

**IN THE CIRCUIT COURT
OF THE THIRD CIRCUIT
STATE OF HAWAII**

**Electronically Filed
THIRD CIRCUIT
3CCV-25-0000438
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DAISY MITCHELL;
REBECCA MELENDEZ,
Petitioners,

vs.

KAMEHAMEHA SCHOOLS (BISHOP ESTATE);
HAWAII COUNTY PLANNING, JEFF DARROW,
IN HIS OFFICIAL CAPACITY AS DIRECTOR;
MARISSA HARMAN, IN HER PROFESSIONAL & OFFICIAL CAPACITY; G70; KAWIKA
MCKEAGUE, IN HIS OFFICIAL CAPACITY; JANE DOES 1-20; DOE CORPORATIONS 1-
20; DOE ENTITIES 1-20; AND DOE GOVERNMENTAL UNITS 1-20,
Respondents.

CIVIL NO. 3CCV-25-0000438

(Declaratory Judgment)

**PETITIONERS' FIRST NOTICE OF ERRATA TO PETITIONERS' RESPONSE AND
OPPOSITION TO RESPONDENTS KAMEHAMEHA SCHOOLS AND MARISSA
HARMAN'S JOINDER TO RESPONDENTS G70 AND KAWIKA MCKEAGUE'S
MOTION TO DISMISS FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT.
55, 65, 69]**

Hearing Date: July 8, 2026

Time: 10:00 a.m.

Judge: Honorable Kauanoë Jackson

Trial Date: None Set

I. INTRODUCTION

Petitioners Daisy Mitchell and Rebecca Melendez, appearing pro se, respectfully submit this First Notice of Errata to (1) correct a characterization of one authority, and (2) clarify the relevance of two additional authorities, each addressed in Petitioners' Response and Opposition to Respondents Kamehameha Schools and Marissa Harman's Joinder to Respondents G70 and Kawika McKeague's Motion to Dismiss First Amended Petition for Judicial Review [Dkt. 69], filed June 2, 2026. This Notice raises no new claim and seeks no new relief. Part II below corrects the description of a case already cited and discussed in Dkt. 69. Parts IV and V clarify, without altering the substance of Petitioners' existing arguments, the relevance of two additional cases cited in Respondents' Joinder [Dkt. 65] that Dkt. 69 addressed only in general terms. Part VI applies Hawai'i's well-settled motion-to-dismiss standard to the clarified record.

II. THE PASSAGE BEING CORRECTED

At page 3 of Dkt. 69, addressing Respondents' citation to *Sensible Traffic Alternatives and Resources, Ltd. v. Federal Transit Administration*, 307 F. Supp. 2d 1149, 1160 (D. Haw. 2004) (relevant excerpts attached hereto as Exhibit 2), Petitioners stated:

"Respondents also rely upon Sensible Traffic Alternatives v. FTA, 307 F. Supp. 2d 1149, 1160 (D. Haw. 2004), a federal district court decision interpreting NEPA — the federal environmental review statute. That decision has no binding authority over proceedings under Hawai'i's Hawaii Environmental Policy Act ("HEPA"), HRS Chapter 343, which has its own independent statutory framework and is grounded in the Hawai'i Constitution. Federal NEPA standards do not govern judicial review under HRS §343-7(c)."

Petitioners withdraw this characterization and replace it with the corrected discussion set forth below.

III. CORRECTED DISCUSSION

The page Respondents cite, 307 F. Supp. 2d at 1160, falls within Part V.B.2 of the opinion — "ATI's (Alliance for Traffic Improvement) HEPA Claims Are Barred by Haw. Rev. Stat. § 343-7" — not the portion addressing NEPA. There, the court construed and applied HRS §343-7(c) itself. Properly read, the case does not support dismissal here. It illustrates, by contrast, why Petitioners' claims survive.

The court held that "contestable issues" are limited to those raised in written comments submitted during the designated review period. 307 F. Supp. 2d at 1160. The court further held that judicial proceedings must be initiated within sixty days of the date "the public has been informed pursuant to section 343-3" — meaning publication of notice of acceptance in *The Environmental Notice*. Id. at 1161–62. The court noted in footnote 8 that this sixty-day period "appears to be jurisdictional under Hawaii law," citing *Waianae Coast Neighborhood Bd. v. Hawaiian Elec. Co.*, 64 Haw. 126, 129, 637 P.2d 776, 778 (1981).

Why ATI lost — and why Petitioners do not face the same result. The plaintiff in *Sensible Traffic* failed on both statutory prongs. ATI submitted no written comments on the issues it later litigated. 307 F. Supp. 2d at 1160. And ATI filed suit more than sixty days after the Office of Environmental Quality Control published the FEIS acceptance in *The Environmental Notice* — specifically, after the December 8, 2002 issue of that bulletin announced the Governor's acceptance of the State FEIS. Id. at 1161–62. The court dismissed ATI's HEPA claims for both reasons.

Petitioners here satisfy both requirements that ATI did not.

On written comments: Petitioner Rebecca Melendez personally submitted four written comments during the DEIS review period, including two petitions bearing 6,198 and 444 signatures and supporting scientific documentation addressing Keauhou Bay's impaired-water designation, cumulative water-quality impacts, and impacts to protected marine species. She met twice with Respondent Harman during the review process and sought a meeting with the Trustees of Kamehameha Schools, which was denied; she instead participated in a two-hour meeting with Kā'eo Duarte, Vice President of 'Āina Pauahi for Kamehameha Schools, presenting scientific reports documenting the environmental consequences of a bungalow resort development on Keauhou Bay's nearshore waters (Dkt. 69 at 5, 7.) Petitioners' claims are grounded in those comments and the issues raised therein.

On timeliness: The sixty-day clock under §343-7(c) began here on September 23, 2025, when the Office of Planning and Sustainable Development published in *The Environmental Notice* that the Keauhou Bay Management Plan Final EIS "has been accepted by the Accepting Authority." That publication is the Acceptance Determination required by HRS §343-3 and is the same mechanism the *Sensible Traffic* court applied to the December 8, 2002 issue of that same bulletin. September 23, 2025 plus sixty days sets the deadline at November 22, 2025. Petitioners' original Complaint was filed on October 22, 2025 — twenty-nine days after publication, and thirty-one days before the deadline expired. Unlike ATI, Petitioners initiated this proceeding well within the statutory window. Petitioners thereafter filed their First Amended Petition on April 8, 2026 (Dkt. 16), before any responsive pleading had been served, as authorized by HRCP Rule 15(a)(1). The Court further recognized the validity of this proceeding by granting Petitioners' Motion to Extend Time for Service (Dkt. 20), extending the service deadline for the First Amended Complaint to May 21, 2026 (Dkt. 36) — addressing service of process as a separate and distinct matter from the statutory requirement that the action be initiated within sixty days, which had already been satisfied on October 22, 2025.

