

HRS CHAPTER 343 UPDATE

HCPO 2024



STANDARD DISCLAIMER

- These are my own opinions
- They are not the position of the City & County of Honolulu or its Department of Planning and Permitting
- If you need legal advice, consult an attorney of your choice

BALANCING CHANGE IN A DYNAMIC LANDSCAPE

- Kaupiko v. DLNR, SCAP-22-0000557 (Aug. 28, 2024)
 - Issue of First Impression: Does the “rule or reason” apply when evaluating an EIS’ compliance with the minim information requirements in the HAR?

KAUPIKO V. DLNR, SCAP-22-0000557 (AUG. 28, 2024)

- Umberger v. DLNR, 140 Hawai'i 500 (2017) (commercial aquarium fish collection permits are not exempt from Chapter 343 HEPA)
- 343 applies in conservation districts and to marine waters & submerged lands
- Commercial collection permits system is a “program” or “project” to which 343 applies
- Extraction of an unlimited number of fish is not a minor exempt activity

KAUPIKO V. DLNR, SCAP-22-0000557 (AUG. 28, 2024)

- Pet Industry Joint Advisory Council (PIJAC) prepared an EIS to continue fishing in the West Hawai'i Reef Fishery Management Area 2 (WHRFMA).
- DLNR initially rejected the EIS for fourteen reasons.
- PIJAC revised the EIS and published it. During the mandatory public comment period, the EIS received extensive feedback
- DLNR voted 3-3 because the seventh member of the Board was absent, and the revised final EIS (RFEIS) was "deemed accepted" by operation of law. I.e., HRS § 343-5(e).

KAUPIKO V. DLNR, SCAP-22-0000557 (AUG. 28, 2024)

- First, apply HAR 11-200.1-24 and the rule of reason to decide if the DEIS contained enough information to enable the decision maker to make a reasoned decision concerning **all of the required factors**.
- Second, apply 11-200.1-27 and the rule of reason to determine if the FEIS reasonably addressed any reasons for rejection and responded to substantive feedback.
- Third, apply the rule of reason and determine whether any errors defeated the goals of informed decision making.

11-200.1-24 CONTENT REQUIREMENTS; DRAFT EIS (FORMERLY 11-200-17)

Minimum information content:

- > **35** itemized points of information
- **In text references** to studies (a.k.a. appendices)
- Descriptions of the “environmental setting [...] from both a ***local and regional perspective***”
- “***Analysis***” of consistency with land use plans, policies, and controls, including a discussion of the extent to which conflicts have been resolved and the project is proceeding without resolving any unresolved conflicts
- “***Discussions***” (e.g., reasonably foreseeable consequences; trade-offs between short-term and long-term gains)

11-200.1-24 CONTENT REQUIREMENTS; DRAFT EIS (FORMERLY 11-200-17)

Minimum Information includes > 35 itemized points of information. Most information is subject to a meaningful qualifier:

- “***Discuss***”
- Provide “***Analysis***”
- Refer to incorporated materials “***in text***”
- **Give** “***special emphasis***”
- Include a “***rigorous exploration***” and “***objective evaluation***”
- “***Summarize***”
- Place information in a “**separate and distinct section**”

HAR Sec. 11-200.1-24(i)

Descriptions of the “environmental setting [...] from both a **local and regional perspective.**”

HAR SEC. 11-200.1-24(m)

“**A separate and distinct section** [providing] a description of the relationship between local short-term uses of humanity’s environment and the maintenance and enhancement of long-term productivity. The extent to which [there are] **trade-offs among short-term and long-term gains and losses shall be discussed.**”

11-200.1-24(q)

Unresolved issues: “The [DEIS] shall include a separate and distinct section that ***summarizes*** unresolved issues and contains either a ***discussion*** of how such issues will be resolved prior to commencement [...] or what overriding reasons there are for proceeding without resolving the issue.”

STILL ON STEP ONE?

- Court is arguably duty-bound to interpret the rules in a way that gives independent meaning and effect to each word in each sentence.
- Apply the rule as written
- Do not interpret words or phrases as superfluous

EIS 3-STEP; STEPTHWOOF OF TWEEEE (HAR SEC. 11-200.1-27)

Minimum information:

- Full declaration of environmental implications,
- Discussions of reasonably foreseeable consequences,
- Responsible opposing views
- 5 enumerated points of information

Format allows reader to track DEIS changes

EIS THREE-STEP, STEP THREE: IMPACTS ON GOALS OF INFORMED DECISION MAKING

Court will decide if any errors in the EIS process were ***significant enough to defeat the goals of informed decision making, applying the rule of reason***

THE COURT'S JUDGMENT

- FEIS upheld.
- Opinion by C.J. Recktenwald joined by J. Eddins
- 2 substitute judges (Tonaki & Park).
- Dissent (McKenna)

KAUPIKO V. DLNR, SCAP-22-0000557 (AUG. 28, 2024)

- DLNR argued that it was not the property defendant because the FEIS was “accepted” by operation of law and not as the result of board approval.
- The Court held that “the State is a proper defendant to the case and should defend the EIS”
- HRS § 343-7(c) provides for an appeal of the acceptance, not the EIS itself

COMMENTS AND APPENDICES

Plaintiffs argue that by relying on comment letters and appended information, the court impermissibly shifted the burden of disclosing impacts to the public.

