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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

HAWAII UNITES, a 501(c)(3) nonprofit corporation; Tina Lia, an individual,

Plaintiffs,

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI‘I, and DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI‘I,

Defendants,

and

AMERICAN BIRD CONSERVANCY,

Defendant-Intervenor.

CIVIL NO. 1CCV-23-0000594

DEFENDANT STATE OF HAWAII'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [DKT. 187]; DECLARATION OF PAUL RADLEY; CERTIFICATE OF SERVICE

Hearing
Date: January 17, 2024
Time: 9:00 a.m.
Judge: Honorable John M. Tonaki

REPLY IN SUPPORT OF MOTION

In its Motion for Summary Judgment ("Motion"; Dkt. 187 and accompanying memorandum in support Dkt. 188), the State outlined how the final environmental assessment ("FEA" or "EA") met the necessary criteria under Hawai'i law. In their Memorandum in Opposition to the Motion ("Opposition" at Dkt. 201), Plaintiffs reverted to repeating the same allegations contained in their Complaint. Plaintiffs assume the underlying Project creates risks which required the preparation of an environmental impact statement ("EIS"). However, the question for this Court is not whether Plaintiffs' fears are correct or even whether the Court agrees with the FEA. The only issue is purely a question of law: whether the FEA contains the information required by Hawai'i law. For the reasons stated in the Motion and as further discussed below, the contents of the FEA are sufficient as a matter of law.

Plaintiffs seek only a determination that the EA should have been an EIS. JEFS Dkt. 201 [Opposition] at 5. The only question this Court needs to answer is if the EA correctly applied the significance criteria. HAR § 11-200.1-13.[1] Plaintiffs still do not identify how the significance criteria were misapplied. But even setting aside this fundamental flaw, Plaintiffs' argument that the EA was insufficient is based on their disputes with the analysis given, not the omission of said analysis. The insufficiency argument boils down to three points: (1) insufficient analysis of impacts (i.e., "evolutionary" events and "horizontal" transmission); (2) insufficient mitigation measures over concerns about "horizontal" transmission, accidental pathogen introduction, or

[1] The significance criteria were evaluated in Appendix G of the EA. Ex. 1 (part 2) at 99-100.

biosecurity protocols; and (3) insufficient discussion of alternatives because the EA did not discuss Dr. Lorrin Pang's rabbit theory that was only elicited during cross-examination.[2]

I. SUMMARY JUDGMENT STANDARD

Under Hawai'i Rule of Civil Procedure ("HRCP") 56(e), when a party moving for summary judgment meets its burden, the adverse party "may not rest upon the mere allegations or denials" but "by affidavits or as otherwise provided in this rule, ***must set forth specific facts*** showing that there is a genuine issue for trial." HRCP 56 (e) (emphasis added). Otherwise, summary judgment, if appropriate, "***shall*** be entered against the adverse party." *Id.* (emphasis added). The non-moving party "cannot discharge his or her burden by alleging conclusions, nor is he or she entitled to a trial on the basis of a hope that he can produce some evidence at that time." *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 116 Hawai'i 277, 301, 172 P.3d 1021, 1045 (2007) (quoting *Young v. Planning Comm'n of the County of Kaua'i*, 89 Hawai'i 400, 407, 974 P,2d 40, 47 (1999)).

II. DISCUSSION

The biggest flaw in the Opposition is that it relies on allegations from the Complaint. This recitation of allegations with nothing more entitles the State to summary judgment.

A. The State is entitled to summary judgment because the FEA meets the "rule of reason" and is therefore sufficient under Hawai'i law.

In Plaintiffs' view, unless the FEA details every possible effect of the Project and provides iron-clad assurances that it will not have any negative consequences, it is insufficient. And this iron-clad assurance includes every scenario envisioned by Plaintiffs, even if such

[2] Plaintiffs also contend that the EA failed to address "irradiation" as an alternative. JEFS Dkt. 201 [Mem. Opp.] at 15. Irradiation is the sterile insect technique alternative discussed in the alternatives section of the EA. Ex. 1 (part 1) at 113.

scenarios are grounded in science-fiction rather than science. Plaintiffs are mistaken. Under the correct test, the FEA is sufficient on its face and the Defendants are entitled to summary judgment as a matter of law.

