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CAAP-24-0000123

INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

HAWAI'I UNITES, a 501(c)(3) nonprofit
corporation; and TINA LIA, an individual,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

AMERICAN BIRD CONSERVANCY,

Defendant-Intervenor-
Appellee.

CIVIL NO. 1CCV-23-0000594 (JMT)

APPEAL FROM THE

- (1) Final Judgment filed on February 6, 2024**
- (2) Order Granting State of Hawai'i's Motion for Summary Judgment filed on February 6, 2024**
- (3) Circuit Court's Minute Order re: Defendant State of Hawai'i's Motion for Summary Judgment and Defendant-Intervenor American Bird Conservancy's Joinder to Defendants Board of Land and Natural Resources, State of Hawai'i, and Department of Land and Natural Resources, State of Hawai'i's Motion for Summary Judgment filed January 29, 2024**

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PLAINTIFFS-APPELLANTS' OPENING BRIEF

COMES NOW Plaintiffs-Appellants HAWAI'I UNITES and TINA LIA (collectively, "Plaintiffs" or "Plaintiffs-Appellants") by and through their attorneys Margaret Wille and Timothy Vandever of MARGARET WILLE & ASSOCIATES LLLC, pursuant to Rules 28(b) "Opening Brief" and 32 "Form of Documents" of the Hawai'i Rules of Appellate Procedure ("HRAP"), and files this Opening Brief.

I. INTRODUCTION

The ecosystems of East Maui's Haleakalā National Park, state forest reserves, natural areas and private managed lands are some of the most unique and fragile in the world, set aside for preservation and protection. It is in these special ecosystems that the Defendant Department of Land and Natural Resources, State of Hawai'i ("DLNR") and its "partners" seek to release up to 775,992,000 lab-reared bacteria-infected mosquitoes ("biopesticide experiment" or "project") per week for the next 20 years, in a stated effort to protect endangered native forest birds from avian malaria. *JEFS #246 RA: 16-23*. Assuredly, with an experiment of this size and scope proposed, a full environmental impact study would be a given prerequisite. Yet, DLNR contends a full environmental impact study is not needed, arguing that what could amount to upwards of 807 billion infected mosquitoes released on nearly 65,000 acres of land will have no significant impact on Maui's people, wildlife, and ecosystem. *See Id. at 6, 13, 21-22*. Not only is DLNR's position contrary to its administrative rules and statutory standards, but it defies common sense.

On March 28, 2023, Defendant Board of Land and Natural Resources, State of Hawai'i ("Board" or "BLNR") (collectively, along with DLNR "State Defendants") accepted the DLNR's Final Environmental Assessment ("FEA") and Finding of No Significant Impact ("FONSI"), and in so doing accepted DLNR's recommendation that an Environmental Impact Statement ("EIS") for the project is not required. *Id. at 6*. On May 8, 2023, Plaintiffs Hawai'i Unites and Tina Lia (collectively "Plaintiffs") filed a Complaint challenging the decision and the sufficiency of the FEA. *JEFS # 1*. On January 29, 2024, the Circuit Court, using an incorrect standard of review of the sufficiency of the FEA, granted State Defendants' Motion for Summary Judgment ("MSJ"), dismissing Plaintiffs' Complaint. *See JEFS #211*. In its ruling, the Circuit Court also failed to address additional material facts that have been discovered since the filing of the Complaint that suggest that this project is being carried out in a manner contrary to what was proposed, explained, and/or studied in the FEA. *Id.* Finally, the Court failed to address

that Defendant BLNR’s acceptance of the FEA and FONSI for the proposed biopesticide mosquito project violated the letter and purpose of the Hawaii Environmental Policy Act (“HEPA”). *Id.*

II. PARTIES AND PERSONA

A. Plaintiffs-Appellants

1. Hawai‘i Unites

Plaintiff Hawai‘i Unites is a 501(c)(3) nonprofit organization dedicated to the conservation and protection of Hawai‘i’s environment and natural resources. *JEFS # 1 RA: 4.* The organization has conducted extensive research into the science, data, and documentation of the biopesticide mosquito project. *Id.* The organization has become a trusted source for information about the biopesticide experiment. *Id. at 5.* Hawai‘i Unites’ officers and supporters live, work, and recreate in and around East Maui. *Id.* Hawai‘i Unites’ officers and supporters are concerned about how the proposed biopesticide mosquito project will affect Maui’s fragile ecosystems and public health. *Id.*

2. Plaintiff Tina Lia

Plaintiff Tina Lia is the founder of Hawai‘i Unites and current Board President. *Id. at 7.* She resides on Maui, the island where the proposed biopesticide mosquito experiment area is located, and has submitted testimony since June 2022, to the State of Hawai‘i Department of Agriculture Board of Agriculture and the BLNR, along with providing comments on DLNR Defendants’ Draft Environmental Assessment (“DEA”). *Id.* These testimonies and comments documented serious risks of the project and the potential for significant environmental impact. *Id.* Since January 2023, Plaintiff Lia has also attended public meetings held by project agency partners where she raised questions and concerns regarding the details and the risks of the project, which have yet to be addressed. *Id.*

B. Defendants-Appellees

1. Defendant DLNR

Defendant DLNR is responsible for managing, administering, and exercising control over the State’s public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein. Hawaii Revised Statutes (“HRS”) §§ 171-3. *Id. at 9.* DLNR is a member of the multi-agency partnership named Birds, Not Mosquitoes (“BNM”) that is responsible for evaluating the

potential for control of mosquitoes on a landscape-scale in Hawai‘i through a method known as Incompatible Insect Technique (“IIT”). *See Id. at 24.* DLNR is both the co-applicant and accepting agency overseeing the project. *JEFS # 38 RA:4; JEFS # 246 RA: 6.*

2. Defendant BLNR

Defendant BLNR is the executive board that heads DLNR. HRS §§ 26-15(a), 171-3(a); *JEFS # 1 RA: 9.*

BLNR is the “agency that issues an approval prior to implementation of an applicant action” for the use of state lands for the project including a Conservation District Use Permit and management plan. *JEFS # 1 RA: 11.* Pursuant to HRS §343-5(a) “trigger(s)” for a project include:

- (1) Propose the use of state or county lands or the use of state or county funds
- (2) Propose any use within any land classified as a conservation district

BLNR is the “approving agency” for the biopesticide experiment. Hawaii Administrative Rules (“HAR”) § 11-200.1-2; *JEFS # 1 RA: 11.* As the “approving agency,” BLNR is responsible for determining “whether the anticipated effects constitute a significant effect” and “the need for an EIS.” *Id.*

3. Defendant-Intervenor American Bird Conservancy

Defendant American Bird Conservancy (“ABC”) is a nonprofit organization dedicated to preserving native birds and their habitats throughout the Americas and in Hawai‘i. *JEFS #50 RA: 5.* ABC became a founding member of Birds, Not Mosquitoes and a funder of activities coordinated by it. *See Id.*