What the case confirms for Petitioners beyond timeliness. The *Sensible Traffic* court also held that even procedural challenges to the EIS process fall within §343-7(c)'s framework as challenges to "the acceptance of an environmental impact statement." 307 F. Supp. 2d at 1160–61. This forecloses any argument that Petitioners' claims lie outside §343-7(c)'s scope. Respondents cited this case; its holding confirms that §343-7(c) is the correct vehicle for all of Petitioners' claims, and that the statute does not require anything beyond timely initiation and prior written comment — both of which Petitioners have demonstrated.

A federal district court's reading of a Hawai'i statute is persuasive, not binding, authority. Petitioners no longer rely on the now-withdrawn ground that the case is inapplicable because it discusses NEPA. Properly read, *Sensible Traffic* confirms the compliance already shown at Dkt. 69, pages 3–5, and reinforces why Respondents' reliance on it does not support dismissal.

IV. SUPPLEMENTAL CLARIFICATION REGARDING *KAUPIKO V. BOARD OF LAND AND NATURAL RESOURCES*

Respondents cite *Kaupiko v. Board of Land and Natural Resources*, 154 Hawai'i 456, 555 P.3d 143 (2024), together with *Price v. Obayashi*, in support of dismissing G70 and Kawika McKeague. *Kaupiko* does not address whether a private consultant or EIS preparer may be dismissed from a judicial review proceeding under HRS § 343-7(c).

Accordingly, *Kaupiko* reaffirms that Hawai'i courts evaluate the legal sufficiency of an accepted EIS under the rule of reason. The Court explained that "Hawai'i courts have used the 'rule of reason' in determining the sufficiency of the EIS" and that the inquiry is "whether the EIS is legally sufficient in adequately disclosing facts to enable a decision-making body to render an informed decision." The Court further held that "the ultimate standard is still the rule of reason as

set forth in *Price*: does the RFEIS adequately disclose sufficient facts to enable BLNR to render an informed decision?" Nothing in *Kaupiko* addresses whether a private consultant or EIS preparer may be dismissed from a judicial review proceeding under HRS § 343-7(c), and the opinion provides no holding supporting dismissal of G70 or Kawika McKeague.

V. SUPPLEMENTAL CLARIFICATION REGARDING PRICE v. OBAYASHI

Respondents' Joinder (Dkt. 65) also cites *Price v. Obayashi Hawai'i Corp.*, 81 Hawai'i 171, 914 P.2d 1364 (1996), together with *Kaupiko*, in support of dismissal. *Price* does not address whether a private consultant or EIS preparer may be dismissed from a judicial review proceeding under HRS § 343-7(c).

Price defines acceptance under Hawai'i's environmental review process as follows:

"[A]cceptance means that all procedures have been followed, the EIS content adequately discloses all identifiable environmental impacts and all review comments have received satisfactory responses."

That definition is consistent with HRS § 343-2 and confirms that acceptance requires compliance with applicable procedures, adequate disclosure of identifiable environmental impacts, and satisfactory responses to review comments.

Price further explains that an FEIS must contain sufficient information to permit informed environmental decision-making. The Hawai'i Supreme Court stated that an "EIS should not be

upheld if it does not `reasonably [set] forth sufficient information to enable the decision-maker to consider the environmental factors and make a reasoned decision.'"

Petitioners likewise allege that the Keauhou Bay FEIS failed to adequately disclose material environmental and cultural information required by HRS Chapter 343, including alleged deficiencies concerning water quality, cumulative impacts, public comments, cultural resources, and other matters affecting the legal sufficiency of the FEIS. Petitioners further allege that G70 and Kawika McKeague personally participated in preparing, coordinating, signing, transmitting, and advancing the challenged FEIS.

Nothing in *Price* addresses whether a private consultant or EIS preparer may be dismissed from a judicial review proceeding under HRS § 343-7(c), and the opinion contains no holding supporting dismissal of G70 or Kawika McKeague.

VI. ANY DOUBT MUST BE RESOLVED IN PETITIONERS' FAVOR AT THIS STAGE

As explained in Petitioners' Response and Opposition (Dkt. 69 at 2), dismissal is disfavored under Hawai'i law. The Hawai'i Supreme Court has held:

"Although a motion to dismiss for failure to state a claim should rarely be granted, a complaint may be dismissed when it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

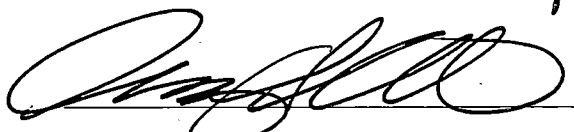
Petitioners have alleged numerous factual deficiencies in the challenged FEIS and G70's and Kawika McKeague's alleged participation in preparing, coordinating, signing, transmitting, and

advancing that FEIS. Accepting those allegations as true, as required at this stage, dismissal is not warranted.

VII. CONCLUSION

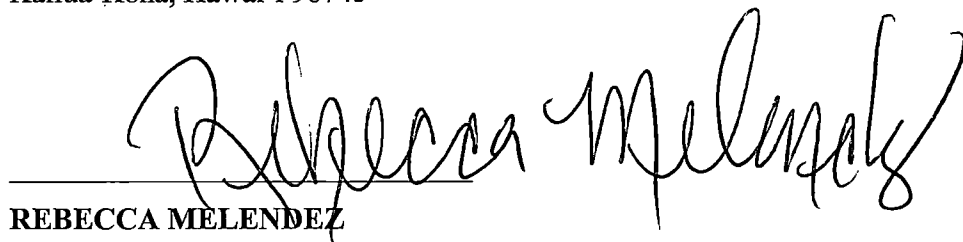
For the foregoing reasons, Petitioners respectfully request that the Court accept this First Notice of Errata. This Notice corrects Petitioners' prior characterization of *Sensible Traffic Alternatives*, clarifies the relevance of *Kaupiko* and *Price v. Obayashi* to the issues presented in Respondents' Joinder, and demonstrates that none of those authorities holds that a private consultant or EIS preparer must be dismissed from a judicial review proceeding under HRS § 343-7(c). Petitioners further respectfully request that the Court consider these corrections and clarifications together with Petitioners' Response and Opposition (Dkt. 69) in ruling on Respondents G70 and Kawika McKeague's Motion to Dismiss (Dkt. 55) and Respondents Kamehameha Schools and Marissa Harman's Joinder (Dkt. 65).