Price v. Obayashi Hawaii Corp., 81 Hawai‘i 171, 914 P.2d 1364 (1996) is directly on point. *Price* involved a challenge to the sufficiency of an EIS. *Id.* at 173, 914 P.2d at 1366. The trial court granted summary judgment to the City and County of Honolulu (which accepted the EIS). *Id.* On appeal, the Hawai‘i Supreme Court agreed that the sufficiency of an EIS is a question of law because the only issue "is whether the EIS complies with applicable statutory mandates" and "[t]here are no factual determinations to be made regarding EIS adequacy." *Id*. at 182, 914 P.2d at 1375. Even conflicting expert opinions *do not* create a material issue of fact. *Id.* at 181-82, 914 P.2d at 1374-75.

> It is difficult to imagine a situation . . . where there would not be disagreements as to the need for the project or as to the scope and content of the investigation. ***But, whether or not the parties disagree, or even whether there is authority which conflicts with the agency's decision is not the yardstick by which the sufficiency of an EIS is to be measured.*** Rather it is whether the EIS as prepared permitted informed decision making by the agency.

Id. (quoting *Anson v. Eastburn*, 582 F.Supp. 18 at 24 (S.D.Ind. 1983)) (emphasis added).

The Court held that an EIS should be upheld on summary judgment if it meets the "rule of reason." *Id*. at 182, 914 P.2d at 1376. An EIS meets the rule of reason if it adequately discloses facts to enable a decision-making body to render an informed decision. *Id.* Under the rule of reason, an EIS "need not be exhaustive to the point of discussing all possible details bearing on the proposed action." *Id.* (quoting *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164 577 P.2d 1116, 1121 (1978)) (emphasis added). The Court also recognized that neither HRS chapter 343 nor the administrative rules indicate "the level of detail or specificity" that must be included

in the EIS. *Id.* at 183, 914 P.2d at 1376. Instead, "[t]he statute and rules were designed to give latitude to the accepting agency as to the content of each EIS." *Id.* "A court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a 'hard look' at environmental factors." *Id.* at 182 n.12, 914 P.2d at 1375 n.12 (quoting *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 159 (D.Haw. 1982)).

The plaintiff in *Price* asserted that the EIS was inadequate because it failed to address various threats and potential damages such as erosion, lack of infrastructure, the effect of pesticides, and the location of archaeological sites. *Id.* at 183 n.13, 914 P.2d at 1376 at n.13. However, each topic *was* discussed in the EIS and the EIS included studies which demonstrated that the applicant made "good faith efforts" to set forth sufficient information. *Id.* at 184-85, 914 P.2d at 1377-78. Thus, the EIS addressed all legal requirements and summary judgment upholding the EIS was proper. *Id.* at 185, 914 P.2d at 1378.

The FEA in this case should also be upheld as a matter of law. An EA, like an EIS, is evaluated under the "rule of reason." *Ho'opakele v. Dep't of Acct. & Gen. Servs.*, 138 Hawai'i 51, 375 P.3d 1289 (App. 2016). However, an EA is intended to be concise and less comprehensive than an EIS. *Malama Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1160 (D. Haw. 2001). Like an EIS, an EA is required to have certain content. It must include: (1) a detailed description of the project, (2) an evaluation of direct, indirect, and cumulative impacts, (3) a discussion of alternatives, and (4) a description of any mitigation measures. *Kilakila 'O Haleakala v. Univ. of Hawai'i and David Lassner*, 138 Hawai'i 364, 370, 382 P.3d 176, 182 (2016). However, like the requirements for an EIS, HRS chapter 343 does not describe the "level of detail or specificity" required, and thus, like an EIS, the accepting agency is given wide

latitude to determine whether the content is sufficient. *Price*, 81 Hawai‘i at 183, 914 P.2d at 1376.

Plaintiffs allege that the FEA is insufficient under prongs 2, 3, and 4 of the test in *Kilakila*. The Motion already explained that the FEA was sufficient under this test in Section A. Moreover, it even addressed most of the concerns Plaintiffs raise in their Opposition. For example, Plaintiffs' concerns over "evolutionary" events, "horizontal" transmission,[3] and accidental release of female mosquitoes were both addressed in the FEA and identified as addressed in the FEA in the Motion. JEFS Dkt. 188 [Motion] at PDF page 12.[4]

Plaintiffs allege that the FEA did not adequately address mitigation measures. But they point to the same concerns, which the FEA discussed and addressed why those are not

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[3] Plaintiffs cite a study in footnote 7 of their Opposition to allege that *Wolbachia* can "transfer to humans[.]" The study describes a case study of genetic material from *Wolbachia* detected in the bloodstream of a patient diagnosed with non-Hodgkin's lymphoma, an individual that may be considered immunocompromised. Declaration of Paul Radley ¶ 4. Given the sample size of n=1, this observation is an anecdotal observation that cannot be tested statistically. *Id.* ¶ 5. The authors additionally could not rule out the possibility that the detected genes had been released from a filarial worm infection in the patient, which had apparently not been tested for. *Id.* ¶ 6.