III. STATEMENT OF THE CASE: COURSE AND DISPOSITION OF THE PROCEEDINGS

A. East Maui’s Ecosystems

Haleakalā National Park, Ko‘olau Forest Reserve, Hāna Forest Reserve, Hanawī Natural Area Reserve, Kīpahulu Forest Reserve, Makawao Forest Reserve, and Waikamoi Preserve (The Nature Conservancy); as well as the privately managed lands of East Maui Irrigation Company, LLC; Mahi Pono; and Haleakalā Ranch include numerous intermittent and perennial streams, bogs, small montane lakes, and rainforest that provide habitat for native birds, bats, invertebrates, and aquatic organisms. *See JEFS # 246 RA: 72; JEFS # 1 RA: 23.* Nine species of federally listed threatened and endangered wildlife (one insect, eight bird species, and one mammal) are

known to occur within the project area. *Id.* Threatened and endangered wildlife species in the project area include the native damselfly, nēnē (Hawaiian goose), seabirds (albatross, petrel, shearwater, and storm-petrel), and ‘ōpe‘ape‘a (Hawaiian hoary bat) and Hawaiian honeycreepers (kiwīkiu, ‘ākohekohe, ‘i‘iwi). *JEFS # 1 RA: 23.*

B. “Birds, Not Mosquitoes”

BNM is a collaboration of state, federal, and private non-profit partners behind the project known as “Suppression of Invasive Mosquito Populations to Reduce Transmission of Avian Malaria to Threatened and Endangered Forest Birds on East Maui.” *See JEFS # 1 RA: 2, 24.* BNM includes representatives from DLNR, Hawai‘i Department of Health, U.S. Fish and Wildlife Service, University of Hawai‘i, U.S. Geological Survey, National Park Service, American Bird Conservancy, The Nature Conservancy of Hawai‘i and Palmyra, Coordinating Group on Alien Pest Species, Maui Forest Bird Recovery Project, Kaua‘i Forest Bird Recovery Project, MosquitoMate, Michigan State University, Pacific Rim Conservation, and Island Conservation. *Id.* The purpose of BNM is to coordinate and advance efforts to develop, permit, test, and register for conservation use as a biopesticide the mosquito species *Culex quinquefasciatus* (“southern house mosquito” or “*Culex q.*”) infected with a strain of *Wolbachia* bacteria. *Id. at 24-25.*

The stated purpose of BNM’s biopesticide mosquito project is to substantially suppress or eliminate southern house mosquitoes and, thus, avian malaria in threatened and endangered forest bird populations in East Maui using the IIT method for mosquito population control, thereby reducing extinction risks and contributing to the recovery of these species. *Id. at 25.* The action consists of repeatedly releasing incompatible male mosquitoes using IIT with the intent of reducing the reproductive potential of wild mosquitoes. *Id.* This method of IIT is known as population suppression. *Id.*

C. Draft Environmental Assessment

In November 2022, the DLNR transmitted a draft EA and anticipated finding of no significant impact (“DEA-AFONSI”) for the biopesticide mosquito project, “Suppression of Non-native Wild Mosquito Populations to Reduce Transmission of Avian Malaria to Threatened and Endangered Forest Birds on East Maui,” to the State of Hawai‘i Office of Planning and Sustainable Development Environmental Review Program (“ERP”) for publication in The Environmental Notice. *Id. at 38.* On December 8, 2022, the DEA-AFONSI was published by the

ERP in The Environmental Notice. *Id.* The statutory 30-day public review and comment period for the DEA-AFONSI started on the publication date, December 8, 2022. *Id.* Pursuant to HRS Chapter 343, comments were due by January 9, 2023. *Id. at 38-39.* The National Park Service, in collaboration with the DLNR, accepted comments through their website link and by mail through January 23, 2023, extending the public review and comment period. *Id. at 39.*

Following the December 8, 2022, publication of the DEA-AFONSI, and prior to the January 23, 2023, deadline for comments, Hawai‘i Unites Founder and President Tina Lia submitted a comment on behalf of the organization. *Id.* Hawai‘i Unites’ comment on the DEA-AFONSI documented risks of the project, including but not limited to, the experimental nature of the plan, lack of United States Environmental Protection Agency (EPA) registration of the biopesticide mosquitoes, dangers of horizontal transmission of the introduced bacteria strain, increased pathogen infection in mosquitoes, irreversible evolutionary events, population replacement, accidental release of lab-reared (“lab-strain-infected”) females, creation of lab-strain-infected females in the wild, horizontal gene transfer, biopesticide drift, and mosquitoes becoming more capable vectors of avian malaria and West Nile virus. *Id.* Peer-reviewed studies were included for reference. *Id.* Specific concerns voiced by tropical disease and vector expert Dr. Lorrin Pang, speaking as a private citizen, were described in detail, with a focus on the risks of horizontal transmission of the lab bacteria. *Id.*

D. Final Environmental Assessment

On March 17, 2023, the DLNR posted the final EA for the biopesticide mosquito project on their website. *Id. at 41.* The final EA included a recommendation that the Board approve the final EA, authorize the Chairperson to issue a FONSI, and authorize the Chairperson to publish a FONSI for the final EA in the ERP’s The Environmental Notice. *Id.* The final EA also included an Appendix H entitled “Responses to Substantive Public Comments on Environmental Assessment.” *Id.*

E. Prior Proceedings

On May 8, 2023, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief (“Complaint”) against Defendants DLNR and BLNR. *Id.* Plaintiffs contend that Defendants fail to demonstrate why the Proposed Action - which could result in the release of over 800 billion lab-reared *Wolbachia*-bacteria-infected mosquitoes in the fragile ecosystems of East Maui with

no meaningful mitigation measures in place if things don't go according to plan - will not have a significant contrary and potentially adverse impact on the environment. *See generally* *JEFS* #1.

The Complaint has two claims for relief: 1) that the BLNR erroneously issued a Finding of No Significant Impact (“FONSI”) and erroneously accepted an FEA (instead of requiring that an EIS be conducted based on the significant impacts of the project on the environment) and 2) that the BLNR violated HRS Chapter 91 for denying Plaintiffs’ contested case hearing request. *Id.* at 47-49.

On June 20, 2023, Plaintiffs filed a Motion for Preliminary Injunction. *JEFS* # 37.

On June 26, 2023, State Defendants filed a Partial Motion to Dismiss the Complaint. *JEFS* # 54.

On July 9, 2023, the Court approved a stipulation authorizing the intervention of American Bird Conservancy (ABC) as a Defendant. *JEFS* # 68.

On July 21, 2023, a hearing was held on Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs presented testimony from two witnesses, expert witness Dr. Lorrin Pang (“Dr. Pang”) and Plaintiff Tina Lia (“Plaintiff Lia”), then rested. *See* *JEFS* # 133. State Defendants and Defendant-Intervenor American Bird Conservancy began the presentation of their defense with a live witness, but due to time constraints were unable to finish. *Id.* The hearing on Plaintiffs’ Motion for Preliminary Injunction was eventually continued to 2024. *See* *JEFS* # 156.