DATED: Kailua-Kona, Hawai'i, July 1, 2026.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONERS' FIRST NOTICE OF ERRATA TO PETITIONERS' RESPONSE AND OPPOSITION TO RESPONDENTS KAMEHAMEHA SCHOOLS AND MARISSA HARMAN'S JOINDER TO RESPONDENTS G70 AND KAWIKA MCKEAGUE'S MOTION TO DISMISS FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT. 55, 65, 69] was duly served upon the following parties by depositing the same in the United States Mail, postage prepaid, on the date indicated below:

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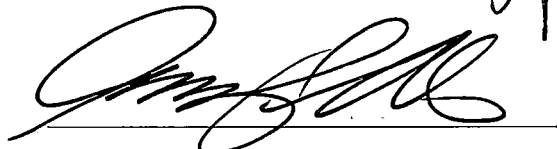
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DATED: Kailua-Kona, Hawai'i, July 1, 2026.

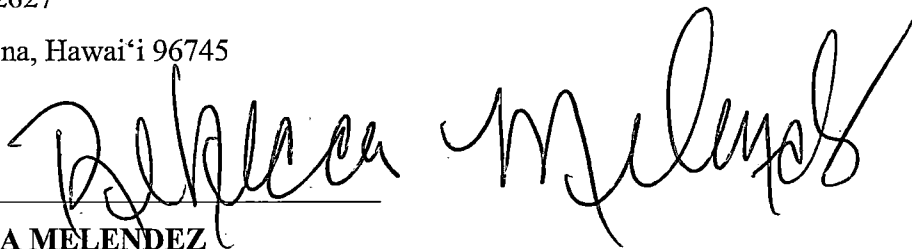


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EXHIBIT 1

**SENSIBLE TRAFFIC ALTERNATIVES AND RESOURCES, LTD. v. FEDERAL TRANSIT
ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION**

307 F. Supp. 2d 1149 (D. Haw. 2004)

U.S. District Court for the District of Hawai'i

Decided February 19, 2004

Attached Pages:

Pages 1–2 of published opinion (case caption and introduction, establishing this is a federal district court decision applying HRS §343-7(c))

Pages 10–12 of published opinion (Part V.B.2 — "ATI's HEPA Claims Are Barred by Haw. Rev. Stat. §343-7" — containing the court's construction of §343-7(c), the written comment requirement, the sixty-day filing requirement, the trigger date mechanism, and the holding that even procedural EIS challenges fall within §343-7(c)'s framework)

Submitted in support of Petitioners' First Notice of Errata.

Sensible Traf. Alternatives and Resources, Ltd. v. Fed. Transit Admin. of US Dept. of Transp., 307 F. Supp. 2d 1149 (D. Haw. 2004)

Full Name: Sensible Traf. Alternatives and Resources, Ltd. v. Fed. Transit Admin. of US Dept. of Transp.

Citation: 307 F. Supp. 2d 1149

Docket Number: 03-00628 SOM-LEK

Date: February 19, 2004

**U.S. District Court for the District of Hawaii - 307 F. Supp. 2d 1149 (D. Haw. 2004)
February 19, 2004**

307 F. Supp. 2d 1149 (2004)

SENSIBLE TRAFFIC ALTERNATIVES AND RESOURCES, LTD., Plaintiff,

v.

**FEDERAL TRANSIT ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION;
Administer of the Federal Transit Administration of the U.S. Department of
Transportation; Department of Transportation Services of the City & County of
Honolulu; Director of the Department of Transportation Services of the City & County
of Honolulu, et al., Defendants.**

Civil No. 03-00628 SOM-LEK.

United States District Court, D. Hawai'i.

February 19, 2004.

***1150 *1151 *1152** Elijah Yip, Cades Schutte, Honolulu, HI, for Plaintiff Sensible Traffic Alternatives and Resources, Ltd., a Hawai'i non-profit corporation dba The Alliance for Traffic Improvement.

Harry Yee, Assistant United States Attorney, Office of the United States Attorney, Honolulu, HI, for Defendants Federal Transit Administration, U.S. Department of Transportation; Administrator of the Federal Transit Administration of the U.S. Department of Transportation.

John Manaut, Carlsmith Ball LLP, Honolulu, HI, for Defendants Transportation Services, City and County of Honolulu; Director of the Department of Transportation Services for the City and County of Honolulu.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CITY & COUNTY OF HONOLULU'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT FEDERAL TRANSIT ADMINISTRATION'S JOINDER THEREIN

MOLLWAY, District Judge.

I. INTRODUCTION.

How traffic congestion on Oahu should best be addressed is a matter that touches *1153 nearly everyone. The subject has generated heated debate for years within the community. While this case concerns an attempt by the City & County of Honolulu ("City") to address the problem, this case clearly does not call upon this court to take on the political task of resolving the problem. Instead, this case presents the narrow question of whether the City has complied with applicable environmental protection laws as it prepares to move forward with what it says will be the first phase of a "Bus Rapid Transit" ("BRT") system intended to alleviate traffic congestion.

The BRT system, if fully implemented, will run from Kapolei to Waikiki and the University of Hawaii at Manoa. In proceeding with the BRT system, the City had to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e ("NEPA") and the Hawaii Environmental Policy Act, ch. 343, Hawaii Revised Statutes ("HEPA"). The City and the Federal Transit Administration ("FTA") prepared draft and supplemental environmental impact statements for the entire system, noting that it would be built in phases, beginning with an In-Town BRT.

To comply with HEPA, the City then issued a final environmental impact statement ("State FEIS") for the entire system. The then-Governor accepted the State FEIS.

In contrast to the State FEIS, the final environmental impact statement required by NEPA ("Federal FEIS") discussed the impact of the entire BRT system but then focused on a single segment, the Initial Operating Segment ("IOS"), described as the first phase of construction of the system. The FTA issued a Record of Decision ("ROD") accepting only the portion of the Federal FEIS that pertained to the IOS and leaving the remainder of the Federal FEIS for later review and acceptance.

The construction of the IOS is at the heart of this case. Plaintiff Sensible Traffic Alternative and Resources, Ltd., dba The Alliance for Traffic Improvement ("ATI"), arguing that HEPA and NEPA are falling victim to politics, files this lawsuit alleging that those laws have been violated.

limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Hyland v. Wonder*, 117 F.3d 405, 413, *as amended by* 127 F.3d 1135 (9th Cir.1997) ("If the state is not legally liable for any judgment against the named individuals, and local government, rather than the state, would be responsible for any money judgment rendered, an action against individual defendants who are state employees is not barred by the Eleventh Amendment.").^[5] The City has not demonstrated that any judgment issued against it in this case would be a judgment against the State of Hawaii. Accordingly, the City has failed *1160 to demonstrate that Eleventh Amendment immunity applies.

