

The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation

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“All parties involved and society as a whole’ would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai‘i Environmental Policy Act.”¹

At first blush, the Hawai‘i Supreme Court’s environmental review jurisprudence under the leadership of Chief Justice Ronald T.Y. Moon—twelve major decisions from 1993 until 2010—appears “pro-environmental” in terms of the classic “environment versus development” paradigm. In eight of those decisions,² the citizens challenging state or county agencies for evading the public review process required by Hawai‘i Revised Statutes (H.R.S.) chapter 343³ won major, sometimes stunning, victories. On deeper examination of all twelve cases,⁴ however, the environmental review jurisprudence of the Moon

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¹ *Sierra Club v. Dep’t of Transp. (Superferry I)*, 115 Haw. 299, 343, 167 P.3d 292, 336 (2007) (quoting HAW. REV. STAT. § 343-1 (1993)).

² *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010); *Sierra Club v. Dep’t of Transp. (Superferry II)*, 120 Haw. 181, 202 P.3d 1226 (2009); *Superferry I*, 115 Haw. 299, 167 P.3d 292; *Sierra Club v. State Office of Planning (Koa Ridge)*, 109 Haw. 411, 126 P.3d 1098 (2006); *Kepo’o v. Kane (Kepo’o II)*, 106 Haw. 270, 103 P.2d 939 (2005); *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai‘i (North Kohala)*, 91 Haw. 94, 979 P.2d 1120 (1999); *Kepo’o v. Watson (Kepo’o I)*, 87 Haw. 91, 952 P.2d 379 (1998); *Kahana Sunset Owners Ass’n v. Cnty. of Maui*, 86 Haw. 66, 947 P.2d 378 (1997).

³ The court and many practitioners often refer to H.R.S. chapter 343 as “HEPA,” an acronym for the “Hawaii Environmental Policy Act,” because the law is one part of Hawai‘i’s version of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2006). This article uses the technically correct reference “chapter 343” to avoid confusion with the other part of Hawai‘i’s “mini-NEPA,” the little-known Hawai‘i Revised Statutes chapter 344, aptly titled the “State Environmental Policy” Act.

⁴ See Part III for a discussion of *Sierra Club v. Hawai‘i Tourism Authority (HTA)*, 100 Haw. 242, 59 P.3d 877 (2002), *Nuuamu Valley Ass’n v. City & County of Honolulu (Nuuamu)*,

Court appears to be concerned less with substantive results than with process, focusing on the likely benefits to agencies and all stakeholders of more robust public participation, a core value of chapter 343. In its vigorous enforcement of chapter 343, the court has identified sensible boundaries to the law, while implicitly rejecting objections from the losing agencies (and the private developers) about the short-term economic implications of its rulings. The court has stayed true to the original intent of the law even when that meant squaring off against other branches of state government. Despite the criticism, the Hawai'i Supreme Court, under the leadership of Chief Justice Moon, maintained its judicial independence and bravely protected public participation in the environmental review process.

Throughout its chapter 343 decisions, the court repeatedly cited the first aspirational section of the law, where the Legislature expressly encourages public participation,⁵ putting the public at the table alongside agencies and applicants in the review process. The twelve key cases discussed in this article indicate that the Moon Court's decisions almost uniformly rule in favor of those seeking to maintain openness in the governmental processes that protect environmental values against arbitrary and capricious agency decision-making, particularly when those agencies are reviewing large-scale projects. Plaintiffs do not always win, but when an agency abruptly or unfairly cut off a potentially beneficial process for a large-impact project, the court reacted strongly. As the court lamented in the 2007 case, *Sierra Club v. Department of Transportation (Superferry I)*, "[c]ontrary to the expressly stated purpose and intent of [chapter 343], the public was prevented from participating in an environmental review

119 Haw. 90, 194 P.3d 531 (2008), *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 914 P.2d 1364 (1996), and *Morimoto v. Board of Land & Natural Resources*, 107 Haw. 296, 113 P.3d 172 (2005).

⁵ Hawai'i Revised Statutes section 343-1 states:

The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole. It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

HAW. REV. STAT. § 343-1 (2010).

process[.]”⁶ and their participation would have benefitted “[a]ll parties involved and society as whole.”⁷

This article reviews the environmental review jurisprudence of the Moon Court along a theoretical spectrum of “beneficial public participation.” Part I presents a brief background on chapter 343 litigation in Hawai‘i. Part II discusses the eight cases where the court expressed most strongly that citizens’ lack of participation harmed the public interest in, and the integrity of, the environmental review process; this part focuses on three “blockbuster” cases: *Kahana Sunset*,⁸ *Superferry I*⁹ and *Superferry II*,¹⁰ and *Turtle Bay*.¹¹ Part III examines the two decisions where the court tipped the public benefit versus the procedural injury balance in favor of defendants, splitting the court in one case (*Hawaii Tourism Authority*)¹² and setting some boundaries on the reach of chapter 343 in the other (*Nuuanu*)¹³. Part III also mentions briefly the remaining two Moon Court cases, *Price v. Obayashi Hawaii Corp.*¹⁴ and *Morimoto v. Board of Land and Natural Resources*,¹⁵ in which quixotic individuals, seeking more environmental review against a backdrop of already extensive agency review processes, simply lost.

The legacy of the Moon Court’s decisions in this core area of environmental law is a ringing endorsement of the fundamental principles enshrined by the Hawai‘i Legislature in chapter 343 that environmental values must be fully considered alongside economic concerns, that citizens play a vital role in giving voice to those values as part of permitting and development reviews, and that the role of the judiciary is to enforce the legislature’s plain intent. Although not without harsh critics among some agencies and members of the development community, the Moon Court’s decisions provide a cohesive, principled, and well-balanced body of jurisprudence in this area that will well serve Hawai‘i’s environment, agencies, responsible applicants, and citizens’ groups for many years to come.

⁶ *Superferry I*, 115 Haw. at 343, 167 P.3d at 336.

⁷ *Id.*

⁸ *Kahana Sunset Owners Ass’n v. Cnty. of Maui*, 86 Haw. 66, 947 P.2d 378 (1997).

⁹ 115 Haw. 299, 167 P.3d 292.

¹⁰ 120 Haw. 181, 202 P.3d 1226 (2009).

¹¹ *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010).

