 270, 103 P.3d 939.

Where department of Hawaiian home lands lease was executed in contravention of subsection (c) inasmuch as the condition precedent--acceptance of a required final environmental impact statement--was not satisfied, the lease was void. 106 H. 270, 103 P.3d 939.

Where all three elements under subsection (c) were present: (1) an applicant proposed an action specified by subsection (a), (2) the action required the approval of an agency, and (3) the action was not exempt under §343-6, the land use commission, as the agency that received the request for approval of the boundary amendment petition, was required by statute to prepare an environmental assessment of the proposed action at the earliest practical time. 109 H. 411, 126 P.3d 1098.

Where the record showed that the department of transportation did not consider whether its facilitation of the Hawaii superferry project would probably have minimal or no significant impacts, both primary and secondary, on the environment, its determination that the improvements to Kahului harbor were exempt from the requirements of this chapter was erroneous as a matter of law; the exemption thus being invalid, the environmental assessment of this section was applicable. 115 H. 299, 167 P.3d 292.

Trial court did not err in determining that there was no "use" of state or county land under subsection (a)(1) where developer's detention basins and drainage line was merely connected and routed through the existing street drainage system and developer's sewage lines were connected to the county's existing sewage lines as neither line would require tunneling or construction beneath state or county lands. 119 H. 90, 194 P.3d 531.

While chapter 150A and the board's microorganism import rules may have vested the board with exclusive authority to approve marine biotechnology firm's proposal to import and grow genetically engineered algae at the State's research and technology park, as the demonstration project constituted an action that proposed the use of state land, this section plainly

and unambiguously required the preparation of an environmental assessment before the board could approve firm's application. 118 H. 247 (App.), 188 P.3d 761.

Where record in the case showed no substantive change in the project, nor any evidence that the subdivision application proposed "any use within a shoreline area as defined in §205A-41", as required in subsection (a)(3), thereby making the subdivision application an "action" under §343-2 that required a supplemental environmental impact statement, once the environmental impact statement had been accepted, no other statement for the proposed project was required under subsection (g). 120 H. 457 (App.), 209 P.3d 1271.

Where there were genuine issues of material fact regarding whether the church building project site was included in the National and Hawaii (historic) registers, thus triggering the requirement for an environmental assessment under this section, the circuit court erred in granting summary judgment by finding that only the church structure itself, and not the church building project site, was included in the National and Hawaii registers. 128 H. 455 (App.), 290 P.3d 525 (2012).

" **[§343-5.5] Exception to applicability of chapter.** (a) Notwithstanding any other law to the contrary, for any primary action that requires a permit or approval that is not subject to a discretionary consent and that involves a secondary action that is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way or highway, that secondary action shall be exempt from this chapter; provided that the applicant for the primary action shall submit documentation from the appropriate agency confirming that no further discretionary approvals are required.

(b) As used in this section:

"Discretionary consent" means:

(1) An action as defined in section 343-2; or

(2) An approval from a decision-making authority in an agency, which approval is subject to a public hearing.

"Infrastructure" includes waterlines and water facilities, wastewater lines and wastewater facilities, gas lines and gas facilities, drainage facilities, electrical, communications, telephone, and cable television utilities, and highway, roadway, and driveway improvements.

"Primary action" means an action outside of the highway or public right-of-way that is on private property.

"Secondary action" means an action involving infrastructure within the highway or public right-of-way. [L 2012, c 312, §1]

" **§343-6 Rules.** (a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules that shall:

- (1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;
- (2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment;
- (3) Prescribe procedures for the preparation of an environmental assessment;
- (4) Prescribe the contents of an environmental assessment;
- (5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;
- (6) Prescribe the contents of an environmental impact statement;
- (7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;
- (8) Establish criteria to determine whether an environmental impact statement is acceptable or not; and
- (9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council.

(b) At least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(7); am L 1983, c 140, §9; am L 1986, c 186, §2; am L 1987, c 187, §3; am L 2008, c 110, §3]

Law Journals and Reviews

Determining the Expiration Date of an Environmental Impact Statement: When to Supplement a Stale EIS in Hawai'i. 35 UH L. Rev. 249 (2013).

Case Notes

Project requiring completely new drainage system serving over 300 residences was qualitatively incompatible with both letter and intent of administrative rules implementing subsection (a)(7) which intended to exempt only very minor projects from requirements of this chapter. 86 H. 66, 947 P.2d 378.

Where all three elements under §343-5(c) were present: (1) an applicant proposed an action specified by §343-5(a), (2) the action required the approval of an agency, and (3) the action was not exempt under this section, the land use commission, as the agency that received the request for approval of the boundary amendment petition, was required by statute to prepare an environmental assessment of the proposed action at the earliest practical time. 109 H. 411, 126 P.3d 1098.