2. ATI's HEPA Claims Are Barred by Haw.Rev.Stat. § 343-7.

The City argues that, because ATI did not submit written comment and did not initiate this proceeding within sixty days of being informed pursuant to section 343-7(c), this court must dismiss ATI's claims. Section 343-7(c) applies to judicial proceedings, "the subject of which is the acceptance of an environmental impact statement." Haw.Rev.Stat. § 343-7(c). Section 343-7(c) provides that affected agencies and persons who submit written comment about an EIS "during the designated review period shall be adjudged aggrieved parties for purposes of bringing judicial action under this section." Haw.Rev.Stat. § 343-7(c). However, "contestable issues shall be limited to issues identified and discussed in the written comment." *Id.* The Supreme Court of Hawaii has therefore stated that review of the sufficiency of an EIS is limited to concerns that a person raised in his or her comments. *Price v. Obayashi Hawaii Corp.*, 81 Hawai'i 171, 183, 914 P.2d 1364, 1376 (1996) ("our review of the EIS is limited to those concerns that Price listed in his comments to the draft EIS") (citing section 343-7(c)).

ATI contends that, as ATI is challenging the process surrounding the EIS, not the sufficiency of the EIS (or the acceptance of the EIS for purposes of section 343-7(c)), section 343-7 does not apply. See Opposition at 15-17.^[6] This court is unpersuaded.

Whether the limitation imposed in section 343-7(c) is applicable turns on whether the subject of this action "is the acceptance of an environmental impact statement." Haw.Rev.Stat. § 343-7(c). Section 343-2 defines "acceptance" as the "formal determination that the document required to be filed pursuant to section 343-5 fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement." Haw.Rev.Stat. § 343-2 (Michie Supp.2003). Haw Admin R. § 11-200-23(b) additionally states that an EIS

shall be deemed to be an acceptable document by the accepting authority or approving agency only if all of the following criteria are satisfied:

(1) The procedures for assessment, consultation process, review and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter;

(2) The content requirements described in this chapter have been satisfied; and

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement.

Haw. Admin. R. § 11-200-23(b). Under this framework, even challenges to EIS procedures necessarily implicate "the acceptance of an environmental impact statement" such that section 343-7(c) applies.

Each of ATI's HEPA claims pertains to the "acceptance of an environmental impact statement." The first claim alleges that the City failed to prepare a new DEIS or an SDEIS for the IOS (Count III). This claim clearly goes to the procedures described in Haw. Admin. R. § 11-200-23(b). Haw. Admin. R. §§ 11-200-16 and *1161 XX-XXX-XX discuss the requirements for a DEIS. Similarly, Haw. Admin. R. §§ 11-200-26 to XX-XXX-XX describe the requirements for an SDEIS. Section 11-200-27 even expressly requires the accepting authority to be "responsible for determining whether a supplemental statement is required." Haw. Admin. R. § 11-200-27. Because Haw. Admin. R. § 11-200-23(b) (1) requires the accepting authority to review the procedures for and preparation of the EIS, including the DEIS, Count III's challenge to whether a new DEIS or an SDEIS was necessary certainly pertains to the "acceptance of an environmental impact statement" for purposes of Haw.Rev.Stat. § 343-7(c). Because ATI did not file any comments regarding the City's alleged failure to prepare a new DEIS or an SDEIS under HEPA, Count III must be dismissed pursuant to Haw.Rev.Stat. § 343-7(c).^[7]

ATI's second and third HEPA claims allege that the City failed to prepare a joint EIS (Count VII) and failed to coordinate concurrent public review and processing of the State FEIS and Federal FEIS (Count X) in violation of Haw.Rev.Stat. § 343-5(f) and Haw. Admin. R. § 11-200-

25. These claims again ask the court to examine whether the Governor properly determined that the procedures set forth in Title 11, chapter 200, of the Hawaii Administrative Rules were followed. Pursuant to Haw. Admin. R. § 11-200-23(b), these claims pertain to the Governor's acceptance of the FEIS. Because ATI did not submit public comment, it may not challenge that acceptance in Counts VII and X of the Complaint. See Haw.Rev.Stat. § 343-7(c).

Section 343-7(c) also requires that judicial proceedings be initiated within sixty days "after the public has been informed pursuant to section 343-3."^[8] Section 343-3 *1162 3 requires the Office of Environmental Quality Control to inform the public of the availability of an Environmental Assessment and an EIS for review and of the acceptance or nonacceptance of an EIS. See Haw.Rev.Stat. § 343-3(b). In this case, on or about December 8, 2002, the Office of Environmental Quality Control informed the public that the State FEIS had been accepted. See Ex. 5 to the Declaration of Kelly G. LaPorte (Nov. 24, 2003) (attached to Plaintiff's Application for a Temporary Restraining Order filed Nov. 24, 2003) ("The Environmental Notice," Dec. 8, 2002). ATI filed this suit more than sixty days after the Office of Environmental Quality Control informed the public that the State FEIS had been accepted. Because Counts III, VII, and X pertain to a judicial proceeding, "the subject of which is the acceptance of an environmental impact statement," those counts are also time-barred under Haw.Rev.Stat. § 343-7(c).^[9]

C. NEPA Claims.

ATI alleges numerous violations of NEPA. Count I alleges that the BRT system is a major federal action that is proceeding without a ROD, limiting the choice of reasonable alternatives in violation of 40 C.F.R. § 1506.1(a). Count II alleges that construction of the IOS requires either another DEIS or an SDEIS. Count IV alleges that the Federal FEIS failed to consider the cumulative impacts of the IOS. Count V alleges improper segmentation. Count VI alleges a failure to prepare a joint EIS. Count VIII alleges a failure to coordinate environmental review of the IOS. Count XI alleges a failure to consider approved local plans. Count XII alleges a failure to comply with state environmental laws. Count XIII alleges that the Federal FEIS is insufficient.

1. Standing to Assert NEPA Claims.

The City challenges ATI's standing to assert claims under NEPA. Except as set forth below with respect to Counts VI and VIII of the Complaint, ATI establishes its standing to assert its NEPA claims.