¹² *Sierra Club v. Haw. Tourism Auth. (HTA)*, 100 Haw. 242, 59 P.3d 877 (2002).

¹³ *Nuuanu Valley Ass’n v. City & Cnty. of Honolulu (Nuuanu)*, 119 Haw. 90, 194 P.3d 531 (2008).

¹⁴ 81 Haw. 171, 914 P.2d 1364 (1996).

¹⁵ 107 Haw. 296, 113 P.3d 172 (2005).

I. BACKGROUND OF CHAPTER 343 LITIGATION IN HAWAI'I

Since the Legislature's enactment of chapter 343 in the early 1970s,¹⁶ Hawai'i state courts have played an important role in the environmental review process by interpreting the statute and its administrative rules in the context of lawsuits brought by citizens challenging a variety of state and county agency determinations. Although procedural in nature, chapter 343 is an action-enforcing statute requiring agencies and applicants to consider at the earliest stage the environmental effects of certain proposals for action, projects, or development.

Chapter 343 requires that an "action" that proposes to "use state or county lands or funds" or meets certain other land use or environmental "triggers" undergo a public review that can involve two basic steps and may last months or a few years.¹⁷ First, the agency prepares a preliminary screening document called an Environmental Assessment (EA). Then, if the environmental impacts are likely to be significant, the applicants must prepare an Environmental Impact Statement (EIS), a more comprehensive and usually much longer analysis that examines the potential impacts, as well as project alternatives, in greater depth. If the state or county agency accepts the final EA or EIS, that analysis is supposed to inform the agency's decision-making on subsequent substantive approvals, such as a zoning change or a permit sought under another law. Chapter 343 itself does not require an agency to select the most environmentally benign alternative; rather, it requires agencies to take a "hard look"¹⁸ at the information and give it serious consideration.

When that review system breaks down, chapter 343 provides for a back-end enforcement system of judicial review and lawsuits by "persons aggrieved."¹⁹

¹⁶ For a comprehensive analysis of chapter 343 and its companion laws, chapter 341 and chapter 344, see the series of three reports prepared by the University of Hawai'i for the State of Hawai'i since 1978: DOAK COX, PETER RAPPA & JACQUELIN MILLER, *THE HAWAII STATE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: SUMMARY AND CONCLUSION* (1978); PETER RAPPA, JACQUELINE MILLER & C. COOK, *THE HAWAII STATE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: REVIEW AND RECOMMENDED IMPROVEMENTS* (1991); and KARL KIM, DENISE ANTOLINI, PETER RAPPA, SCOTT GLENN & NICOLE LOWEN, *FINAL REPORT ON HAWAII'S ENVIRONMENTAL REVIEW SYSTEM* (2010) [hereinafter KIM, ANTOLINI & RAPPA].

¹⁷ See HAW. REV. STAT. § 343-5(a)(1)-(9) (2010) (listing what are commonly known as the "triggers"); *id.* § 343-5(b)-(c) (describing the two-step environmental assessment and impact statement system).

¹⁸ The "hard look" doctrine, well known under NEPA case law, is also consistently applied by the Hawai'i courts to chapter 343 cases. See, e.g., *Superferry I*, 115 Haw. 299, 342, 167 P.3d 292, 335 (2007) (citing *Price*, 81 Haw. at 182 n.12, 914 P.2d at 1375 n.12 (citation omitted)).

¹⁹ See HAW. REV. STAT. § 343-7(a) and (b) addressing the lack of an EA or the failure to proceed from an EA to an EIS, respectively, providing: "The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for

In fact, one explanation for the wealth of Hawai'i Supreme Court chapter 343 decisions focusing on public participation is that, for citizens' groups, there are no alternatives to judicial review, no administrative remedies to exhaust,²⁰ and no one with authority²¹ to listen to and resolve complaints of citizens seeking to enforce the law.²² The other reason is that none of the other four kinds of potential plaintiffs—applicants, agencies, the Office of Environmental Quality Control (OEQC), or the Environmental Council—has ever²³ sought a judicial remedy to enforce chapter 343. Approving agencies never²⁴ reject exemption declarations, EAs, or EISs. Thus, only citizens have sued. Not surprisingly,

the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.” Section 343-7(c), covering challenges to an EIS, provides a slightly modified standing platform for plaintiffs, limiting it to the council and to those who commented on the draft EIS and to the scope of those comments.

²⁰ Only applicants whose final EIS is rejected by the approving agency may seek review from the Environmental Council. HAW. REV. STAT. § 343-5(c). The author is unaware of any situation where an agency rejected a final EIS and that non-acceptance was appealed to the Council.

²¹ Since 1985, the Environmental Council rules have provided for a declaratory order process. See HAW. CODE R. § 11-201-21 to -25 (LexisNexis 2011). When the author served on the council from 2004 to 2006, the Attorney General's Office advised the council repeatedly that it had no declaratory order authority based on the Attorney General's prior opinions and a report by the Legislative Reference Bureau, DECLARATORY RULINGS AND THE ENVIRONMENTAL COUNCIL (1989). Therefore, in 2006, the Council proposed to delete this section of its rules pending legislative clarification. Governor Lingle never approved the Council's proposed rules for public hearings; thus the current Council rules (somewhat ironically) suggest that such quasi-judicial authority exists when the Attorney General takes the position that it does not.

²² During this author's term of service on the Council, it heard citizen complaints several times but, due to the lack of any advisory opinion, declaratory order, or other authority, was unable to do anything more than write a letter expressing concern to the agencies involved. Hawai'i Revised Statutes section 341-6 provides: “The council shall serve as a liaison between the director and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning ecology and environmental quality through public hearings or any other means and by publicizing such matters as requested by the director pursuant to section 341-4(b)(3).” Whether to modify the legal authority of the council was one issue examined in the 2010 University of Hawai'i study for the legislature. KIM, ANTOLINI & RAPP, *supra* note 16.

²³ The author is unaware of any such case, and no such case appears in the reported case law.

²⁴ The only well-known situation in Hawai'i of a rejected EIS involved the 1999 decision by Tim Johns, then-director of the State Department of Land and Natural Resources, who rejected an EIS by Hawaiian Electric Company for the Wa'ahila Ridge transmission project, which engendered thousands of public comments. Director Johns later accepted the EIS, but the agency voted to deny the Conservation District Use Permit in 2002, and the project was ultimately shelved. See Mālama O Mānoa, Historic Preservation, <http://my.malamaomanoa.org/preservation> (last visited Apr. 3, 2011).

then, the case law in this area focuses heavily on removing the barriers to public participation and ensuring the adequacy of the agency process.