On August 10, 2023, the Court granted the State Defendant’s Partial Motion to Dismiss and dismissed Plaintiffs’ second claim for relief (violation of HRS Chapter 91). *JEFS* # 151.

On December 22, 2023, State Defendants filed a Motion for Summary Judgment on the remaining claim in the Complaint (“MSJ”). *JEFS* # 187.

On January 17, 2024, a hearing on State Defendant’s MSJ was held before Hon. John M. Tonaki. *JEFS* # 210.

On January 29, 2024, the Circuit Court issued a Minute Order granting State Defendants’ MSJ (“Minute Order”). *JEFS* # 214.

On February 6, 2024, the Circuit Court granted Defendant State of Hawai‘i’s MSJ as to the remaining count as well as Defendant-Intervenor American Bird Conservancy’s substantive joinder “Order”. *JEFS* # 215.

On February 6, 2024, the Court entered a Final Judgment in favor of State Defendants and Defendant-Intervenor ABC and against Plaintiffs Hawai‘i Unites and Tina Lia. *JEFS* # 221.

IV. STATEMENT OF POINTS OF ERROR

A. FIRST POINT OF ERROR:

The Circuit Court erred by applying the wrong standard for reviewing the sufficiency of an environmental assessment (“EA”), namely, the “rule of reason” that Hawai‘i Courts have held is only appropriate for review of Environmental Impact Statements. The Circuit Court articulated its Standard of Review in the Minute Order¹, stating:

Whether an Environmental Assessment [“EA”] is sufficient under HRS chapter 343 is a question of law, which is properly addressed through summary judgment. *Price v. Obayashi Hawaii Corp.*, 81 Hawai‘i 171, 182(1996). Like an Environmental Impact Statement, courts apply the “rule of reason” to determine whether an EA is sufficient. *Id.* (emphasis added.)

JEFS # 211 RA: 1.

Further, the Circuit Court erred by granting summary judgment because there are material facts in dispute. Though Plaintiffs assert that the FEA did not adequately disclose or failed to address numerous issues, including issues that were *entirely omitted* from the FEA, in its Minute Order the Court explained that:

“[a] reading of the FEA reveals that many of the alleged issues raised by Plaintiff, were, in fact, addressed in the FEA and that some of the potential impacts of the project were raised as mere possibilities by Plaintiff.” (emphasis added.)

Id. at 2.

The Circuit Court’s Order Granting Defendant State of Hawai‘i’s Motion for Summary Judgement as to the remaining count as well as Defendant-Intervenor American Bird

¹ A copy of the First Circuit Court’s Minute Order re: Defendant State of Hawai‘i’s Motion for Summary Judgment and Defendant-Intervenor American Bird Conservancy’s Joinder to Defendants Board of Land and Natural Resources, State of Hawai‘i, and Department of Land and Natural Resources, State of Hawai‘i’s Motion for Summary Judgment dated January 29, 2024 is attached as **Appendix A**.

Conservancy’s substantive joinder contained the same language as reflected above.² *See JEFS # 215.*

Plaintiffs objected at JEFS #238.³

B. SECOND POINT OF ERROR:

The Circuit Court erred in granting Summary Judgment based on a failure to address additional material facts that Plaintiffs detailed in the Memorandum in Opposition to Defendants MSJ that suggest a project being carried out in a manner contrary to what was proposed, explained, and/or studied in the FEA. *See JEFS # 201 RA: 17-19.* The additional material facts that were not addressed pertaining to changes to the scope of the project as proposed and studied in the FEA included: long-term releases of biopesticide mosquitoes via helicopter, helicopters flying closer to the tree canopy than was stated in the FEA, and fire risks from hazardous materials used in mosquito monitoring, all of which would have a significant impact on the environment. *Id.* Plaintiffs objected at *JEFS # 201 RA: 17-19.*

C. THIRD POINT OF ERROR:

The Circuit Court erred in granting Summary Judgment because Defendant BLNR’s acceptance of the FEA was a violation of HRS Chapter 343, due to Defendant DLNR’s failure to comply with HAR Sec. 11-200.1-20 in preparing its FEA by failing to include the comments that it received to its Draft Environmental Assessment (“DEA”) as a part of each response to the comments in the FEA, failing to append the comments in full to their FEA, and failing to clearly identify the names of commenters who raised the issue addressed in a distinctly labeled section with the topic heading. This failure is undisputed⁴ and was not addressed in the Circuit Court’s Minute Order or Order granting Defendants’ Motion for Summary Judgment. *See JEFS #s 211, 215.* Plaintiffs objected at *JEFS # 37 RA: 11-13; JEFS # 115 RA: 4,8; JEFS # 118 RA: 4; JEFS # 201 RA: 15-16.*

V. STANDARDS OF REVIEW

² A copy of the First Circuit Court’s Order Granting Defendant State of Hawaii’s [187] Motion for Summary Judgment dated February 6, 2024 is attached as **Appendix B.**

³ Due to the nature of the error, this objection was not raised during the course of a Circuit proceeding, but through the Notice of Appeal after the Circuit Court’s ruling was issued.

⁴ *See* Civ. Dkt. No 208 at FN 6.

A. STANDARD OF REVIEW IN THE GRANT OR DENIAL OF SUMMARY JUDGMENT

“Unlike other appellate matters, in reviewing summary judgment decisions[,] an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied.” *Citizens for Equitable & Responsible Gov't v. Cnty. of Hawaii*, 108 Haw. 318, 321–22, 120 P.3d 217, 220–21 (2005), *amended on reconsideration in part* (Sept. 22, 2005)(citations omitted). “Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Id.*

In cases of public importance, a circuit court should grant a motion for summary judgment “sparingly, and never on limited and indefinite factual foundations.” *Kilakila 'O Haleakala v. Univ. of Hawai'i & David Lassner*, 138 Haw. 364, 375, 382 P.3d 176, 187 (2016)(internal citation omitted)(emphasis added).

B. STANDARD FOR REVIEW FOR SUFFICIENCY OF AN ENVIRONMENTAL ASSESSMENT

The court “must ensure that the agency has taken a ‘hard look’ at environmental factors.” *Sierra Club v. DOT*, 115 Hawai'i 299, 342, 167 P.3d 292, 335 (2007). Furthermore, when public trust resources are involved, Hawai'i courts take a “close look” to ensure compliance with public trust principles and “will not act merely as a rubber stamp for agency or legislative action.” *In Re Water Use Permit Applications*, 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000). In *Kepo 'o v. Kane*, 106 Hawai'i 270, 281, 103 P.3d 939, 950 (2005), the department that had accepted an environmental assessment (EA) argued that the court should have given deference to the agency's determination. The Supreme Court rejected that standard. *Id.* at 287 n.27, 103 P.3d at 956 n. 27.