EXHIBIT 2

KAUPIKO v. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I

154 Hawai'i 456, 555 P.3d 143 (2024)

Supreme Court of the State of Hawai'i

Opinion Filed August 28, 2024

Attached Pages:

Pages 1–4 of published opinion (case caption, party identification, and Introduction stating the Court's three holdings, including PIJAC's role as EIS preparer and its status as defendant-intervenor throughout the litigation)

Pages 24–25 of published opinion (Part IV.A — holding that the deciding agency is a proper party, that deemed acceptance is still an acceptance subject to judicial review under §343-7(c), that dismissing the preparer as the only necessary party would improperly limit review to content rather than procedure, and the rule of reason standard for EIS sufficiency)

Submitted in support of Petitioners' First Notice of Errata.

**Electronically Filed
Supreme Court
SCAP-22-0000557
28-AUG-2024
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Dkt. 38 OP**

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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WILLIE KAUPIKO; KA'IMI KAUPIKO; MIKE NAKACHI; FOR THE FISHES;
CENTER FOR BIOLOGICAL DIVERSITY; and KAI PALAOA,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; and
DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I,
Defendants-Appellees/Cross-Appellants,

and

PET INDUSTRY JOINT ADVISORY COUNCIL,
Defendant-Intervenor-Appellee/Cross-Appellee.

SCAP-22-0000557

APPEAL FROM THE ENVIRONMENTAL COURT OF THE FIRST CIRCUIT
(CAAP-22-0000557; CASE NO. 1CCV-21-0000892)

AUGUST 28, 2024

RECKTENWALD, C.J., AND EDDINS, JJ., AND
CIRCUIT JUDGE TONAKI AND CIRCUIT JUDGE PARK,
ASSIGNED BY REASON OF VACANCIES,
WITH McKENNA, J., CONCURRING IN PART AND DISSENTING IN PART

The appeal of the acceptance of an EIS is just that — an appeal of the acceptance, not just the EIS itself. In creating a deemed acceptance provision, the legislature intended a tie vote to be construed as an acceptance (unlike in HELCO). And if PIJAC were the only necessary party to the case for judicial review, judicial review would be limited to only the content of the EIS and not the procedures used to decide upon it. We therefore affirm the environmental court's denial of the State's motion to dismiss.

B. The Proper Standard for Court Review of a RFEIS is to Consider the Rule of Reason Along with HEPA's Substantive Requirements

The sufficiency of an EIS is a "question of law, which is properly addressed through the summary judgment procedure. This is because the only question presented is whether the EIS complies with applicable statutory mandates, such as HRS chapter 343 and EIS Rules chapter [11-]200." Price, 81 Hawai'i at 182, 914 P.2d at 1375.

Hawai'i courts have used the "rule of reason" in determining the sufficiency of the EIS.

[W]e use the "rule of reason" to determine whether the EIS is legally sufficient in adequately disclosing facts to enable a decision-making body to render an informed decision. Life of the Land v. Ariyoshi, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978).

In Life of the Land, we enunciated the standard of review that governs a court's determination as to whether an EIS satisfies the statutory requirements:

In making such a determination the court is guided by the "rule of reason," under which 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. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. []1977), cert. den., 434 U.S. 1064[.]

Price, 81 Hawai'i at 182, 914 P.2d at 1375 (quoting Life of the Land, 59 Haw. at 164-65, 577 P.2d at 1121).

The environmental court here wrote the following:

The court attempts to focus on 1) the reasons for the initial non-acceptance of the EIS, 2) whether the revised FEIS fully addressed those reasons, 3) whether the RFEIS completely discussed the changes made, and 4) whether the RFEIS satisfactorily addresses the findings and reasons for non-acceptance. See Section 11-200-23(e).⁶ However, the court concludes these requirements under Section 11-200-23(e) ultimately do not impose any higher standard than the "rule of reason" set forth in Price. In other words, although Price was an EIS case, and although a revised EIS is required to address the non-accepted items from the initial EIS, the ultimate standard is still the rule of reason as set forth in Price: does the RFEIS adequately disclose sufficient facts to enable BLNR to render an informed decision? Since the Board voted 3-3, reasonable minds can clearly differ on the issues raised. This court is not to decide which side of the 3-3 vote was "correct."

⁶ HAR § 11-200-23(e) reads:

A non-accepted EIS may be revised by a proposing agency or applicant. The revision shall take the form of a revised draft EIS document which shall fully address the inadequacies of the non-accepted EIS and shall completely and thoroughly discuss the changes made. The requirements for filing, distribution, publication of availability for review, acceptance or non-acceptance, and notification and publication of acceptability shall be the same as the requirements prescribed by sections 11-200-20, 11-200-21, 11-200-22, and 11-200-23 for an EIS submitted for acceptance. In addition, the revised draft EIS shall be evaluated for acceptability on the basis of whether it satisfactorily addresses the findings and reasons for non-acceptance.

EXHIBIT 3

Relevant Excerpts from

Price v. Obayashi Hawai'i Corp.

81 Hawai'i 171, 914 P.2d 1364 (1996)

Attached pages include the portions of the opinion relied upon in Petitioners' First Notice of Errata, including:

- Definition of "**acceptance**" under Hawai'i's environmental review process.
- The Hawai'i Supreme Court's discussion of the information an Environmental Impact Statement must disclose to enable a reasoned decision.
- Relevant excerpts cited in Section V of Petitioners' First Notice of Errata.

Information taken from <https://law.justia.com/cases/hawaii/supreme-court/1996/16628-2.html>

Price v. Obayashi Hawaii Corp.

Full Name: Price v. Obayashi Hawaii Corp.

Citation: 914 P.2d 1364

Docket Number: 16628

Date: April 9, 1996

914 P.2d 1364 (1996)

81 Hawai'i 171

Kamuela PRICE, Plaintiff-Appellant, v. OBAYASHI HAWAII CORPORATION, Obayashi Corporation, and the City & County of Honolulu, Defendants-Appellees.

No. 16628.[*]

Supreme Court of Hawai'i.

April 9, 1996.

Walter R. Schoettle, on the briefs, Honolulu, for plaintiff-appellant.

Lloyd S. Yoshioka (Kevin S.C. Chang and Lyle Y. Harada with him on the brief; of Watanabe, Ing & Kawashima), Honolulu, for defendants-appellees.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

*1366 RAMIL, Justice.

This appeal is a consolidation of two appeals filed by the plaintiff-appellant Kamuela Price. The first appeal arises from a dismissal following a Notice of Proposed Dismissal issued by the circuit court. The second appeal arises from an order granting a motion for summary judgment, involving the adequacy of an environmental impact statement, in favor of the defendants-appellees Obayashi Hawaii Corporation and Obayashi Corporation (collectively, Obayashi) and the City and County of Honolulu (the city). For the reasons set forth below, we vacate the dismissal following the Notice of Proposed Dismissal and affirm the orders granting summary judgment in favor of Obayashi and the city and against Price.