- We disagree. HAR § 11-201.27 requires that the [FEIS] "incorporate substantive comments received during the consultation and review processes" and include "responses of the applicant or proposing agency to each substantive question, comment, or recommendation[.]
- [T]he appendix should be considered part of a complete document. [...]. [But] the EIS should not just be a "document dump[.]" [It must be] a cohesive document that informs the approving agency and the public.
- [T]he EIS "discussed in the body all of the environmental problems to which the comments were addressed."

COMPETING STUDIES AND DATA

Plaintiffs' central allegation here is that the EIS uses the wrong baseline data. Baseline data is the measure of a condition before an action is taken[,] in this case, **estimates of fish populations.**

- As the environmental court wrote, '[t]he parties disagree on how good the baseline information is, and how to analyze it, but there is no question baseline information is in the RFEIS and was available to BLNR.' [...]. The question is whether the RFEIS contains sufficient information such that BLNR could make a reasoned decision concerning the relevant environmental factors. Here, the RFEIS contains sufficient information from both sides of the issue to meet the HEPA content requirements.

MITIGATION V. FUTURE DECISIONS

- The next alleged deficiency is that the RFEIS fails to analyze the impacts of increasing catch above historical rates.
- Plaintiffs and the environmental court both rightly acknowledge that, under HRS § 343-5(e), full and adequate environmental review is a "condition precedent" to implementing a proposed action — that is, environmental review ought to be "front-loaded"

[A]n applicant may not escape public and agency review by, for example, analyzing the environmental impact of their actions once those actions have already begun.”

Here, the RFEIS includes recent data on trends in fish populations, reasonable explanations for how it decided **on each catch limit**, and the public comments indicating opposition to the catch limit. Part of the RFEIS includes regular **monitoring from the DAR[.]**.

[These are] reasonable mitigation measure rather than deference to future decision-makers.

ADDRESSING REASONS FOR REJECTION

- Plaintiffs and the dissent argue that the RFEIS does not adequately respond to [a particular] **reason for non-acceptance**.
- I.e., “[t]he FEIS does not adequately discuss relevant negative findings, for example, the reduced numbers of aquarium fish at collection sites found by Tissot and Hallacher (2003).”
- [The article by] Tissot and Hallacher article [is noted] several times throughout the [RFEIS]— for example, in section 5.4.2.3.
- The RFEIS also responds to the science of the Tissot and Hallacher article in the appendix, writing “[t]he **collection that was occurring during the Tissot and Hallacher study was before the establishment of the WHRFMA[.]**”

A MORE FORMALISTIC APPROACH? (J. MCKENNA DISSENTING)

The sufficiency of an EIS is a question of law **because the only question presented is whether the EIS complies with applicable mandates**, such as Hawai'i Revised Statutes ("HRS") chapter 343 and Hawai'i Administrative Rules ("HAR"). An environmental impact statement ("EIS") shall only be upheld as adequate if:

[I]t has been compiled **in good faith** and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

HEPA requires that an EIS "discuss all relevant and feasible consequences" of an action, including "responsible opposing views" on any "significant environmental issues raised by the proposal." **HEPA's administrative rules provide specific requirements for EISs that are revised after being initially rejected. [and]** expressly mandate that a revised EIS [...] "fully address the inadequacies of the non-accepted EIS." Thus, under the plain language of HEPA and its administrative rules, the acceptance of a revised EIS is evaluated "on the basis of whether it satisfactorily addresses the findings and reasons for nonacceptance."



A MORE FORMALISTIC APPROACH? (J. MCKENNA DISSENTING)

[T]he RFEIS lacks HEPA's required discussion of "relevant negative findings" regarding the aquarium trade's harmful impacts, because it fails to analyze and disclose relevant negative findings that show "aquarium collectors have a significant effect on the abundance of targeted aquarium fishes."

The RFEIS also does not comply with the HEPA requirement that an EIS discuss mitigation measures. The Office of Environmental Quality Control's HEPA Citizen's Guide (2014) "indicates that an EIS needs to consider all mitigation measures to avoid, minimize, rectify, or reduce adverse impacts."

THE RULE OF REASON, FOR NOW

Under the "rule of reason," an EIS **need not be exhaustive** to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been **compiled in good faith** and sets forth **sufficient information** to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

[The court] may not "flyspeck" [the] agency's environmental analysis, ***looking for any deficiency***, no matter how minor. Instead, we must take a holistic view of what the agency has done to assess environmental impact and examine all of the various components of [the] agency's environmental analysis. . . to determine, on the whole, whether the agency has conducted the required "hard look."

LOPER BRIGHT ENTERS.V. RAIMONDO, 144 S. CT. 2244 (2024)

If the adequacy of an EIS is “purely a question of law,” will the loss of Chevron deference cause a rethinking of the “rule of reason?”

Is the adequacy of an EIS at least a “fact bound determination” that is at least given some persuasive weight?

Factual findings are needed, will EIS litigation still be amenable to summary judgment?



CURRENT EVENTS

Mootness & remedies: Unite Here v. PACREP et. al., SCAP-22-0000601

Jurisdiction & Remedies: Maui Lani Neighbors, Inc. v. State, 153 Hawai'i 527, 533, 542 P.3d 1222, 1228 (App. 2023). Permit can only be vacated through the Chapter 91 process. Other remedies are available in court. Primary jurisdiction & exhaustion do not apply to constitutional claims (even if they are defined by laws relating to environmental quality).

Double independent utility test (but for utility). Kia'i Wai o Wai'ale'ale v. Dep't of Water, 151 Hawai'i 442 (2022)