[4] Plaintiffs additionally argue that their concerns over "biopesticide drift" via wind was not addressed in the FEA. On the contrary, the FEA addressed the anticipated dispersal of the *Culex quinquefasciatus*:

> Based on past research, southern house mosquitoes are estimated to travel (disperse) approximately 650 feet in a 24-hour period (LaPointe 2008); thus, incompatible males would have the highest probability of finding a female and mating during the first day of release when locations are spaced 1,300 feet apart. Based on the estimated dispersal of mosquitoes into the range of threatened and endangered birds, a total of 1,389 proposed release locations were identified within the center of the project area (Figure 2). The area encompassing these 1,389 release locations is hereafter referred to as the "core area." The number of release locations, based on 1300-foot spacing within the core area, within each land management area are included in Table 2.

Exhibit 1 (part 1) at 18.

scientifically viable concerns. JEFS Dkt. 188 [Motion] at PDF page 12. The EA, having addressed these "concerns," does not provide mitigation measures because these are more accurately characterized as unfounded fears.

Plaintiffs argue that the alternatives section was insufficient because the alternatives section uses the word "potentially." Opposition at 15. The FEA, as discussed in the Motion, clearly identifies alternative mosquito control methods and articulates why those methods are not viable in this case. JEFS Dkt. 188 [Motion] at PDF page 12. Plaintiffs then argue that the FEA's alternatives discussion is insufficient because Dr. Pang (not a Plaintiff) mentioned his rabbit theory ("blood source feeding") as an alternative during cross-examination. But under the rule of reason, the State is not required to exhaust all possible alternatives to the proposed action. *Price*, 81 Hawai'i at 182, 914 P.2d at 1375.[5]

B. Plaintiffs' miscellaneous arguments neither raise a legal argument that an EIS was required nor a material dispute of fact.

Plaintiffs list several unsubstantiated beliefs to try and create a material fact dispute. Opposition at 16-19. None of these beliefs allow them to defeat summary judgment because the "evidence" they present is inadmissible and most of these beliefs go to efficacy of the project, which has nothing to do with sufficiency of an EA.[6]

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[5] Although not necessary to determining that the EA is sufficient under the rule of reason, it is also worth noting that a plan involving the placement of non-native mammals around the perimeter of a forest reserve presents a whole host of issues. For example, if the rabbits escape, a feral rabbit population could be established. How would the rabbits be fed? How would the mosquitoes even bite the rabbits when they are unlikely to disperse more than 1,300 feet and the rabbits are located only on the perimeter? Why would the *Culex quinquefasciatus* choose a blood meal from a mammal when it is generally ornithophilic?

[6] Plaintiffs assert that the FEA did not attach comments it received during the public review period. Their assertion is not that their concerns were not addressed but that the actual comments the agency responded to in Appendix H were not appended to the FEA. While Plaintiffs are correct in identifying that FEAs "shall" contain written comments received under HAR § 11-

The claims that improper segmentation and different release methods are occurring are based on Plaintiff Lia's declaration. She believes helicopter drops of mosquitoes are occurring because she believes she has seen records of helicopter flights from the Project. Opposition at 16-18. Her basis? A screenshot of flight records from a website called "flightaware.com." Declaration of Tina Lia at ¶ 7. First, her screenshots of fight records (Exhibit B to the Opposition) are inadmissible. For starters, those records constitute double hearsay—flightaware.com does not provide any information as to how it acquired this information, and Plaintiff Lia is simply repeating what she was told by flightaware.com. She has no firsthand knowledge of these alleged flights. But even if Plaintiffs somehow managed to admit Exhibit B into evidence, it simply shows that a flight occurred. It gives no information about the purpose of the flight, or even if the State or one of its BNM partners were involved with the flight. This is pure conjecture and speculation.