I. BACKGROUND

not mention anything about the requirement of an affidavit, there was no need to file one; and (3) because the grounds for his objection, i.e., the fact that summary judgment was orally granted on April 23, 1992 was a matter of public record, an affidavit was not

[9] "[A]cceptance means that all procedures have been followed, the EIS content adequately discloses all identifiable environmental impacts and all review comments have received satisfactory responses." Guidebook, at 17. See HAR § 11-200-23 (1993).

[10] A federal court in *Residents in Protest v. Dole*, 583 F. Supp. 653 (D.Minn.1984), denied the plaintiffs' request for an injunction and refused to find that the EIS in question was inadequate, despite expert testimony that it was inadequate. The court stated:

The court finds that both the plaintiffs' and defendants' witnesses are credible witnesses who happen to represent divergent viewpoints of a scientific debate. The National Environmental Policy Act does not require scientific unanimity. Where there is a legitimate debate such as in the present case, the agency responsible for preparing the EIS must make a decision and this court will not substitute its judgment for that of the agency's.

Dole, 583 F. Supp. at 662 (citations omitted).

[11] The federal courts have addressed the issue of the adequacy of an EIS and have recognized that it is not possible to draft an EIS that is perfect in all respects:

Congress, we must assume, intended and expected the courts to interpret the NEPA in a reasonable manner in order to effectuate its obvious purposes and objectives. It is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project. Further studies, evaluations and analyses by experts are almost certain to reveal inadequacies or deficiencies.

Environmental Defense Fund, Inc. v. Corps of Engineers of the U.S. Army, 342 F. Supp. 1211, 1217 (E.D.Ark.1972), aff'd, 470 F.2d 289 (8th Cir.1972).

[12] Generally, federal courts have circumscribed their role in determining the adequacy of an EIS by narrowly limiting their review of the EIS to the issues of whether the statutory procedural requirements were met and whether the EIS "performs its primary task of presenting the decision-maker with an environmentally-informed choice." *Stop H-3 Ass'n v. Lewis*, 538 F. Supp. 149, 159 (D.Haw.1982) (citing *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981)).

Using the approach of *Stop H-3 Ass'n*, this court's role, in evaluating whether the EIS complies with statutory requirements, is very narrow. The court does not wish to

substitute its judgment for that of an agency within the executive branch of government, specifically, the Department of General Planning. Stop H-3 Ass'n emphasized this position by stating that:

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.

If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be "arbitrary and capricious," given the known environmental consequences.

The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies. The environmental laws were neither meant to be used as a "crutch" for chronic fault-finding, nor as a means of delaying the implementation of properly [accepted] projects.

538 F. Supp. at 159 (citations omitted).

Accordingly, courts are reluctant to "second guess" the decision-making body regarding the sufficiency of an EIS. "Courts are not to 'fly speck' EISs, ... but an **EIS should not be upheld if it does not reasonably [set] forth sufficient information to enable the decision-maker to consider the environmental factors and make a reasoned decision.**" Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir.1986) (quoting Adler v. Lewis, 675 F.2d 1085, 1096 (9th Cir.1982)) (citation omitted).

[13] Price asserts that the EIS prepared by Obayashi was inadequate because there are unaddressed questions concerning: (1) threats to the marine environment regarding erosion and storm runoff, especially during the construction phase; (2) the likelihood of alteration of ground water flow and of seawater intrusion, especially under conditions of inter-annual variation and drought; (3) the potential, which was not sufficiently covered in the EIS, for buildup of nitrates in groundwaters of property owners with land immediately below the bluffs owned by the developers (Obayashi); (4) threats of contamination to levels above those acceptable for drinking water, at least at some times of the year; (5) the potential of damage to the marine environment immediately offshore of the proposed development; (6) changes due to increased nitrate availability resulting from the proposed development runoff, which would alter the compositions of species in the surrounding marine environment; (7) erosion runoff damaging the animals habitat; (8) availability of water for the project; (9) lack of infrastructure in the neighborhood, including inadequate fresh water supply, waste water treatment facilities, and transportation facilities; (10) the proposed solution to the traffic congestion involving

EXHIBIT 4

Relevant Excerpts from

Au v. Au

63 Haw. 263, 626 P.2d 173 (1981)

Attached pages include the portions of the opinion relied upon in Petitioners' First Notice of Errata, including:

- Hawai'i's standard governing motions to dismiss for failure to state a claim.
- The Court's statement that dismissal should be granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to relief.
- Relevant excerpts cited in Section VI of Petitioners' First Notice of Errata.

Au v. Au

Full Name: Au v. Au

Citation: 626 P.2d 173

Docket Number: 6706

Date: March 23, 1981

626 P.2d 173 (1981)

Belinda AU, Plaintiff-Appellant, v. Gordon S. K. AU and Herbert Hu, Defendants-Appellees.

No. 6706.

Supreme Court of Hawaii.

March 6, 1981.

On Motion for Partial Reconsideration March 23, 1981.

*175 George Kimura, Honolulu (Leslie Togioka, Honolulu, with him on briefs), for plaintiff-appellant.

Reuben S.F. Wong, Honolulu (Robert K. Matsumoto, Honolulu, with him on brief), for defendants-appellees.

Before RICHARDSON, C.J., and OGATA, MENOR, LUM and NAKAMURA, JJ.

OGATA, Justice.

The instant appeal concerns the application of the proper statute of limitations by the trial court to a five-count complaint brought by plaintiff-appellant Belinda Au (hereinafter appellant) against defendant-appellee Gordon Au, the owner of the home (hereinafter appellee Au), and defendant-appellee Herbert Hu, the salesperson (hereinafter *176 appellee Hu), for damages resulting from water leakages in the residence purchased by appellant. Specifically, appellant appeals from an order of the trial court granting appellees' motion to dismiss the complaint based on the bar of the statute of limitations. We affirm with regard to Count IV but reverse as to Counts I, II, and III.[1]

The complaint was filed in the court below by appellant against both appellees on February 6, 1976, and alleged the following: Count I that appellant and appellees are residents of the City and County of Honolulu; that appellant, prior to purchasing the two-story dwelling at 2048 Mauna Place in Honolulu from appellee Au, did inspect the residence and during this inspection appellant noticed what appeared to be a water stain on the wall in the bottom story of the residence; that appellant inquired of both

Finally, we consider whether the court below was warranted in dismissing Count IV.

Count IV alleged a breach of the agreement of sale by appellee Au due to the recurring water leakages.[9] After a careful examination of the record, we are unable to determine the nature of the claim alleged in Count IV.