“In cases reviewing the sufficiency of an environmental assessment (“EA”), see Haw. Rev. Stat. § 343-5; Haw. Admin. R. §§ 11-200.1-18 to -21, and whether an environmental impact statement (“EIS”) is required, see Haw. Rev. Stat. § 343-5; Haw. Admin. R. § 11-200.1-22, courts apply the “clearly erroneous standard.” *Pele Def. Fund v. Dep't of Land & Natural Res.*, 141 Haw. 381, 384–86 (Haw. Ct. App. 2018) (“[A]n agency's determination that a proposed action will likely have no significant impact on the environment is an issue that should be reviewed **under the clearly erroneous standard.**”) (emphasis added); *see also* *Kilakila 'O*

Haleakala v. Univ. of Hawai'i & David Lassner, 138 Haw. 364, 368 P.3d 176, 187 (2016) (“Because [defendant’s] conclusion that the Management Plan would not cause significant environmental impacts is not **clearly erroneous**, an environmental impact statement was not required.”) (emphasis added).

“This standard of review is deferential; the [C]ourt cannot substitute its judgment for that of the agency. The agency’s decision will only be overturned if the agency made ‘a clear error in judgment.’” *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1216 (D. Haw. 2001) (internal citations omitted). So long as the agency has taken a “hard look” at the “consequences of its actions, **based its decision on a consideration of relevant factors, and provided a ‘convincing statement of reasons’** to explain why a project’s impacts are insignificant,” the court will defer to the agency. *Id.* (emphasis added)

VI. ARGUMENT

A. FIRST POINT OF ERROR

The Circuit Court Erred by applying the wrong standard for reviewing the sufficiency of an Environmental Assessment. The “rule of reason” standard of review that the First Circuit Court cites to as the appropriate standard of review in its Minute Order, is inapplicable based on where this matter stands within the environmental review process. *Pele Def. Fund v. Dep’t of Land & Natural Res.*, 141 Haw. 386 (Haw. Ct. App. 2018) (“In *Life of the Land*, the supreme court considered whether an EIS contained sufficient information, not whether an EIS was necessary following the completion of an EA and issuance of a [finding of no significant impact (“FONSI”)].

Though in its Minute Order (and also in its Order of February 6, 2024) the Lower Court gives reference to the correct “clearly erroneous” standard of review, it is clear that the “rule of reason” was the standard that the Court applied in reaching its conclusion that the EA for the Birds, Not Mosquitoes project was sufficient under HRS chapter 343. In explaining its decision under the “rule of reason” standard, the Circuit Court found that:

“the FEA in the instant case was compiled in good faith and set forth sufficient information to enable the BLNR 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.”

As discussed above, the correct standard to be employed by a reviewing court as to

whether an EIS was necessary following the completion of an FEA and issuance of a FONSI is whether the subject agency clearly erred in determining whether the proposed action will likely have a significant impact on the environment. Therefore, the First Circuit Court should have applied the above “clearly erroneous” standard in this case. *See Nā Kia ‘I O Wai Hā et al. v. Hawaii Community Development Authority et al. Civ. No. ICCV-23-0000517.*

Though Plaintiffs understand that in reviewing a summary judgment decision, the ICA typically steps into the shoes of the trial court and applies the same legal standard as the trial court applied, in this case the standard applied by the Circuit Court is incorrect, and the trial court’s conclusions of law are not binding upon the appellate court and are freely reviewable for correctness under the right/wrong standard. *See Citizens for Equitable & Responsible Gov’t v. Cnty. of Hawaii*, 108 Haw. 318, 321–22, 120 P.3d 217, 220–21 (2005), *amended on reconsideration in part* (Sept. 22, 2005)(citations omitted). Therefore, Plaintiffs ask the ICA to review the Circuit Court’s decision using the correct standard as detailed above.

Had the Circuit Court used the correct standard of review, the outcome of the decision would have been different, given the clearly erroneous acceptance of the EA based on missing, inaccurate and misleading information that prevented the decision-maker from weighing the impacts of the project.

1. APPLICABLE LEGAL FRAMEWORK

An EA “must include the following: (1) a detailed description of the proposed action or project; (2) an evaluation of the direct, indirect, and cumulative impacts; (3) a discussion of alternatives to the proposed project or action; and (4) a description of any measures proposed to minimize potential impacts” *Kilakila ‘O Haleakala v. Univ. of Hawai‘i & David Lassner*, 138 Hawai‘i at 370, 382 P.3d at 182 (2016); HAR 11-200.1-13.

For any action that “*may* have a significant effect on the environment” HEPA requires the preparation of an EIS. HRS § 343-5(c) (emphasis added). The Hawai‘i Supreme Court has made clear that under the “likely have a significant effect” standard, “plaintiffs need not show that significant effects will in fact occur but instead need only **raise substantial questions whether a project may have a significant effect.**” *Unite Here! Local 5 v. City & Cnty. of Honolulu*, 123 Hawai‘i 150, 178, 231 P.3d 423, 451 (2010) (internal citations omitted)(emphasis in original).

In determining whether an action may have a significant impact on the environment, “the agency shall consider every phase of a proposed action, the expected impacts, and the proposed mitigation measures.” HAR § 11-200.1-13(b). The agency must consider certain “significance criteria” outlined in HAR § 11-200.1-13: “[A]n action shall be determined to have a significant effect on the environment if it may,” among other factors:

- (1) Irrevocably commit a natural, cultural, or historic resource;
- (2) Curtail the range of beneficial uses of the environment;
- (3) Conflict with the State’s environmental policies or long-term environmental goals established by law;
- (4) Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community and State;
- (5) Have a substantial adverse effect on public health;
- (6) Involve adverse secondary impacts, such as population changes or effects on public facilities;
- (7) Involve a substantial degradation of environmental quality;
- (8) Be individually limited but cumulatively have substantial adverse effect upon the environment or involves a commitment for larger actions;
- (9) Have a substantial adverse effect on a rare, threatened, or endangered species, or its habitat;
- (10) Have a substantial adverse effect on air or water quality or ambient noise levels;
- (11) Have a substantial adverse effect on or be likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters.
- (12) Have a substantial adverse effect on scenic vistas and viewplanes, during day or night, identified in county or state plans or studies; or. . .

HAR § 11-200.1-13(b)(emphasis added).