The environmental council is expressly granted the power to promulgate rules regarding environmental impact statements, and it clearly contemplates the possibility of changes to an original project that may dictate the need for a supplemental environmental impact statement (SEIS); the rules promulgated to address SEISs, including HAR §§11-200-26 and 11-200-27, were within the implied powers reasonably necessary to carry out the powers expressly granted; as the SEIS process was consistent with the Hawaii environmental protection act, the council did not exceed its authority in promulgating rules to guide the SEIS process, including HAR §§11-200-26 and 11-200-27. 123 H. 150, 231 P.3d 423 (2010).

" **[§343-6.5] Waiahole water system; exemption.** The purchase of the assets of the Waiahole water system shall be specifically exempt from the requirements of chapter 343. [L 1998, c 111, §4]

" **§343-7 Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by environmental court action, may be adjudged aggrieved.

(b) Any judicial proceeding, the subject of which is the determination that a statement is required for a proposed action, shall be initiated within sixty days after the public has been informed of such determination pursuant to section 343-

3. Any judicial proceeding, the subject of which is the determination that a statement 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 council or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by environmental court action, may be adjudged aggrieved.

(c) Any judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under section 343-5, shall be initiated within sixty days after the public has been informed pursuant to section 343-3 of the acceptance of such statement. The council shall be adjudged an aggrieved party for the purpose of bringing judicial action under this subsection. Affected agencies and persons who provided written comment to such statement during the designated review period shall be adjudged aggrieved parties for the purpose of bringing judicial action under this subsection; provided that the contestable issues shall be limited to issues identified and discussed in the written comment. [L 1974, c 246, pt of §1; am and ren L 1979, c 197, §1(8); am L 1983, c 140, §10; am L 1992, c 241, §3; am L 2014, c 218, §8]

Law Journals and Reviews

The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation. 33 UH L. Rev. 581 (2011).

Case Notes

Plaintiff's claims that Hawai'i environmental policy act was violated were barred; plaintiff did not submit comment and filed suit more than sixty days after office of environmental quality control informed the public that the state final environmental impact statement had been accepted. 307 F. Supp. 2d 1149.

Court has no jurisdiction over actions initiated after time limit. 64 H. 126, 637 P.2d 776.

Date of commission's decision to grant SMA permit triggered time period for appeal, not date when commission made express determination that no environmental assessment was required for project; plaintiff's challenge to lack of environmental assessment thus timely. 86 H. 66, 947 P.2d 378.

Where the federal construct of a procedural right was not germane to case because this section, the statute at issue, establishes who and under what circumstances the lack of an environmental assessment, may be challenged, and federal cases

recognizing this standard were inapposite because they rested on non-analogous statutes, petitioner could not be afforded so-called "procedural standing" under subsection (a). 100 H. 242, 59 P.3d 877.

Where Hawaiian homes commission did not accept the proposal for an environmental impact statement, the subject of the judicial proceeding before the trial court was not the "acceptance" of such statement; intervenors were not required to provide written comments pursuant to subsection (c) as subsection (c) did not apply; intervenor's objections, therefore, were subject to judicial review under subsection (b). 106 H. 270, 103 P.3d 939.

Appellants established standing where they showed threatened injuries under the traditional injury-in-fact test and procedural injuries based on a procedural right test; the threatened injury in fact was due to defendant's decision to go forward with harbor improvements and allow the superferry project to operate at Kahului harbor without conducting an environmental assessment; the procedural injury was based on various interests appellants identified that were threatened due to the violation of their procedural rights under this chapter. 115 H. 299, 167 P.3d 292.

Where this section waived the State's sovereign immunity against actions brought to challenge: (1) the lack of an environmental assessment; (2) the determination that an environmental impact statement is or is not required; and (3) the acceptance of an environmental impact statement, sovereign immunity did not prevent the application of the private attorney general doctrine against the State and the circuit court did not err in relying on the doctrine as a basis for its award of attorney's fees against the State and superferry jointly. 120 H. 181, 202 P.3d 1226.

Although the subdivision application was part of the larger action (i.e., the project), the specific "action" for statute of limitations purposes was the date the subdivision application was approved, as opposed to when the project itself was originally approved; thus, where plaintiffs' initial complaint was filed within 120 days of the department of planning and permitting's approval of the subdivision application, plaintiffs' claims were not barred by this section. 123 H. 150, 231 P.3d 423 (2010).

Where there was no evidence that the city department of planning and permitting filed a notice with the office of environmental quality control pursuant to HAR §11-200-11.1 of its determination that a supplemental environmental impact statement was not required, there was no date from which to measure the thirty day limitation prescribed by subsection (b)

and subsection (b) was thus inapplicable; in addition, given the plain and unambiguous language of this section and §343-3, coupled with the related administrative rules, actual knowledge cannot be substituted for the public notice requirement. 123 H. 150, 231 P.3d 423 (2010).

" **§343-8 Severability.** If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application; and to this end, the provisions of this chapter are declared to be severable. [L 1974, c 246, pt of §1; ren L 1979, c 197, §1(9)]