Across nearly four decades of chapter 343 litigation, Hawai'i appellate courts have issued approximately twenty-three noteworthy decisions: twenty by the Hawai'i Supreme Court and three by the Hawai'i Intermediate Court of Appeals (ICA).²⁵ Twelve, more than half of those decisions, were issued during the 1993-2010 term of the Moon Court. Those cases dominated the court's environmental docket, keeping these issues at the forefront of environmental law in Hawai'i and shaping current stakeholder and public perception about the importance and reach of this fundamental environmental law.

The Hawai'i Supreme Court and ICA have repeatedly grounded their decisions in the four key principles of the state environmental review system: (1) the broad purpose and intent of chapter 343 to protect environmental quality, (2) the "informational role" of the environmental review process, (3) the value of public participation, and (4) the goal of improving the quality of agency decision-making. Despite the clamor among agencies and applicants for more efficiency, clarity, and predictability in the law, these values are not embedded in the law itself. In fact, in several of these chapter 343 cases, the Hawai'i Supreme Court has made it clear that agencies and developers proceed at their peril if they circumvent the environmental review process.²⁶ This is not to say the court is unaware of the potential real-world impact of its rulings, but rather that the Moon Court has given highest priority to the procedural requirements of the law. The court has repeatedly referred to the Legislature's strong emphasis on public participation and restricted its judicial role to

²⁵ In addition to the twelve decisions featured in this article, *see supra* notes 2 and 4, the Hawai'i Supreme Court has rendered seven important chapter 343 cases since 1978: *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 1116 (1978); *Molokai Homesteaders Ass'n v. Cobb*, 63 Haw. 453, 629 P.2d 1134 (1981); *McGlone v. Inaba*, 64 Haw. 27, 636 P.2d 158 (1981); *Waikiki Resort Hotel, Inc. v. City & County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981); *Waianae Coast Neighborhood Board v. Hawaiian Electric Co.*, 64 Haw. 126, 637 P.2d 776 (1981); *Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc.*, 65 Haw. 133, 648 P.2d 702 (1982); and *Mauna Kea Power Co. v. Board of Land & Natural Resources*, 76 Haw. 259, 874 P.2d 1084 (1994). In addition, *Ka Pa 'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068 (2000), discusses the amendments to chapter 343 that initiated the cultural impact statement requirement. The Intermediate Court of Appeals decided three notable cases: *Medeiros v. Hawaii County Planning Ass'n*, 8 Haw. App. 183, 797 P.2d 59 (1990); *Bremner v. City & County of Honolulu*, 96 Haw. 134, 28 P.3d 350 (App. 2001); and *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008).

²⁶ *See Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007) (stopping the \$40 million state harbor improvements project, as well as the Superferry's operations, for lack of chapter 343 compliance); *see also Kepo 'o II*, 106 Haw. 270, 103 P.3d 939 (2005) (rejecting the defendants' argument that voiding a six-year-old lease deprived them of a vested property right or due process).

interpreting the plain language of the law. In essence, the court has let the economic chips fall where they may, leaving those policy choices to the Legislature.²⁷

In slicing up the Moon Court's chapter 343 decisions, it is helpful to keep in mind the four basic types of environmental review cases: (1) failure to prepare (or require) an EA;²⁸ (2) failure to prepare (or require) an EIS;²⁹ (3) agency acceptance of an insufficient EIS,³⁰ and (4) failure to require a supplemental EA or EIS.³¹ From the perspective of citizens' groups, the first two types of cases are easier to win. The third type can be quite difficult, and in Hawai'i, the fourth has been successful at least once but is still novel. Perhaps more importantly for this article's focus on public participation, the cases in which the court is most likely to perceive the biggest injustice that merits judicial intervention are the first two—when the agency stiff-arms citizens' groups and

²⁷ Amending chapter 343 has often been the topic of legislative debate. The University of Hawai'i study and a legislative working group formed by Senator Mike Gabbard during the 2010 session proposed an omnibus bill to modernize the law, but that bill was not introduced in the 2011 session. For the history of that process, see *Assessing Hawai'i's Environmental Review Process*, <http://hawaiieisstudy.blogspot.com> (last visited Apr. 3, 2011). During the 2011 session, the only major chapter 343 bills to make it to conference (and then die due to unrelated procedural reasons) were Senate Bill 699, a proposal to strengthen the OEQC by allowing the office to assess fees on filed documents, and Senate Bill 723, the developer and agency-proposed extension of what is called the "ministerial exemption."

²⁸ When there is a "lack of assessment required under section 343-5," a lawsuit must be filed within 120 days of "the agency's decision to carry out or approve the action" or, if the agency has made no formal determination, within 120 days after the project has started. HAW. REV. STAT. § 343-7(a) (2010).

²⁹ If an EIS is not prepared when one "is required" and the process stops at only an EA/Finding of No Significant Impact (FONSI), then an action must be brought within thirty days after the public has been informed of that decision. *Id.* § 343-7(b).

³⁰ An "adequacy" challenge must be brought within sixty days after public notice of the acceptance of an EIS. *Id.* § 343-7(c). These timing restrictions (called "limitation of actions" under chapter 343) act as an important screen for timely litigation. Failure to meet these requirements has barred several citizen claims. See, e.g., *Waikiki Resort Hotel, Inc.*, 63 Haw. 222, 624 P.2d 1353; *Waianae Coast Neighborhood Board*, 64 Haw. 126, 637 P.2d 776; *Medeiros*, 8 Haw. App. 183, 797 P.2d 59; *Bremner*, 96 Haw. 134, 28 P.3d 350. Cf. *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 181, 231 P.3d 423, 454 (2010) (finding plaintiffs met the statute of limitations, adopting the more generous 120-day period of -7(a), running from the date of the City and County of Honolulu Department of Planning and Permitting (DPP) approval of the subdivision application).