The criteria are expressly listed in the disjunctive. Thus, the existence of a single factor is sufficient to require preparation of an EIS. See *id.*

As discussed in *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008), in the context of the NEPA, the Court must take a hard look in order to “determine whether the EA foster[s] both informed decision-making and informed public participation” (citations omitted), or alternatively, whether a more in-depth evaluation is required by way of an EIS. And as explained in *Sierra Club v. Off. of Plan., State of Haw.*, 109 Haw. 411, 126 P.3d 1098 (2006), the appropriate time for preparing an EIS is prior to a decision, when the decision-maker retains a maximum range of options. *Id.* at 1106. Therein, the Court also underscored the importance of ensuring a sufficient early environmental assessment because

“after major investment of both time and money, it is likely that more environmental harm will be tolerated.” *Ibid.*

2. RELEVANT FACTS

Defendant BLNR simply took Defendant DLNR’s word that the BNM project would not have any significant impact and approved the FEA/FONSI instead of taking a “hard look” at the information presented and giving serious consideration to the impacts as required by chapter 343. Defendants incorrectly surmise that the sole “purpose” of an EA is to “create a workable public document” that is “concise and less comprehensive than an EIS,” thus serving as its own justification for not needing to conduct an EIS. *JEFS # 187 RA: 11*. Defendants seem to ignore the purpose of the information that the EA is supposed to contain, that is, to assess whether impacts to the environment will be significant such that more study (i.e. an EIS) is necessary. The assessment is instead intended to satisfy the two main prongs of HEPA: to foster public participation and to inform decision-makers. *See HRS § 343-1*.

Instead of focusing on the substance of the FEA and whether it provided a sufficient evaluation of the impacts, a discussion of alternatives, and a description of measures to minimize said impacts, in their MSJ, Defendants asserted that the DLNR’s conclusory statements regarding “no impact” somehow “[meets] the [HAR significance] criteria,” thereby excusing the need to actually comply with the substantive requirements of the criteria itself. *See Id. at 10, 15*. This is extremely important because unintended consequences of a project of this scale resulting in the spread of the imported *Wolbachia* strain(s) of biopesticide mosquitos to female *Culex* or *Aedes* mosquitoes or other insect vectors of diseases would be catastrophic and probably irreversible. *See JEFS # 43 RA: 71-77*. Hawai‘i has a bad history of invasive species entering and spreading unabated, including their spread of infectious diseases. *Id.* In their pleadings and evidence, Plaintiffs cite numerous specific examples where information is inaccurate and/or misleading (*Id.*; *JEFS #1 RA 39, 43-44*) or missing entirely (*Id. at 34, 42*), such that decision-makers and the public are unable to properly determine whether the proposed action will have a significant impact on the environment and why the project requires more rigorous analysis through an EIS.

Plaintiffs also support these facts with the testimony of tropical disease and vector expert witness and Dr. Lorrin Pang (“Dr. Pang”), who raises serious questions regarding Defendants’ lack of study of the specific strains of *Wolbachia* bacteria and the *Culex q.* species of mosquito,

the relevancy of the studies upon which Defendants base their conclusions, the failure to support their conclusions by “showing their work” through math modeling, and also the peer-reviewed studies that call into question Defendants’ methods and conclusions – studies that have not been properly addressed or have been disregarded. *See Appendix D (Transcript from Audio Recording for the Hearing for Plaintiffs’ Motion Temporary Restraining Order/Preliminary Injunction) at pgs. 86:20-25; 87:1-24.*⁵ Plaintiffs-Appellants address these examples in turn:

a. Facts in Dispute

i. The IIT Technique

Plaintiffs have raised substantial questions as to whether the IIT technique planned for use will have significant effect. *See JEFS #1*. The specific IIT technique planned for use is experimental and has never been studied for efficacy or safety, and the East Maui project area is the largest *Wolbachia* mosquito release of any kind globally to date. *JEFS # 201 RA: 9*. Defendants also repeat the myth that *Culex* mates only once (Motion at pg. 2), when studies show that they can mate twice in the first 48 hours. *Id. at 10.*⁶ Third, Defendants state that *Wolbachia* is already naturally present in *Culex quinquefasciatus* mosquitoes in Hawai‘i, when Plaintiffs have repeatedly pointed out that the introduced *wAlbB* strain is a foreign bacteria originating from Kuala Lumpur in Malaysia and therefore not present in Hawai‘i and the *wPip4* strain approved for import in connection with this project does not exist in Hawai‘i. *See JEFS #1 RA: 43; Appendix D at pgs. 139-140*. Fourth, Defendants assert that *Wolbachia* cannot be transferred to humans, when a peer-reviewed study has shown that there is at least one instance when *Wolbachia* transfer to a human occurred. *JEFS 201 RA: 10.*⁷

⁵ In lieu of a transcript being filed as requested, Plaintiffs-Appellants attach as **Appendix D**, the Transcript of Audio Recording for the Hearing for Plaintiffs’ Motion Temporary Restraining Order/Preliminary Injunction before Hon. Judge John M. Tonaki dated Friday, July 21, 2023 (Day 1, Pages 1 through 214). *See Declaration of Counsel* also attached hereto.

⁶ *See* also Figure 1 in “The Insemination Rates of some Anopheline and Culicine Populations in the Makurdi Area of Benue State, North Central Nigeria.” by Manyi et al, International Journal of Scientific and Research Publications, Volume 4, Issue 10, (October 2014) available at: <https://www.ijsrp.org/research-paper-1014/ijsrp-p3474.pdf> (last visited on June 27, 2024).

⁷ *See* also “Detection of *Wolbachia* genes in a patient with non-Hodgkin’s lymphoma” by X-P. Chen et al in The Clinical Microbiology and Infection, Volume 21, Issue 2, February 2015, Pages 182.e1-182.e4 available at:

Plaintiffs also explain that the effects of *Wolbachia* are highly specific to the strain of *Wolbachia*, the type of host, the targeted action, the manner of inoculation (laboratory or natural), and the potential for increased pathogen infection and transmission of specific disease in the host; and that no studies have been done to confirm that the *Wolbachia* bacteria strains imported in connection with this project (*wAlbB*, *wAlbA* and *wPip4*) are not currently present within the corresponding *Culex q.* species of Hawai‘i’s established mosquito population. *See JEFS # 43 RA: 71.*

Further, Plaintiffs assert that that suppression of vertical transmission of *Wolbachia* can cause an increase in horizontal transmission, that the math model for this Project does not seem to account for choke points, that mosquitoes and other insects can be infected with more than one strain of *Wolbachia* bacteria at the same time (called “superinfection”), that *Wolbachia* bacteria can cause increased pathogen infection and disease-spreading capability in mosquitoes, and that male mosquitoes can transmit pathogens and viruses to females through mating. *Id. at 73.* Plaintiffs also note that these mechanisms can interact with each other (cumulatively have substantial adverse effects upon the environment) and that there has been insufficient study in each area of concern and in the combination of mechanisms. *See JEFS # 1 RA: 41, 44; see also JEFS # 43 RA: 71-77.*

Plaintiffs also assert that a full range of alternative approaches to mitigating avian malaria have not been sufficiently studied or considered, that Native Hawaiian concerns and environmental justice have not been adequately addressed, that concerns of tropical disease and vector expert Dr. Pang have not been adequately addressed, that there is no way for the project to be self-contained, that the project may have been improperly segmented through the exemption notice for mark release recapture studies, that the environmental effects of dropping mosquito packaging in the project area are not adequately addressed in the FEA, that conflicts of interest have not been adequately addressed or disclosed, that horizontal gene transfer has not been adequately addressed, that concerns about *Wolbachia* being a parasitic bacteria that alters host behavior have not been adequately addressed, that there is no documented USDA permit for interstate transport of poultry pathogen vectors, that there is no mitigation plan in place to

