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Dkt. 81 REPLY

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

DAISY MITCHELL; REBECCA
MELENDEZ,

Petitioners,

v.

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
ENTITIES 1-20; DOE
GOVERNMENTAL UNITS 1-20,

Respondents.

Civil No. 3CCV-25-0000438
(Declaratory Judgment)

**RESPONDENTS G70 AND KAWIKA
MCKEAGUE'S REPLY
MEMORANDUM IN SUPPORT OF
THEIR MOTION TO DISMISS
PETITIONERS' FIRST AMENDED
PETITION FOR JUDICIAL
REVIEW OF ENVIRONMENTAL
IMPACT STATEMENT
ACCEPTANCE**

CERTIFICATE OF SERVICE

Hearing:

Date: June 15, 2026

Time: 2:00 pm

Judge: Honorable Kauano'e Jackson

Trial Date: None

**RESPONDENTS G70 AND KAWIKA MCKEAGUE'S
REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS
PETITIONERS' FIRST AMENDED PETITION FOR JUDICIAL
REVIEW OF ENVIRONMENTAL IMPACT STATEMENT ACCEPTANCE**

I. INTRODUCTION

HRS Chapter 343 has been the law of Hawai'i for more than 50 years. In that time, no court has ever held that the statute's cause of action extends to a consultant hired by an applicant to assist with document preparation. The Response [Dkt. 57] identifies no such authority. Counsel for Respondents G70 and Kawika McKeague (collectively, the "**G70 Respondents**") have found none. The silence reflects the statute's plain structure and intent, which together impose duties on agencies and applicants and create remedies that prevent projects from moving forward if the environmental review does not meet the standards set out in rules and caselaw. There is no place in Chapter 343 for a suit against the consultant and its employee or for a remedy barring the employee from further work in the environmental review of a project.

In response, petitioners emphasize the breadth of the First Amended Petition for Judicial Review of Environmental Impact Statement Acceptance [Dkt. 16] (the "**FAP**") and assert that the G70 Respondents were not "passive" participants but rather prepared, coordinated, approved, transmitted, and advanced the FEIS on behalf of the applicant. Response at 2.

For purposes of the Motion to Dismiss [Dkt. 55] (the "**Motion**"), the G70 Respondents do not dispute this characterization. The FAP describes G70's role at length, and the Motion accepts that characterization as the framework of its

argument. The legal failing remains, however. Chapter 343 does not authorize a suit against the consultants that are engaged to assist with preparing the review.

The same statutory framework controls directs when a suit must be filed. Section 343-7(c) requires a judicial proceeding challenging acceptance of an EIS to be initiated within 60 days after the public is informed of acceptance. The limitation is jurisdictional. *Waiānae Coast Neighborhood Bd. v. Hawaiian Elec. Co.*, 64 Haw. 126, 129, 637 P.2d 776, 778 (1981). The FAP invokes § 343-7(c) (at page 1) and pleads September 23, 2025, as the acceptance date. The window to file an action closed on November 22, 2025. The G70 Respondents were named for the first time in the FAP on April 8, 2026—197 days after acceptance. The Response argues this is permissible under a “continuing agency action and continued reliance framework,” Response at 4, but offers no statute, rule or case supporting an exception to the statutory limitation.

The Motion seeks only the dismissal of the G70 Respondents because they should not have been named in the FAP. The dismissal of the G70 Respondents would not affect the continuation of the suit or the remedies available under Chapter 343. The threshold questions of whether Chapter 343 authorizes suit against an applicant’s consultant and whether the claims against the G70 Respondents are timely should be answered on a motion to dismiss. For the reasons set forth below, both questions must be answered in the negative. The FAP should be dismissed as to the G70 Respondents.

II. ARGUMENT

A. Dismissal of the G70 Respondents Will Not Affect the Claims Against Any Other Defendant

The Motion does not seek to dismiss the action against the applicant (Kamehameha Schools) or the accepting authority (Hawai'i County Planning Department and related defendants). The Motion is solely directed at whether Chapter 343 authorizes suit against the consultant and whether the claims against the consultant are timely. Neither question affects the viability of the litigation against other named defendants.

B. The Constitutional and Public Trust Allegations Do Not Establish a Cause of Action Against a Consultant

Petitioners argue that the Motion “improperly attempts to characterize the First Amended Petition as asserting only a narrow statutory challenge” while “disregarding the broader constitutional, public trust, fiduciary, environmental review, and unlawful FEIS advancement allegations.” Response at 1. The broader framing, while perhaps earnestly advanced, does not resolve the threshold question of who may be sued over the acceptance of an environmental review document.