Generally, pleadings should be construed liberally and not technically. *Island Holidays, Inc., v. Fitzgerald*, 58 Haw. 552, 574 P.2d 884 (1978). Thus, Rule 8(a) H.R.C.P., requires a complaint to set forth a "short and plain statement of the claim... ." This requirement under our pleading system provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Hall v. Kim*, 53 Haw. 215, 491 P.2d 541 (1971). We repeatedly have said that the Rules of Civil Procedure were not meant to be a game of skill where one misstep by counsel would be decisive to the outcome. *Conley v. Gibson*, supra; *Hall v. Kim*, supra. Although a motion to dismiss for failure to state a claim should rarely be granted, a complaint may be dismissed when it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, supra; *Hall v. Kim*, supra; *Midkiff v. Castle & Cooke*, 45 Haw. 409, 368 P.2d 887 (1962).

In the instant case, even liberally construing the pleadings of Count IV, we believe that appellant can prove no set of facts which would entitle her to relief under that claim. Count IV fails to specify what provisions of the agreement of sale were breached. Thus, this count fails to give appellees fair notice of what appellant's claim is or the grounds upon which it rests.

Therefore, we hold that the dismissal of Count IV was proper.[10]

VI.

We reverse the order of the trial court as to Counts I, II, and III and remand the case for further proceedings not inconsistent with this opinion. We affirm the dismissal of Count IV of the complaint.

Affirmed in part, reversed in part.

MOTION FOR PARTIAL RECONSIDERATION OF SUPREME COURT'S OPINION

*182 PER CURIAM.

A motion for partial reconsideration of this Court's opinion in the instant case was filed by appellees on March 16, 1981. The motion contends that this Court should reconsider the use of HRS § 657-1(4) as the limitations period for counts I and II, since the applicability of that statute was never briefed or discussed previously. They argue that

Exhibit 5

The Environmental Notice

September 23, 2025

Official Publication of Acceptance Determination

Keauhou Bay Management Plan – Final Environmental Impact Statement (FEIS)

Relevant excerpts establishing:

- **Publication in The Environmental Notice dated September 23, 2025.**
- Listing of the Kamehameha Schools – Keauhou Bay Management Plan – (Acceptance of Final EIS) in the Table of Contents.
- Official notice that "The FEIS has been accepted by the Accepting Authority."
- The publication that triggered the 60-day period for initiating judicial review under HRS § 343-7(c).

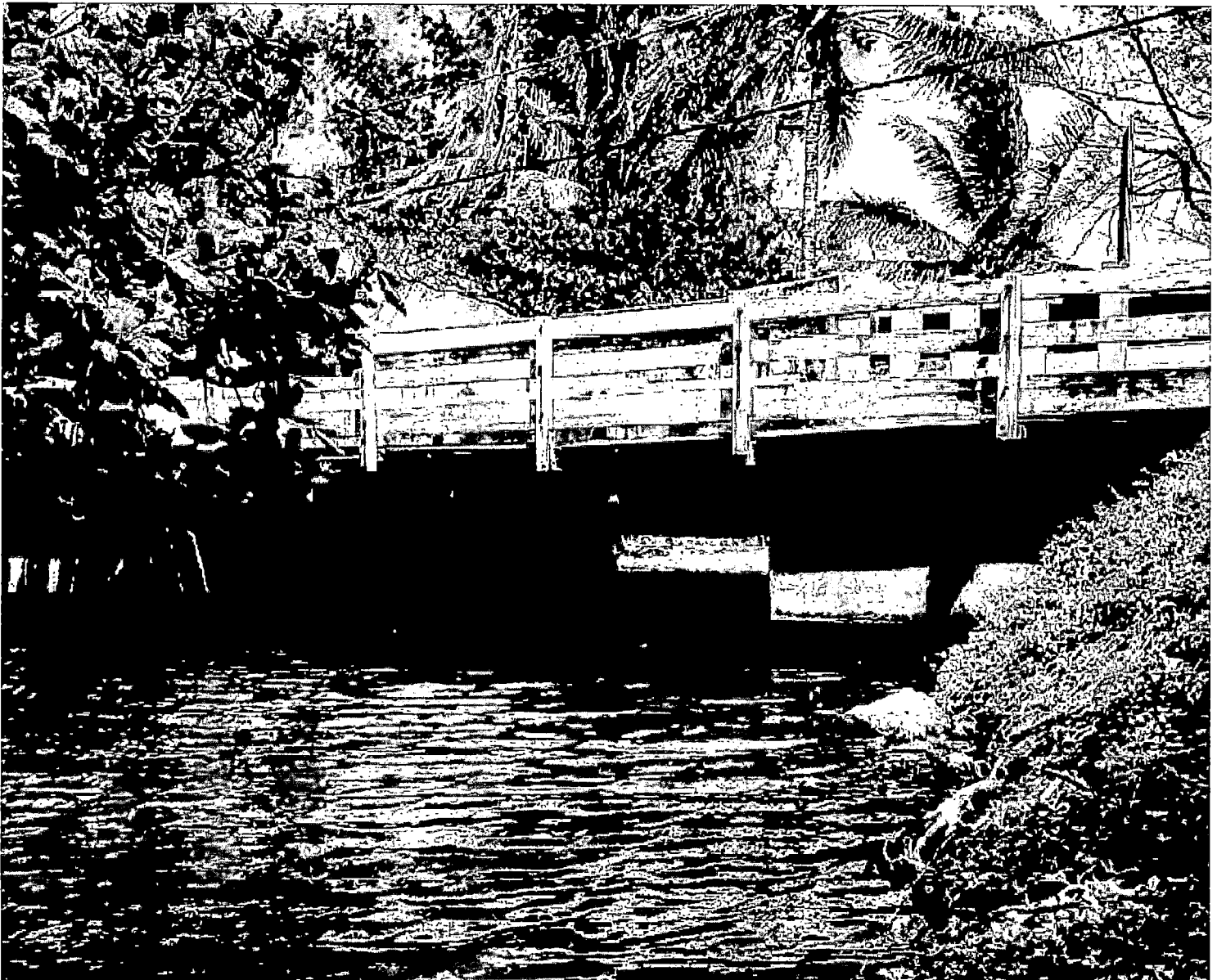


The Environmental Notice

September 23, 2025

JOSH GREEN, M.D., GOVERNOR
MARY ALICE EVANS, DIRECTOR

The Environmental Notice provides public notice for projects undergoing environmental review in Hawai'i as mandated under Section 343-3, Hawai'i Revised Statutes, the Environmental Impact Statement Law. Along with publishing Environmental Assessments (EAs) and Environmental Impact Statements (EISs) for projects in Hawai'i. The Environmental Notice also includes other items related to the shoreline, coastal zone, and federal activities.