<https://www.sciencedirect.com/science/article/pii/S1198743X14000408> (last visited on June 27, 2024).

eliminate the establishment of introduced lab-strain *Wolbachia* in the wild, that there are no mitigation protocols for accidents such as horizontal transmission of *Wolbachia* bacteria or unexpected evolutionary events, that as few as 3 lab-strain-infected female mosquitoes accidentally released could cause the population to be replaced with the lab-strain mosquitoes, that EPA guidelines allow for the release of one lab-strain-infected female for every 250,000 males, that pathogen screenings of the lab-infected mosquitoes have not been disclosed, that no biosecurity protocols for the imported mosquitoes have been documented, that imported *Culex q.* mosquitoes may transmit diseases to people and animals, that the FEA's assertion that released mosquitoes pose no risk to human health is based on unsound science discredited by the EPA, and that an Environmental Risk Assessment for the biopesticide mosquitoes has not been conducted by the EPA to determine the environmental, ecological, and human health risks. *See JEFS # 1; see also JEFS # 201 RA: 11.*

ii. Horizontal Transmission and Increased Disease-Spreading Capability

Horizontal transmission is defined as the spread of an infectious agent from one group or individual to another, directly or indirectly. *See Appendix D at pg. 44:3-12.* The evidence of horizontal transmission of *Wolbachia* bacteria (documented in peer-reviewed studies) shows that the bacteria go not only to sexual cells, but also to somatic cells (nonsexual cells of the body). *JEFS #43 RA: 71-77; see Appendix D at pg. 47:6-12.* *Wolbachia* can also live outside of intracellular systems for several months. *JEFS # 41 RA: 30..* Horizontal transmission of the *Wolbachia* bacteria can occur through mating, shared feeding sites, and serial predation of larva in standing water breeding sites. *Id.* Studies that downplay the possibility of horizontal transmission based on *Aedes aegypti* mosquitoes are flawed references because *Aedes aegypti* are resistant to *Wolbachia*. *JEFS # 41 RA: Id.*

Peer-reviewed studies have shown *Wolbachia* bacteria in mosquitoes to cause increased pathogen infection and to cause mosquitoes to become more capable of spreading diseases such as avian malaria and West Nile virus. West Nile virus can infect birds and humans. *Id.* This project has the potential to cause the extinction of endangered native birds, and it could impact human health. *Id.*

b. Omissions

i. Biopesticide Drift (Wind Drift)

The possibility of biopesticide drift, or the movement of the lab-bred mosquitoes through wind to unintended areas - a very real threat of IIT mosquitoes drifting out of the project area (increasing the threat of horizontal transmission), along with the threat of wild mosquitoes drifting on the wind into the project area and diluting the efficacy of the IIT and thereby requiring a commitment to a larger action (namely the need to maintain higher proportions of the experiment) - are not addressed in the FEA at all. *Appendix D at pg. 90:20-25; 91:1-25; 92:1-23; 93:11-25; 94:1-6; see also JEFS # 43 RA: 75.* This material fact regarding proposed impacts from the experiment on the environment was also raised in numerous of Plaintiffs' pleadings and by Dr. Pang and Plaintiff Lia through testimony received in the hearing for Plaintiffs' Motion for Preliminary Injunction and is missing entirely from the FEA. *JEFS #1 RA: 34, 42; Appendix D (testimony of Dr. Pang at pgs. 91-92, 93:11-21; and (testimony of Plaintiff Lia) at pgs. 136:5-25 – 137:1; see generally FEA (JEFS # 246 RA: 6-281).*

ii. Mitigation Measures

Defendants allege that they have provided “discussion with sufficient detail to ensure that environmental consequences have been fairly evaluated,” and that “all that is required is that the EA describe proposed mitigation measures” (citing *Kilakila*, 138 Hawai‘i at 370, 382 P.3d at 182). *JEFS # 188 RA: 17.* Defendants further point to the potential impacts of the Proposed Action discussed in Section 3 of the FEA and the significance of the potential impacts of the project discussed in Appendix G of the FEA. *Id. at 13.* A discussion of Defendants' failure to address the public's comments and concerns pursuant to HAR Sec. 11-200.1-20 follows below.

In the Section and Appendix, however, Defendants include discussion on such topics as drones and the biodegradable containers used in the experiment but remain silent as to mitigation measures for possible horizontal transmission of *Wolbachia*. Further, the FEA does not address the concern of accidental pathogen introduction, and Defendant DLNR ignores any discussion regarding a comprehensive plan for biosecurity protocols, specifically in the event that the *Wolbachia* behaves in any manner described above. See *JEFS # 19; Appendix D at pgs. 93:22-25 – 94:1-6; see generally JEFS # 246.* This oversight, whether purposeful or not, is important because peer-reviewed studies have shown *Wolbachia* bacteria in mosquitoes can result in increased pathogen infection and can cause mosquitoes to become more capable of spreading diseases such as avian malaria, and West Nile virus that can infect birds and humans, meaning

that horizontal transmission has the potential to cause the extinction of endangered native birds and could impact human health. *JEFS #1 RA:33; Appendix D at pgs. 38:12-24; 39:6-11.*

While the accidental release of misidentified lab-reared female mosquitoes was not addressed at all in the draft EA, Hawai‘i Unites’ DEA-AFONSI comment provided documentation from the DLNR’s “Permit Application for Restricted Commodities into Hawai‘i” for import of the mosquitoes, as well as figures published online by the EPA, stating the expected accidental release rate of one *Wolbachia*-bacteria-infected female for every 250,000 males. *JEFS #1 RA: 39.* Hawai‘i Unites noted that with the potential release of up to 775,992,000 biopesticide mosquitoes per week on Maui, this would calculate to up to 3,103 lab-strain-infected females released on the island per week, and each of those 3,103 females could produce a conservative estimate of 160,000 more females in her eight-week lifespan, amounting to potentially 496,480,000 lab-strain-infected females within each eight-week lifespan of the initial accidental release scourge. *Id. at 39-40.* Female mosquitoes bite and spread disease. Lab-strain-infected females can breed with the lab-strain-infected males released, and population replacement can occur. *Id. at 40.* Wild females can also become lab-strain-infected through horizontal transmission, further exacerbating population replacement risks. *Id.*

3. REVIEW UNDER CLEARLY ERRONEOUS STANDARD

In assessing the omissions and disputed facts above, the Court must address the impact of the proposed project and ask “whether the [HCDA] clearly erred in determining whether the [project] will likely have a significant impact on the environment.” *Pele Def. Fund v. Dep’t of Land & Natural Res.*, 141 Haw. 381, 384–86 (Haw. Ct. App. 2018) (emphases added); *see also Kepo’o v. Kane*, 106 Haw. 270, 289 (2005) (“The proper inquiry for determining the necessity of an EIS based on the language of HRS § 343-5(c) . . . is whether the proposed action will ‘likely’ have a significant effect on the environment.”). “As defined in HRS § 343-2, ‘significant effect’ includes, (but is not limited to): (h) Hav[ing] a substantial adverse effect on public health; (8) Be[ing] individually limited but cumulatively have substantial adverse effect upon the environment or involve[ing] a commitment for larger actions; (9) Hav[ing] a substantial adverse effect on a rare, threatened, or endangered species, or its habitat.” *Id.* at 290; *see also* HRS § 343-2.