First, the FAP frames this action as a judicial review proceeding under Chapter 343. The caption identifies the pleading as a “First Amended Petition for Judicial Review of Environmental Impact Statement Acceptance,” and the first page expressly invokes “HRS § 343-7(c)” as the basis for the action. The fact that Petitioners marshal additional constitutional and public trust arguments in support of their challenge to the acceptance of the FEIS does not convert their pleading into something other than a Chapter 343 challenge.

Second, the broader framing does not broaden the “substance” of the action or allow plaintiffs to evade statutory structures. *Maui Lani Neighbors, Inc. v. State*, 156 Hawai‘i 520, 575 P.3d 610 (2025). In *Maui Lani Neighbors*, the plaintiffs pleaded claims under HRS Chapter 343 alongside constitutional claims under Article XI, section 9 of the Hawai‘i Constitution. The court held that even where a party invokes constitutional environmental rights, the character of the action “is determined from the substance of the entire pleading, the nature of the grievance, and the relief sought, rather than from the formal language employed or the form of the pleadings.” *Id.* at 540, 575 P.3d at 630 (quoting *Troyer v. Adams*, 102 Hawai‘i 399, 411, 77 P.3d 83, 95 (2003)). As the court recognized, Article XI, section 9 claims arising in the context of challenges under Chapter 343 are “subject to reasonable limitations and regulations as provided by law,” including the procedural and jurisdictional constraints of Chapter 343. *Id.* at 541-42, 575 P.3d at 631-32. In other words, a challenger cannot use constitutional framing to bypass the structural limits of the statute. *Id.*

Finally, nothing in Articles XI and XII of the Hawai‘i Constitution subjects consultant to suit merely because petitioners disagree with the substance of an approved environmental review document. Articles XI and XII principally impose obligations on the State and its agencies. *See* Haw. Const. art. XI, § 1 (“For the benefit of present and future generations, **the State and its political subdivisions** shall conserve and protect Hawai‘i’s natural beauty and all natural resources”) (emphasis added); *id.* art. XII, § 7 (“**The State** reaffirms and shall protect all rights,

customarily and traditionally exercised for subsistence, cultural and religious purposes . . .”) (emphasis added). The public trust doctrine and the framework articulated in *Ka Pa‘akai O Ka ‘Āina v. Land Use Commission*, 94 Hawai‘i 31 (2000), and *In re Water Use Permit Applications*, 94 Hawai‘i 97 (2000), regulate the conduct of state agencies in carrying out their public-trust duties. None of these doctrines creates a private right of action against a private consultant retained by an applicant under Chapter 343. Petitioners cite no authority extending these public trust and constitutional doctrines to impose direct liability on private consultants assisting in document preparation.

At bottom, the FAP challenges the acceptance of an EIS under Chapter 343. The invocation of constitutional and public trust rights does not change the substance of the action or extend liability or remedies beyond Chapter 343. Accordingly, Chapter 343 answers whether the G70 Respondents are proper parties in the suit.

C. Chapter 343 Does Not Create a Cause of Action Against the G70 Respondents.

The Response describes G70 and Mr. McKeague’s role as having “actively prepared, coordinated, approved, transmitted, and advanced” the FEIS and as having “directly participated in preparation, coordination, approval, execution, transmission, and advancement of the FEIS.” Response at 2. Petitioners argue that these activities create legal duties enforceable through this action because consultants “are expected to understand, follow, and comply with the legal disclosure, analytical, completeness, and environmental review requirements governing FEIS preparation under Hawai‘i law.” *Id.* These statements evade the question. The

question is whether Chapter 343 creates a cause of action enforceable against a consultant.

The answer is no. A professional expectation that consultants will perform their work competently and in compliance with applicable law is not the same as a cause of action enforceable by third parties in a judicial proceeding. Petitioners are not the applicant. They have no contractual relationship with G70. In the more than 50 years since Hawai'i adopted its Environmental Protection Act (Chapter 343), there is no reported case in Hawai'i in which the consultant that prepared an environmental review document was named as a respondent, held liable, or subjected to any remedy. That absence spans more than five decades of Chapter 343 litigation.