³¹ Chapter 343 itself does not address supplemental documents, but the Environmental Council's rules expressly do. HAW. CODE R. §§ 11-200-26, -27 (LexisNexis 2011). The court specifically upheld the Council's rulemaking authority regarding supplemental documents in the *Turtle Bay* case. See *Turtle Bay*, 123 Haw. at 176, 231 P.3d at 499 ("[T]he rule-making authority expressly grants to the Environmental Council the power to promulgate rules regarding EISs.").

either denies that chapter 343 applies at all, or determines that only an EA (and not a full EIS) is warranted by the proposed action.

The unusual commitment of citizens' groups in pursuing these cases and the summary judgment nature of this type of litigation (which tends to minimize costs and maximize the ability to characterize issues for appeal as "of law" and not "of fact") has meant that almost all chapter 343 cases filed in circuit court have eventually made their way to the Hawai'i Supreme Court.³² Thus, oddly enough, an examination of the Hawai'i Supreme Court decisions does reflect the in-the-trenches battles over chapter 343 actions by agencies and applicants in Hawai'i.³³ The Moon Court era decisions discussed next, seen from the perspective of a theory of beneficial public participation, represent a striking body of case law in their inclination to throw open the courthouse doors to responsible citizens' groups even when it means stopping high-profile development projects.

II. ENSURING JUDICIAL ACCESS WHEN CITIZENS' LACK OF PARTICIPATION HARMED THE PUBLIC INTEREST IN THE ENVIRONMENTAL REVIEW PROCESS

The Moon Court's environmental review decisions have strongly ensured open access to the courts when citizens' lack of participation has, in the court's view, harmed the public interest role that the Legislature built into the environmental review process. This section reviews eight decisions of the court in chronological rather than thematic order to create a cumulative understanding of "why plaintiffs win so often" across nearly two decades of decisions. This section also highlights the three "game-changing" environmental review rulings of the Moon Court: *Kahana Sunset Owners Association v. County of Maui*,³⁴ the *Superferry I*³⁵ and *Superferry II*³⁶ cases, and *Unite Here! Local 5 v. City and County of Honolulu (Turtle Bay)*.³⁷ Each of these major decisions not only had David and Goliath qualities, but all three

³² In the author's experience, only one chapter 343 case of recent note has not reached the Hawai'i Supreme Court. See *'Ohana Pale Ke Ao v. Bd. of Agric.*, 118 Haw. 247, 188 P.3d 761 (App. 2008) (finding that chapter 343 review was required for importation of genetically modified algae by a private company to a state research facility).

³³ This is not to say that citizens sue every time they are concerned about the inadequacy of an EA or EIS; citizens' groups often decline to sue because of a variety of factors, such as lack of available counsel, high costs and attorneys' fees, political concerns, internal disagreement, or poor timing. Because the only way to challenge a flawed chapter 343 decision is to sue, however, there is no "bottom of the pyramid" for these kinds of cases, and citizens rarely settle at the circuit court level because of the important legal issues and projects involved.

³⁴ 86 Haw. 66, 947 P.2d 378 (1997).

³⁵ 115 Haw. 299, 167 P.3d 292 (2007).

³⁶ 120 Haw. 181, 202 P.3d 1226 (2009).

³⁷ 123 Haw. 150, 231 P.3d 423 (2010).

contained numerous progressive rulings on public participation that boldly reinforced the citizen lawsuit paradigm.

A. Kahana Sunset: *Shaping the Broad Funnel of the Applicability of Chapter 343*

In the world of chapter 343 litigation, few issues are more important than the threshold question of *when* the law applies. Divining the precise initial reach of the law consumes much energy in the daily life of consultants, project proponents, agencies, and citizen groups. Prognostication is made simultaneously more—and less—predictable by the structure of the “343 funnel,” which is very wide at the top and then rapidly narrowed by an exemption process.³⁸ At the top, the chapter 343 review process is deliberately broad: it requires an EA for actions that “[p]ropose the use of state or county lands or the use of state or county funds.”³⁹ Following that large initial “big trigger,” chapter 343 lists twelve other circumstances that require environmental review.⁴⁰ *Kahana Sunset Owners Association v. County of Maui*⁴¹ addressed the breadth of this critical “use” trigger and set the stage for a

³⁸ Hawai‘i Revised Statutes section 343-6(a)(2) gives the State Environmental Council the authority to promulgate regulations that exempt “specific types of actions, because they will probably have minimal or no significant effects on the environment.” The exemption regulations, Hawai‘i Administrative Rules section 11-200-8, provide for eleven “classes” of exempt actions and a “safety net” exception. HAW. CODE R. § 11-200-8(a)-(b) (LexisNexis 2011). The agencies maintain “lists” of exemption actions posted on the OEQC web site and in theory the actions are periodically updated and reviewed by the Environmental Council. *Id.* § 11-200-8(d). Agencies are then allowed to “declare” certain action exempt from chapter 343; they must “maintain records” and “produce the records for review upon request.” *Id.* § 11-200-8(e). Unfortunately, this very important declaration process is not transparent, except for the release of a few high-profile exemption declarations such as was challenged in *Superferry*; therefore it is not known how many actions are declared exempt each year by state and county agencies or if those declarations comport with the law. For this reason, a recent University of Hawai‘i study proposed to create a new transparent declaration accounting system. See KIM, ANTOLINI & RAPP, *supra* note 16, at 60.

³⁹ HAW. REV. STAT. § 343-5(a)(1) (2010).

⁴⁰ Hawai‘i Revised Statutes section 343-5(a) lists twelve other triggers for environmental review, including, “use within any land classified as a conservation district,” *id.* § 343-5(a)(2); “use within a shoreline area,” *id.* § 343-5(a)(3); “use within any historic site,” *id.* § 343-5(a)(4); “use within the Waikiki . . . [] Special District,” *id.* § 343-5(a)(5); “amendments to existing county general plans” that propose urbanization, *id.* § 343-5(a)(6); “reclassification of . . . a conservation district by the state land use commission,” *id.* § 343-5(a)(7); certain new or expanded helicopter facilities, *id.* § 343-5(a)(8); certain large wastewater treatment units, *id.* § 343-5(a)(9)(A); a waste-to-energy facility, *id.* § 343-5(a)(9)(B); a landfill, *id.* § 343-5(a)(9)(C); an oil refinery, *id.* § 343-5(a)(9)(D); or a power-generating facility. *Id.* § 343-5(a)(9)(E).