HDOT proposes to remove and replace the Waipilopilo Stream Bridge in Ko'olauloa, O'ahu.

photo from the [project's draft EA](#)

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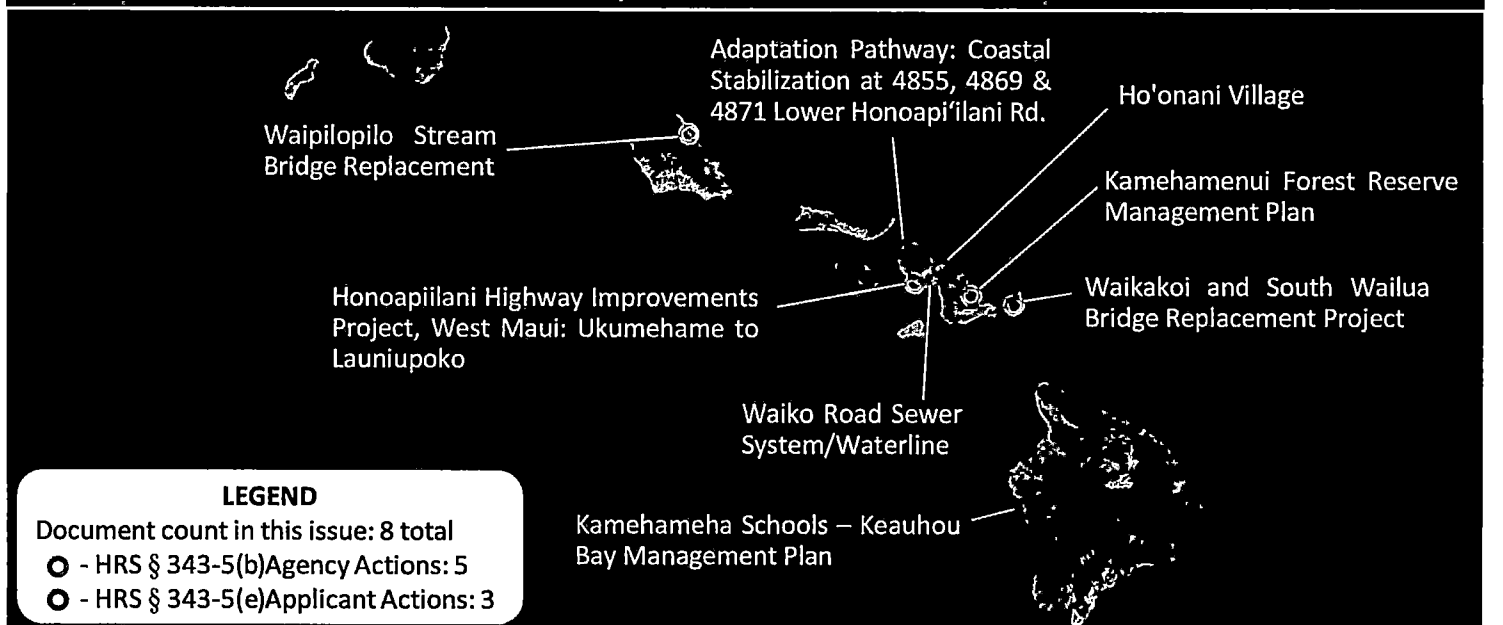
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ANNOUNCEMENTS

- The Environmental Advisory Council (EAC) is still seeking new members. To learn more about the work of the EAC, visit their [webpage](#). To apply to be on the EAC, submit this [online application](#) under Department of Business, Economic Development & Tourism - Environmental Advisory Council.
- Please work toward ensuring that all submittals are Americans with Disabilities Act (ADA) compliant. Our website has an [ADA accessibility page](#) with further information.

STATEWIDE MAP OF EA/EIS DOCUMENTS AND DETERMINATIONS



HAWAI‘I EAS/EISS

Kamehameha Schools – Keauhou Bay Management Plan – (Acceptance of Final EIS)

HRS §343-5(a) Trigger	(3) Propose any use within a shoreline area (4) Propose any use within any historic site as designated in the National Register or Hawai‘i Register
District(s)	North Kona
TMK(s)	(3) 7-8-012:098; (3) 7-8-012:101; (3) 7-8-012:048; (3) 7-8-010:044; (3) 7-8-012:027; (3) 7-8-012:004; (3) 7-8-012:013; (3) 7-8-012:014; (3) 7-8-012:054; (3) 7-8-012:061; (3) 7-8-012:065; (3) 7-8-012:007; (3) 7-8-010:049; (3) 7-8-012:103
Permit(s)	Various Site, Grading, Building and Infrastructure Approvals; Special Management Area Use Permit (Major); Shoreline Setback Variance
Approving Agency / Accepting Authority	County of Hawai‘i, PLANNING DEPARTMENT Alex Roy, (808) 961-8140, planning@hawaiiicounty.gov 101 PAUAHI STREET, SUITE 3, Hilo, HI 96720
Applicant	Kamehameha Schools; 567 S King Street, Honolulu, HI 96813 Marissa Harman, (808) 982-0830, Keauhoubay@ksbe.edu
Consultant	G70; 111 S. King Street, Ste. 170, Honolulu, HI 96813 Kawika McKeague, (808) 523-5866, KeauhouBay@g70.design
Status	The FEIS has been accepted by the Accepting Authority.

Kamehameha Schools proposes to implement the Keauhou Bay Management Plan (KBMP) on approximately 29 acres at Keauhou Bay. The objective of the KBMP is to reinvigorate and transform the Keauhou Bay area to become a place where culture and education is celebrated and highlighted amidst viable commercial operations, which are essential to fund the cultural and educational programming within the immediate area. The KBMP proposes to reorient commercial activities away from culturally sensitive areas to alleviate congestion and establish a new place-based cultural educational center. Existing commercial operations and parking areas will be relocated to new facilities in more appropriate locations away from cultural resources. The KBMP also proposes to create a new low-impact lodging on the resort-zoned plateau mauka of the bay. The new reconfiguration will focus on place-based cultural stewardship, enhance and encourage bayfront access for kama‘āina and kupa‘āina, and promote high quality educational experiences for all.

If you are experiencing any ADA compliance issues with the above project, please contact the County of Hawai‘i, PLANNING DEPARTMENT planner, Alex J. Roy, at alex.roy@hawaiiicounty.gov.