The claim that "hazardous materials" are being transported was not alleged in the Complaint. *See generally* Compl. And the weblink in footnote 10 has no information suggesting the "incident" Plaintiffs are concerned about was related to the Project. But even if Plaintiffs had alleged this in the Complaint, this information was admissible, and it was able to be linked to the

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200.1-21, this does not go to the determination of whether the FEA was sufficient. *Kilakila*, 138 Hawai‘i at 370, 382 P.3d at 182 (identifying the four substantive areas an EA must cover to be sufficient). Because Plaintiffs do not point to concerns not addressed in the EA, "shall" is merely directory. In *Narmore v. Kawafuchi*, this Court determined that the word "shall" may be held to be merely directory when no advantage is lost, when no right is destroyed, or when no benefit is sacrificed, either by the public or to the individual by giving it that construction. 112 Hawai‘i 69, 83-84, 143 P.3d 1271, 1285-86 (2006). But even if this Court finds the omission of the comments an error that must be corrected, it may exercise its equitable powers under HRS § 603-21.9(6) to order the agency to append the comments to the published FEA without withdrawing the FEA. Withdrawal of the EA would result in the project halting, an entirely new HEPA document subject to public comment being prepared, and the increased likelihood of the birds going extinct.

Project, the FEA is still sufficient. Throughout the discussion on using drones and helicopters, the FEA makes clear that all operations will comply with Federal Aviation Administration regulations and guidelines (*see, e.g.*, Ex. 1 (part 1) at 28-82), which include transporting hazardous materials. *See, e.g.*, 14 CFR §§ 121.135, 121.221, 121.1003, 121.1005, 121.1007.

The claim that the FEA "fails to disclose" the EPA guidelines for allowable release of female mosquitoes also fails. *See* Opposition at 19. This is an EPA guideline for what the EPA deems to be an acceptable level of accidental female release. The FEA discloses studies of anticipated release rates far smaller than this number. But even if the release rate was the same as the EPA guideline, that would still be sufficient as it would correspond to an applicable federal guideline for this type of project.

III. CONCLUSION

For the aforementioned reasons and authorities, and any that may be adduced at a hearing on this Motion, the Board respectfully requests that the judgment be entered in favor of State.

DATED: Honolulu, Hawai'i, January 12, 2024.

/s/ Miranda C. Steed .
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

HAWAII UNITES, a 501(c)(3) nonprofit corporation; Tina Lia, an individual, Plaintiffs, vs. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI, and DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI, Defendants, and AMERICAN BIRD CONSERVANCY, Defendant-Intervenor.	CIVIL NO. 1CCV-23-0000594 DECLARATION OF PAUL RADLEY

DECLARATION OF PAUL RADLEY

I, PAUL RADLEY, hereby declare as follows:

1. I am the Coordinator for the Mosquito Control Project at Pacific Biosciences Research Center *in cooperation with* DLNR DOFAW.

2. I have a Ph.D. in avian ecology and conservation biology.

3. I have reviewed Chen et al., *Detection of Wolbachia genes in a patient with non-Hodgkin's lymphoma*, 21 CLINICAL MICROBIOLOGY & INFECTION 182 (2015) (the "Paper"), which is cited in footnote 7 of JEFS Dkt. 201.

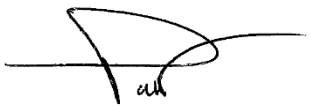
4. The Paper describes a case study of genetic material from *Wolbachia* detected in the bloodstream of a patient diagnosed with non-Hodgkin's lymphoma, an individual that may be considered immunocompromised.

5. Given the sample size of n=1, this observation is an anecdotal observation that cannot be tested statistically.

6. The authors additionally could not rule out the possibility that the detected genes had been released from a filarial worm infection in the patient, which had apparently not been tested for.

7. I hereby declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai‘i, January 12, 2024.



PAUL RADLEY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

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HAWAII UNITES, a 501(c)(3) nonprofit corporation; Tina Lia, an individual, Plaintiffs, vs. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI, and DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI, Defendants, and AMERICAN BIRD CONSERVANCY, Defendant-Intervenor.	CIVIL NO. 1CCV-23-0000594 (Environmental Court) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was duly served upon the person(s) listed below by electronic service or by depositing the same in the United States Mail, postage prepaid, on January 12, 2024:

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