⁴¹ 86 Haw. 66, 947 P.2d 378 (1997).

series of cases from the court that reinforced the broad shape of the funnel and sparked a backlash from the development community that continues today.

Kahana Sunset was not the first case to define the line between what is covered and what is excluded⁴² or exempt from chapter 343. In *McGlone v. Inaba*, decided in 1981 during the Richardson Court era, the court upheld the Board of Land and Natural Resources' (BLNR) decision not to require an EA for an underground utility easement through conservation land or for an adjacent single-family residence in Hawai'i Kai, reasoning that the impacts did not rise to the level of significance contemplated by chapter 343 and, therefore, that BLNR had properly exempted the project.⁴³ The plaintiffs—six individuals “interested in the preservation of the environment at Paiko Lagoon, Kuliouou, Oahu,” represented by Jack Schweigert⁴⁴—lost. The Richardson Court seemed persuaded by three major factors (factors not present in *Kahana Sunset* and its progeny): the project involved a single-family residence; the Environmental Council's exemption regulations expressly included single-family residences and supporting utilities;⁴⁵ and the projected impact on Paiko pond was minimal.⁴⁶ The court held that “significant effect” is a “relative concept” and that any determination of significant effect is “highly subjective.”⁴⁷ At the same time, an agency “must consider every phase and every expected consequence of the proposed action” when assessing potential significant effects.⁴⁸

The facts in the 1997 *Kahana Sunset* case were readily distinguishable from *McGlone*. In *Kahana Sunset*, Justice Paula Nakayama, writing for a unanimous court, agreed with the citizen-plaintiff Kahana Sunset Owners Association (not joined by any environmental group but represented by Isaac Hall, a prominent environmental attorney on Maui and chapter 343 expert⁴⁹) that the Maui County Planning Commission had erred in not requiring an EA for a proposal

⁴² “Excluded” means something different than “exempt.” Under Hawai'i law, the former indicates that the law does not apply at all; the latter indicates that the law applies but that the project falls under the class of exemptions provided under the rules. See HAW. CODE R. § 11-200-8 (LexisNexis 2011). Under federal law, the term used in the Council on Environmental Quality Control's NEPA regulations is “excluded.” See 40 C.F.R. § 1508.4 (2011).

⁴³ 64 Haw. 27, 38, 636 P.2d 158, 166-67 (1981).

⁴⁴ *Id.* at 28, 636 P.2d at 160.

⁴⁵ *Id.* at 36, 636 P.2d at 165 (citing EIS Regs. 1:33(a)(3)[2][d] (currently HAW. CODE R. § 11-200-8(a)(3) (LexisNexis 2011))).

⁴⁶ The court explained that “the effect of the construction of underground utilities on Lot 715—designated the primary impact—would only be minimal and temporary. There is ample evidence to support this finding.” *Id.* at 37, 636 P.2d at 165.

⁴⁷ *Id.* at 35, 636 P.2d at 164.

⁴⁸ *Id.*

⁴⁹ *Kahana Sunset Owners Ass'n v. Cnty. of Maui*, 86 Haw. 66, 67, 947 P.2d 378, 379 (1997).

to build 312 multi-family units that required a thirty-six-inch drainage culvert to be tunneled under a street and then connected to a culvert under a public highway.⁵⁰ The court found that the agency's decision was inconsistent with the intent of chapter 343 to "exempt only very minor projects" as well as the "letter and intent of the administrative regulations."⁵¹

Addressing the merits, Justice Nakayama first reviewed the purpose and general provisions of HEPA,⁵² quoting the entire first section of section 343-1,⁵³ which includes the legislative findings emphasizing the role of public participation. She explained the broad reach of chapter 343: an EA is mandatory unless a project is exempt, and an EA must be prepared at the "earliest practicable time."⁵⁴ Justice Nakayama noted that it was "undisputed" that the housing complex would install a new thirty-six-inch drainage line beneath Napili Hau Street and then connect to an existing twenty-four-inch culvert beneath Lower Honoapi'ilani Highway.⁵⁵ In the court's view, this was a "use of state or county lands or funds" under H.R.S. section 343-5(a)(1).⁵⁶ The opinion then examined the County's claimed exemption for "minor accessory structures" and certain utilities,⁵⁷ finding that the project probably did not fall under the exemptions in Hawai'i Administrative Rules (HAR) section 11-200-8.⁵⁸ Stating that the administrative rules intended to exempt "only very minor projects from the ambit of HEPA,"⁵⁹ the court found that the exemption was "inconsistent with both the letter and intent of the administrative regulations."⁶⁰

⁵⁰ *Id.* at 71-72, 947 P.2d at 383-84. The *Kahana Sunset* case began in 1991 when the developer filed for a special management area (SMA) permit for the Napili Hau Villages development. *Id.* at 68, 947 P.2d at 380. In 1993, the Maui County Planning Commission held a public hearing and granted the homeowners' motion to intervene. *Id.* In 1994, the Commission held a contested case hearing that lasted thirteen days. *Id.* In 1995, the Commission granted the SMA permit, finding that no EA was required for the project. *Id.* The homeowners appealed to circuit court, which affirmed the Commission's order, and then to the Hawai'i Supreme Court. *Id.* Thus, seven years passed while the parties battled in court over whether an EA, which could have taken much less time to complete, would be required.

⁵¹ *Id.* at 72, 947 P.2d at 384.

⁵² *Id.* at 70-71, 947 P.2d at 382-83.

⁵³ *Id.* at 70, 947 P.2d at 382.

⁵⁴ *Id.* at 71, 947 P.2d at 383 (quoting HAW. REV. STAT. § 343-5(c) (1993)).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* The Commission relied on Hawai'i Administrative Rules section 11-22-8(a)(6), "construction of placement of minor structures accessory to existing facilities," and an agency exemption list that covered "drains, sewers, and waterlines within streets or highways." *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 72, 947 P.2d at 384.