Although horizontal transmission is addressed and downplayed in Appendix H to the FEA, there are no references to Dr. Pang’s expert opinion, and specific significant peer-reviewed

studies referenced by Dr. Pang are not addressed. *See JEFS # 246 RA: 264-281*. Likewise, the possibility of wind drift or biopesticide drift is not addressed at all. *See generally JEFS #246*. The FEA acknowledges potential impacts of the Proposed Action discussed in Section 3 of the FEA and the significance of the potential impacts of the project discussed in Appendix G of the FEA. *Id.* Though Defendants include discussion on such topics as drones and the biodegradable containers used in the experiment in the Section and Appendix, they remain silent as to mitigation measures for possible horizontal transmission of *Wolbachia*. *Id.* Further, the FEA does not address the concern of accidental pathogen introduction, and Defendant DLNR ignores any discussion regarding a comprehensive plan for biosecurity protocols, specifically in the event that the *Wolbachia* behaves in any manner described above. *Id.*; *JEFS # 38 RA:19; Appendix D at pgs. 93:22-25 – 94:1-6*. This oversight, whether purposeful or not, is important because peer-reviewed studies have shown *Wolbachia* bacteria in mosquitoes can result in increased pathogen infection and can cause mosquitoes to become more capable of spreading diseases such as avian malaria, and West Nile virus that can infect birds and humans, meaning that horizontal transmission has the potential to cause the extinction of endangered native birds and could impact human health. *JEFS #1 RA:33; Appendix D at pg. 38:12-24; 39:6-11*.

4. SUMMARY

Though the Circuit Court notes in its Minute Order that many of the alleged issues raised by Plaintiff above were addressed in the FEA and that some of the potential impacts of the project were raised as “mere possibilities,” under the summary judgment the Court rules as a matter of law only if *no* material facts are in dispute.

Assuming arguendo that there are no material facts in dispute, the Circuit Court’s “rule of reason” standard of review as articulated in its Minute Order is inapplicable based on where this matter stands within the environmental review process. As discussed above, the correct standard to be employed by a reviewing court in the latter circumstance is whether the subject agency clearly erred in determining whether the proposed action will likely have a significant impact on the environment.”). If it had applied the correct “clearly erroneous” standard, the Circuit Court should have ruled that the above omissions and disputed facts were significant impacts under HEPA such that an EIS should have been required.

B. SECOND POINT OF ERROR

The Lower Court Erred in granting Summary Judgment based on additional material facts that Plaintiffs detailed in the Memorandum in Opposition to Defendants MSJ that suggest a project being carried out in a manner contrary to what was proposed, explained, and/or studied in the FEA. *See JEFS # 201*. This would suggest “new” information or circumstances that were “not originally disclosed,” not previously considered, and could have a substantial effect on the environment – something (in the environmental context) that Hawai‘i Courts have held requires additional review. *See Unite Here! Local 5 v. City & Cnty. of Honolulu*, 123 Hawai‘i 150, 179, 231 P.3d 423, 452 (2010).

1. APPLICABLE LEGAL FRAMEWORK

The Hawai‘i Supreme Court has held that “unless there is an apparent reason indicating otherwise, under HRCF Rule 15(a), leave to amend shall be freely given to a party to amend its complaint when justice so requires.” *Dejetley v. Kaho ‘ohalahala*, 122 Hawai‘i 251, 269, 226 P.3d 421, 439 (2010) (citation and internal quotation marks omitted). The Supreme Court has further explained:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules requires, be “freely given.”

Carvalho v. AIG Hawai‘i Ins. Co., Inc., 150 Haw. 381, 385–86, 502 P.3d 482, 486–87 (2022).

2. RELEVANT FACTS

Though Defendants’ request for summary judgment came before discovery was completed, Plaintiffs learned additional material facts since the filing of the Complaint. These facts were detailed in Plaintiffs’ Memo in Opp. to the MSJ. *JEFS # 201 RA: 17-19*.

a. Drone Release

Though Defendants assert that the EA discusses how the effect on the acoustic environment will be mitigated and minimized by careful planning of flight paths and timing of mosquito releases (*JEFS # 188 RA: 16*), based on information and belief, mosquito release via drone, supposedly the primary release method per the FEA, have not occurred thus far. *JEFS # 203 RA: 2*. This is significant because release by helicopters rather than drones deviates from the plan. The FEA repeatedly notes the anticipated noise disturbances and potential significant impacts of those disturbances, with the focus being on drone releases. This deviation increases the frequency for the only other alternative for release of mosquitoes – that is via helicopter

flights – which were only proposed and studied over the “short term” for an interval of “up to two months.” See *JEFS # 246 RA: 20*. The impacts of long-term release via helicopter were not properly studied and appear to have already been significantly modified based on the release method estimations detailed in the FEA.

b. Helicopter Longline Release

The system described in the FEA for release of mosquitoes from helicopters does not appear to be the system in use. *Id. at 23; JEFS # 203 RA: 2*. Based on the low altitude of the flights, it appears that Defendants are not using a longline cable attached to the belly hook of the helicopter to drop the mosquito packages. While Defendants have been unclear about what method is being used to drop the mosquitoes from the helicopters, it is believed that the helicopters are flying closer to the tree canopy than the 150 to 200 feet AGL (above ground level) than was stated in the FEA. *JEFS # 203 RA: 2*. This is important because it deviates from the approved plan and increases the potential for adverse impacts such as noise disturbances; nesting, breeding, and roosting disturbances; helicopter rotor wash; accidents and collisions; and wildland fires. Recent media coverage provides additional evidence that the helicopter release method is not the approved longline cable, but rather a short tube attached directly to the helicopter.⁸ Further evidence of increased safety concerns includes a hard landing helicopter accident in Kīpahulu Valley on February 20, 2024, reported to the Aviation Safety Network. Based on information and belief, this accident appears to be connected to the mosquito release project.⁹

c. Mosquito Monitoring

FEA Chapter 2: “Alternatives” mentions the use of battery-operated mosquito traps, but it doesn’t say anything about the type of batteries.. Based on information and belief, these are 12V deep cycle batteries. *JEFS # 203 RA: 2*. Transporting these “hazardous materials” brings additional fire risks, as evidenced by an accidental fire cause by one of the “action packers” containing a battery on September 22, 2023.¹⁰ This is important because there isn’t any

⁸ See <https://www.npr.org/2024/06/12/nx-s1-4906582/mosquito-hawaii-birds-endangered-species-extinct> (last visited on June 27, 2024).