Consultants are not sued under Chapter 343 because the statutory architecture forecloses the claim. Section 343-5(c) places the duty to prepare and submit the FEIS on “the applicant.” Section 343-2 defines “applicant” as the person “who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.” The G70 Respondents are not the applicant. As Petitioners’ Response admits, G70 prepared the FEIS “on behalf of the applicant.” Response at 2. The remedy for an applicant’s deficient submission is nonacceptance by the accepting authority or, where acceptance occurs, judicial review of that acceptance under section 343-7(c). The statute provides no mechanism for collateral suit against the applicant’s consultant.

As the FAP conceded, G70 was “named as a Respondent solely because of its integral and foundational role in preparing and advancing the FEIS.” FAP at 37.

While Petitioners now describe their requested relief as “declaratory, injunctive, equitable, and remedial,” Response at 3-4, they do not identify any form of declaratory, injunctive, equitable, or remedial relief that operates on the G70 Respondents. As the Motion explained, a declaration that the FEIS is unlawful, vacatur of the acceptance, and an injunction against further reliance on the FEIS all regulate the conduct of the agency and applicant. The presence of G70 and Mr. McKeague is not necessary to grant any of that relief, if determined to be warranted, and the relief cannot be enforced against them in any meaningful way.

The request for “removal” of Mr. McKeague “from further exercise of authority,” Response at 4, is the only relief that purports to operate uniquely on a G70 Respondent. As the Motion explained, the Court has no authority under Chapter 343 to remove a private corporation’s officer from his position or from his work for an applicant. Petitioners do not respond to this point.

D. The Claims Against the G70 Respondents Are Time-Barred.

Even if Chapter 343 could be read to permit suit against an applicant’s consultant, the claims against the G70 Respondents would be time barred. Petitioners argue that they “proceed under the continuing agency action and continued reliance framework,” pursuant to which “continued reliance upon and advancement of actions premised upon an allegedly unlawful FEIS constitutes continuing conduct subject to judicial review under HRS § 343-7(c).” Response at 4. Petitioners are wrong.

First, the statutory text forecloses their argument. Section 343-7(c) provides that “[a]ny judicial proceeding, the subject of which is the acceptance of an

environmental impact statement required under section 343-5, shall be initiated within sixty days after **the public has been informed pursuant to section 343-3 of the acceptance of such statement.**” HRS § 343-7(c) (emphasis added). The trigger is publication of notice of acceptance. The statute makes no reference to a “continuing conduct” rule, and no reported decision has added one. On the contrary, the Hawai‘i Supreme Court has held that the challenge period is jurisdictional and that courts lack jurisdiction once it closes. *Waianae Coast*, 64 Haw. at 129, 637 P.2d at 778.

Second, even if a “continuing conduct” theory existed under § 343-7(c), the Response conflates the completed conduct of the G70 Respondents in preparing and transmitting the FEIS in August 2025 with the agency’s and applicant’s ongoing reliance on the FEIS after acceptance. G70’s document-preparation work was completed months before the original Complaint was filed. Whatever “continuing reliance” the agency and applicant may have, the reliance is not related to anything that the G70 Respondents continue to do.

Third, the Response fails to address whether the FAP relates back to the original Complaint. As the Motion explained, the addition of the G70 Respondents does not relate back to the date of the original Complaint because (1) Petitioners did not make any “mistake concerning the identity of the proper party,” HRCP 15(c)(3)(B); they simply decided months later to expand the suit; and (2) Petitioners do not allege, and cannot allege, that the G70 Respondents received notice of this action within the statutory period, HRCP 15(c)(3)(A). Where a party fails to respond

to a dispositive legal argument, the argument is effectively conceded. *See Hong v. Estate of Graham*, 70 P.3d 647 (2003).

The action against the G70 Respondents commenced on April 8, 2026, which is 197 days after the September 23, 2025 acceptance and 137 days after the November 22, 2025 deadline to file suit. The Court lacks jurisdiction over the claims against the G70 Respondents under HRS § 343-7(c).

III. CONCLUSION

For the foregoing reasons, the G70 Respondents respectfully request that the Court grant the Motion and dismiss the First Amended Petition as to G70 and Kawika McKeague with prejudice.

DATED: Honolulu, Hawai‘i, June 9, 2026.

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a true and correct copy of the foregoing document was duly served upon the following parties in the manner indicated below:

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DATED: Honolulu, Hawai'i, June 9, 2026.

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