⁶⁰ *Id.*

Justice Nakayama concluded by reviewing the purposes of an EA, noting that the document gives the agency and the public information necessary to evaluate environmental effects.⁶¹ She also noted the importance of public notice and comment in that process: "The public comment and notification provisions of HEPA underscore the legislative intent to provide broad-reaching dissemination of proposed projects so that the public may be allowed an opportunity to comment and the agency will have the necessary information to understand the potential environmental ramifications of their decisions."⁶² She continued: "[I]n the absence of the preliminary environmental assessment, the legislative intent that potential effects be studied and the public notified is undercut."⁶³ The vigor of the court's conclusion was supported by a little-

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* The court also found that, pursuant to H.R.S. section 343-7(a), the plaintiff properly brought the action within 120 days of the Maui County Planning Commission's decision to approve the special management area (SMA) permit. *Id.* at 73, 947 P.2d at 385.

A key but sleeper holding in *Kahana Sunset* involved what is known as the "functional equivalence doctrine," often argued by defendants in NEPA cases, also known as the *Portland/Weyerhaeuser* doctrine (from *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978)). Maui County claimed that chapter 343 was essentially redundant because the similar SMA review process under Hawai'i Revised Statutes chapter 205 was the "functional equivalent." *Kahana Sunset*, 86 Haw. at 73-74, 947 P.2d at 385-86. The court had previously rejected that theory only indirectly in *Pearl Ridge Estates v. Lear Siegler, Inc.*, in which it held that the State Land Use Commission was required to conduct an EA for a boundary amendment to rezone 8.4 acres from conservation to urban, even though the appellant had participated in a contested case hearing. *Id.* The *Kahana Sunset* court expressly rejected this functional equivalence argument, finding that chapter 343 "contains a fixed scheme of public notice," and that the county's argument improperly shifted the burden of conducting required review and studies from the applicant to the public. *Id.* at 73, 947 P.2d at 385.

A few years later, in *Sierra Club v. State Office of Planning (Koa Ridge)*, 109 Haw. 411, 126 P.3d 1098 (2006), however, the Hawai'i Supreme Court seemed to leave the door ajar for a future case that may satisfy the criteria for functional equivalence. The court noted, "[o]n the record before us, we cannot accept this 'functional equivalent of a required EA argument.'" *Id.* at 420, 126 P.3d at 1107. Thus, with sufficient findings that support equivalence, an agency might be able to satisfy chapter 343 review with a different environmental review procedure. On the other hand, even more recently, in *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008), the Intermediate Court of Appeals rejected the argument. The State contended that its process for reviewing algae importation permits under chapter 150A "establishes a comprehensive and exclusive process for the issuance of permits for importing microorganisms and vests in the Board the sole authority to regulate the import of microorganisms." *Id.* at 253, 188 P.3d at 767. The State claimed the chapter 150A process included the "essential components of the HEPA review process." *Id.* The court rejected this argument, finding that, even if the Board of Agriculture had exclusive authority under chapter 150A, "HRS § 343-5 plainly and unambiguously required preparation of an EA before the Board could approve Mera's application" and that "the requirements of HRS Chapter 343 were

noticed observation that the County admitted on appeal—that the lack of an EA “might be error.”⁶⁴ Ultimately, the court vacated the Commission’s granting of the special management area (SMA) permit to the developer and remanded the case.

Kahana Sunset deserves blockbuster status not because the legal ruling is out of line with the statutes or prior case law—it is not. Rather, the case constitutes a ringing endorsement of the chapter 343 process and citizen participation even though the 312-unit Napilihau development had already received its SMA permit from the County. The public participation requirements trumped economic considerations. Moreover, the court’s ruling in this case set up a strong foundation for two more “state or county lands or funds” cases in the trilogy—*North Kohala* and *Koa Ridge*, discussed below—further reinforcing the strict process requirements of chapter 343 to the distinct disadvantage of developers who failed to follow the extra steps involved in the EA and EIS review process. *Kahana Sunset* had the perfect plaintiff to set up good case law for future “use” cases.⁶⁵ A private homeowners group looking to protect their property values is a sympathetic plaintiff even for conservative judges. The group was a far cry from the rabble-rousing environmental groups who would pick up this case as a sword shortly thereafter.

B. Kepo‘o I and Kepo‘o II

Over the next seven years, the Hawai‘i Supreme Court issued two more decisions that followed the principles of *Kahana Sunset*. In *Kepo‘o v. Watson*

intended to be ‘integrated’ with and to supplement decision-making by agencies involved in a permitting process.” *Id.* Because it represents a large potential avoidance strategy for SMA applicants and county agencies, the issue is likely to be brought to the Hawai‘i Supreme Court again in the future.

⁶⁴ *Kahana Sunset*, 86 Haw. at 72, 947 P.2d at 384. Two other key findings in *Kahana Sunset* outside of the scope of this article are: (1) the EA must address the environmental effects of the entire proposal, not only the drainage system (which has “no independent utility”), because it is a “necessary precedent” to the development; otherwise it would be “improper segmentation”; and (2) the lead agency has the responsibility to prepare the EA and cannot defer that process to another agency with downstream authority. *Id.* at 74-75, 947 P.2d at 386-87.

⁶⁵ On the one hand, relatively insignificant private utility connections (as in *McGlone v. Inaba*, 64 Haw. 27, 636 P.2d 158 (1981), and *Nuuanu Valley Association v. City and County of Honolulu*, 119 Haw. 90, 194 P.3d 531 (2008)) appear not to meet the benchmark; on the other hand, tunneling under state highways for major developments projects (*Kahana Sunset*, 86 Haw. 66, 947 P.2d 378, *Citizens for the Protection of the North Kohala Coastline v. State Office of Planning (North Kohala)*, 91 Haw. 94, 979 P.2d 1120 (1999), and *Sierra Club v. State Office of Planning (Koa Ridge)*, 109 Haw. 411, 126 P.3d 1098 (2006)), importation of genetically engineered algae for research at state facilities (*‘Ohana Pale*, 118 Haw. 247, 188 P.3d 761), and large capital harbor improvements (*Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007)) do trigger the need for review.

(*Kepo 'o I*)⁶⁶ and *Kepo 'o v. Kane (Kepo 'o II)*,⁶⁷ the court reinforced its ruling that agencies and applicants must carefully follow the constraints of chapter 343, even when it means holding up major development. Although the cases are less earth-shattering than *Kahana Sunset*, the plaintiffs again were not rag-tag environmentalists; they were, respectively, individual (pro se) residents and a homeowners' association deeply concerned about the economic, social, and environmental implications of a state agency's head-long rush into building a 58-megawatt power plant on the South Kohala coast of the island of Hawai'i.