⁹ See <https://asn.flightsafety.org/wikibase/351840> (last visited on June 27, 2024).

¹⁰ This accidental fire is described in an Aviation Safety Communique that can be found at: <https://www.safecom.gov/safecom/23-1026> (last visited on June 27, 2024).

discussion in the FEA on mitigating risks of hazardous materials used in mosquito monitoring. *See generally JEFS # 246 RA: 6-281.*

3. SUMMARY

The above information clearly qualifies as “new” information or circumstances that were “not originally disclosed,” or previously considered in the FEA, any of which could have a substantial effect on the environment. The omission of these facts suggests a different project than what was proposed in the FEA, and thus contradicts HEPA’s two-pronged purpose of (1) informing decision-makers, and (2) encouraging public participation.

The appropriate relief, therefore, is not dismissal at summary judgment but instead to allow Plaintiffs to conduct discovery and (if necessary) amend their Complaint.

C. THIRD POINT OF ERROR

Perhaps the single undisputed fact (besides all parties’ acknowledgment that native honeycreepers are worth saving) is that the State Defendants failed to properly comply with the Hawai‘i Administrative Rules in compiling their FEA and that Defendant BLNR accepted a flawed document, improperly issuing a FONSI. Though Defendant DLNR does not dispute that it failed to comply with HAR Sec. 11-200.1-20 in preparing its FEA (thus rendering Defendant BLNR’s acceptance of the FEA a violation of HRS Chapter 343), this issue was not addressed in the Circuit Court’s Minute Order/Order granting Defendants’ Motion for Summary Judgment. *See JEFS # 208 RA: 7-8 at FN 6; see also JEFS #s 38, 201, 211, 215.*

1. APPLICABLE LEGAL FRAMEWORK

HAR § 11-200.1-20 “Public review and response requirements for draft environmental assessments” provides, in relevant part:

(c) For agency actions, the proposing agency shall, and for applicant actions, the applicant shall: respond in the final EA in the manner prescribed in this section to all substantive comments received or postmarked during the statutorily mandated review period, incorporate comments into the final EA as appropriate, and include the comments and responses in the final EA. In deciding whether a written comment is substantive, the proposing agency or applicant shall give careful consideration to the validity, significance, and relevance of the comment to the scope, analysis, or process of the EA, bearing in mind the purpose of this chapter and chapter 343, HRS. Written comments deemed by the proposing agency or applicant as non-substantive and to which no response was provided shall be clearly indicated.

(d) Proposing agencies and applicants shall respond in the final EA to all substantive comments in one of two ways, or a combination of both, so long as each substantive comment has clearly received a response:

(1) By grouping comment responses under topic headings and addressing each substantive comment raised by an individual commenter under that topic heading by issue. When grouping comments by topic and issue, the names of commenters who raised an issue under a topic heading shall be clearly identified in a distinctly labeled section with that topic heading. All substantive comments within a single comment letter must be addressed, but may be addressed throughout the applicable topic areas with the commenter identified in each applicable topic area. All comments, except those described in subsection (e), must be appended in full to the final EA; or

(2) By providing a separate and distinct response to each comment clearly identifying the commenter and the comment receiving a response for each comment letter submitted. All comments, except those described in subsection (e), must either be included with the response or appended in full to the final EA.

HAR 11-200.1-20 (Weil)(emphasis added)

2. RELEVANT FACTS

In their FEA, Defendant DLNR appears to have chosen the first response method listed above, however they did not include the comments that they received as a part of each response and did not append the comments in full to their FEA. *See JEFS #246 RA: 264-281.* Defendants also did not clearly identify the names of commenters who raised the issue addressed in a distinctly labeled section with the topic heading. *Id.*

Plaintiffs correctly point out that though Defendant DLNR appears to have chosen the first response method listed (grouping comments by topic and issue), Defendants did not comply with the HAR as required, including by failing to:

- include the comments that they received as a part of each response (required regardless of the response method chosen);
- append the comments in full to their FEA; and
- clearly identify the names of commenters who raised the issue addressed in a distinctly labeled section with the topic heading.

Id.; *JEFS # 38 RA:17-18.*

Defendants have responded to Plaintiffs' assertions *inter alia* by asking a line of questioning of Plaintiff Tina Lia in the Preliminary Injunction hearing that suggests that the State

Defendants acknowledge that they failed to follow the HAR but believe that the rules were irrelevant as long as Plaintiff Lia was able to figure out what the applicant was trying to do in their FEA. *See Appendix D (Plaintiff Lia testimony) at pgs. 171:10-25 – 178:1-7.*

Further Defendants assert that Plaintiff Lia “admitted” that the FEA evaluated the impacts she was concerned about as expressed in her comments submitted for the Draft EA. *JEFS # 188 RA: 12.* However, contrary to this assertion, on cross-examination, Plaintiff Lia confirmed that the concerns she raised as comments to the Draft EA were not clearly addressed in the Final EA and that Defendant’s “evaluation of impacts” instead were simply listed as identified topics in Appendix H to the FEA. *See Appendix D (Plaintiff Lia testimony) at pg. 182:3-24.*

Besides misrepresenting Plaintiff Tina Lia’s (“Plaintiff Lia”) testimony, Defendants fail to acknowledge that she is only *one* of the Plaintiffs in the case. Defendants make no arguments regarding other members of Hawai‘i Unites’ comments to the FEA. *See JEFS # 188.*

3. SUMMARY

Bearing in mind one of the main two purposes of chapter 343 is public participation during the review process, this clearly erroneous failure to comply with the provision of the HAR further bolsters Plaintiffs’ chances of success on the merits in showing that Defendant BLNR’s acceptance of the final EA and FONSI for the proposed biopesticide mosquito project violated the letter and purpose of HEPA. *See HRS § 343-1.*

In addition to the above requested relief, Plaintiffs ask the ICA to remand to the Circuit Court in order for the Court to further instruct DLNR Defendants to amend their FEA to comply with the law before proceeding with their project.

VII. CONCLUSION

State Defendants’ conclusion in its FEA that the biopesticide experiment will not cause significant environmental impacts is clearly erroneous, and an environmental impact statement should be required.

The Circuit Court’s holding evidences a mistake of applied standard in analyzing the sufficiency of the DLNR FEA, as well as a mistake in granting summary judgment given the numerous facts still in dispute and new information not previously disclosed or considered in the FEA, and the mistake that State Defendants made in preparing and accepting the FEA, all of which that renders the FEA insufficient and unacceptable in its current form.

It is incumbent upon this Court to administer justice by permitting Plaintiffs to continue their case, including through discovery, by reversing the Circuit Court's decision and remanding the case back to the lower court.

DATED: Honolulu, Hawai'i June 27, 2024.

/s/ Timothy Vandever
Margaret (Dunham) Wille
Timothy Vandever

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