1. *Kepo 'o I: The expansive scope of chapter 343*

In 1998, Justice Mario Ramil wrote the first of the twin *Kepo 'o* decisions—*Kepo 'o v. Watson (Kepo 'o I)*⁶⁸—regarding the reach of chapter 343 to Hawaiian Home Lands under the definition of “state lands.” In early 1993, the Department of Hawaiian Home Lands (DHHL) completed an EIS for its proposed master plan development of 10,000 acres of Hawaiian Home Lands, which included a power generating facility.⁶⁹ In December 1993, DHHL leased forty acres to Waimana Enterprises, Inc., which sublet a portion to Kawaihae Cogeneration Partners (KCP).⁷⁰ KCP then prepared an EA for the cogeneration power facility, believing the document was required under chapter 343; it prepared an EA instead of an EIS in part because DHHL had already completed an EIS for the 10,000-acre area.⁷¹ DHHL accepted the EA, finding that an EIS was not required.⁷² Three individual pro se plaintiffs, Arthur F. Kepo 'o (who died between the first and second decisions),⁷³ Lillian K. Dela Cruz, and Josephine L. Tanimoto sued DHHL.⁷⁴ Waimana and KCP intervened.⁷⁵ In the circuit court, DHHL and Waimana/KCP sought summary judgment that chapter 343 did not apply to Hawaiian Home Lands.⁷⁶ The circuit court disagreed and granted partial summary judgment to the plaintiffs on the grounds that chapter

⁶⁶ 87 Haw. 91, 952 P.2d 379 (1998).

⁶⁷ 106 Haw. 270, 103 P.3d 939 (2005).

⁶⁸ *Kepo 'o I*, 87 Haw. 91, 952 P.2d 379.

⁶⁹ *Id.* at 93, 952 P.2d at 381.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See Kepo 'o II*, 106 Haw. 270, 274 n.4, 103 P.3d 939, 943 n.4 (2005).

⁷⁴ *Kepo 'o I*, 87 Haw. at 91, 952 P.2d at 379.

⁷⁵ *Id.* at 93, 952 P.2d at 381.

⁷⁶ *Id.* at 94, 952 P.2d at 382.

343 *did* apply to Hawaiian Home Lands.⁷⁷ Waimana/KCP appealed.⁷⁸ The issue on the first appeal was this question of applicability.⁷⁹

Justice Ramil agreed with the pro se plaintiffs and the amicus curiae, a private homeowners' group represented by Cades Schutte Fleming & Wright.⁸⁰ Although Hawaiian Home Lands are special trust lands, they are "state lands" and thus subject to chapter 343.⁸¹ The court also rejected the defendants' challenge to the individual plaintiffs' compliance with the statute of limitations, or standing, provisions of chapter 343.⁸² The court remanded for further proceedings to determine if the Hawaiian Homes Commission and the developer had complied with chapter 343.⁸³ That remand led to another appeal and decision by the court seven years later, more than ten years after the lease agreement.⁸⁴

2. Kepo'o II: Chapter 343 trumps a premature state lease, even years later

With Justice Simeon Acoba writing for a unanimous court, the 2005 *Kepo'o II* decision also favored the plaintiffs.⁸⁵ The court again upheld the circuit court's ruling, this time finding not only that an EIS (not just an EA) was required, but also that DHHL's lease with KCP was null and void due to the lack of compliance with chapter 343.⁸⁶

On this second appeal, the lineup of the parties was stronger. The amicus curiae in *Kepo'o I*, James Growney and the Mauna Kea Homeowners' Association, were no longer just "friends of the court" but now intervening plaintiffs.⁸⁷ The new issues on appeal involved standing,⁸⁸ the significance determination (the threshold line between an EA and an EIS),⁸⁹ and a due

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The prominent law firm represented Amici Curiae James Growney and Mauna Kea Homeowners' Association. *Id.* at 93, 952 P.2d at 381.

⁸¹ *Id.* at 98, 952 P.2d at 386. The court noted that chapter 343 is part of the state's police power ("public safety, health, and welfare"), *id.* at 99, 952 P.2d at 387, and although the law "does not significantly affect the land," *id.* at 100, 952 P.2d at 388, it requires decision-makers to consider environmental impacts in making decisions, and these "procedural and informational requirements" are "incidental" to effect on the land, "not inconsistent" with the interests of Hawaiian Home beneficiaries. *Id.* at 102, 952 P.2d at 390.

⁸² *Id.* at 95, 952 P.2d at 383.

⁸³ *Id.* at 93, 952 P.2d at 381.

⁸⁴ *Kepo'o II*, 106 Haw. 270, 103 P.3d 939 (2005).

⁸⁵ *Id.* at 274, 103 P.3d at 943.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 283-84, 103 P.3d at 952-53.

⁸⁹ *Id.* at 274, 103 P.3d at 943.

process/takings claim by the developer.⁹⁰ Justice Acoba held that the individual plaintiffs were aggrieved parties even if they did not comment on the draft EA because the challenge was brought under Hawai'i Revised Statutes section 343-7(b) (a determination by an agency that an EIS is not required), not section 343-7(c), which does require aggrieved parties to have commented on the draft EIS.⁹¹ He further held that the new intervenors, who filed suit four years after DHHL issued the negative declaration, could participate because the original lawsuit by the other individuals was timely filed. After reviewing the purpose of chapter 343,⁹² which the court stated required an "extensive environmental review process" to determine if the benefit "outweighs any detriment to the surrounding community,"⁹³ Justice Acoba reviewed the circuit court's determination that an EIS was required due to the significant effects—such as groundwater withdrawal, fuel consumption, and air pollution—from the 58-megawatt power plant and that it would be a "major source of pollution."⁹⁴ Addressing an important threshold issue, he held that the word "may" in "may have a significant effect on the environment" in chapter 343 had the common meaning of "likely,"⁹⁵ and that the potential effects from the power plant met that definition.⁹⁶

Hitting the ball out of the park, Justice Acoba then upheld the circuit court's decision to *void* the DHHL lease for the power plant because an EIS was a "condition precedent" and DHHL had not completed a final EIS before entering into a lease for construction.⁹⁷ The court found that the legal violation effectively placed the lease "on hold" until the agency and applicant complied with chapter 343.⁹⁸ Rejecting the due process and takings claims proffered by Waimana/KCP's lawyers (including future Hawai'i Supreme Court Justice James E. Duffy, Jr., then a solo attorney), the court held that a lease voided for failure to comply with chapter 343, even six years after it was granted, did not deprive the leaseholder's property rights.⁹⁹ Absent chapter 343 compliance, DHHL's lease for the project was invalid; thus the project proponents lacked the requisite property interest to assert a due process claim or a takings claim.¹⁰⁰

In summary, *Kepo 'o I* and *Kepo 'o II* strongly reinforce the court's earlier ruling in *Kahana Sunset* that chapter 343 has broad reach and must be strictly

⁹⁰ *Id.*

⁹¹ *Id.* at 284-85, 103 P.3d at 953-54.

⁹² *Id.* at 291, 103 P.3d at 960.

⁹³ *Id.* at 287, 103 P.3d at 956.

⁹⁴ *Id.* at 288, 103 P.3d at 957.

⁹⁵ *Id.* at 288-89, 103 P.3d at 957-58.

⁹⁶ *Id.* at 290, 103 P.3d at 959.

⁹⁷ *Id.* at 291-92, 103 P.3d at 960-61.

⁹⁸ *Id.* at 292, 103 P.3d at 962.

⁹⁹ *Id.* at 293, 103 P.3d at 962.

¹⁰⁰ *Id.*

followed, even if it means holding up proposed development or—as in the case of *Kepe 'o II*—if it means voiding a six-year-old lease. How do these two cases fit into the public benefit theory offered by this article? On the one hand, *Kepe 'o I* and *Kepe 'o II* initially involved real citizen plaintiffs—Kepe 'o, Dela Cruz, and Tanimoto—who started the case pro se, without any apparent support from community or environmental groups. On the other hand, by the time *Kepe 'o I* was before the high court, a powerful new ally was on the plaintiffs' side: a private homeowners' association with prominent lawyers. This additional legal clout undoubtedly changed the quality of the briefing and the perceived equities of the issues before the court. Still, *Kepe 'o I* and *Kepe 'o II* fit the theory of public benefit because the court seemed struck by the rashness of DHHL's decision to move ahead with a long lease for such a big project despite the fairly obvious need to do a full EIS. One can sense from Justice Acoba's exhaustive ruling in particular that he smelled a rat in the story about how DHHL handled the leasing decision. Thus, the court's conclusion that the full EIS process should have been followed, and more public light brought to bear on the agency's decision-making, comports with the core notion in chapter 343 that public process does matter. Two years later, the court revisited similar issues, again arising from the pressures for development of the Kohala Coast, in *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i (North Kohala)*.¹⁰¹

C. North Kohala: *The Second Decision in the "Big Trigger" Trilogy*

Rolling the clock back to 1999—two years after *Kahana Sunset*, one year after *Kepe 'o I*, but six years before *Kepe 'o II*—the court's *North Kohala*¹⁰² decision became the second in the renowned trilogy of Hawai'i's "big trigger" cases addressing the applicability of the "use of state or county lands or funds," that is, the wide top of the chapter 343 funnel. Writing for a unanimous court, Justice Robert Klein held that a resort developer's application to the county for an SMA permit for its 387-acre hotel, residential, and golf development triggered chapter 343 review because the project proposed two roadways for golf carts and maintenance vehicles that would be tunneled under Akoni Pule state highway.¹⁰³ Relying on *Kahana Sunset*, the court reaffirmed that the proposed underpasses constituted "use of [s]tate lands" and were "integral" parts of the larger development project.¹⁰⁴

¹⁰¹ 91 Haw. 94, 979 P.2d 1120 (1999).

¹⁰² *Id.*

¹⁰³ *Id.* at 105, 979 P.2d at 1131.

¹⁰⁴ *Id.*

Similar to *Kahana Sunset*, the *North Kohala* case started when the County had denied a contested case hearing to Citizens for the Protection of the North Kohala Coastline (Citizens) and granted developer Chalon International of Hawai'i Inc.'s SMA permit.¹⁰⁵ In 1993, Citizens challenged the SMA on the basis of chapter 343 violations.¹⁰⁶ Judge Ronald Ibarra ruled against Citizens,¹⁰⁷ finding that Citizens lacked standing, that an EIS was not required, and that the County had properly granted a boundary amendment.¹⁰⁸

On appeal to the Hawai'i Supreme Court, the case focused on standing, "use," and timing. Justice Klein held that Citizens had adequately demonstrated standing for a declaratory judgment action under H.R.S. section 632-1, which is "less stringent" than standing to challenge a denial of a contested case hearing.¹⁰⁹ Justice Klein reiterated that in the "realm of environmental concerns,"¹¹⁰ the court had avoided restricting standing in a series of cases.¹¹¹ He found that Citizens had members residing "in close proximity"¹¹² to the area and who were "long time and frequent users"¹¹³ of the coastline affected, even if they were not owners or adjacent owners of the project.¹¹⁴ He concluded that the "needs of justice"¹¹⁵ also supported standing and upheld the circuit court's amended standing ruling (that had flipped in favor of plaintiff)¹¹⁶ regarding declaratory and injunctive relief.¹¹⁷

Regarding the chapter 343 violations, Justice Klein first held that based on *Kahana Sunset*, the "construction of two underpasses under a state highway constitutes use of state land for purposes of HRS 343-5(a)(1)," triggering an EIS.¹¹⁸ The ruling cemented into the law the notion that a substantial physical disturbance of state land would constitute "use," lending even more momentum

¹⁰⁵ *Id.* at 96, 979 P.2d at 1122. In 1997, Judge Ibarra upheld the County's SMA decision, and the Hawai'i Supreme Court upheld that ruling by summary disposition in 1997. *Id.*

¹⁰⁶ *Id.* This chapter 343 challenge was the second lawsuit filed by Citizens. *Id.*

¹⁰⁷ *Id.* at 95, 979 P.2d at 1121.

¹⁰⁸ *Id.* at 97, 979 P.2d at 1123. After the Hawai'i Supreme Court's decision in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995), the circuit court changed its ruling on standing, but reaffirmed its ruling on the other issues. *North Kohala*, 91 Haw. at 97, 979 P.2d at 1123.

¹⁰⁹ *North Kohala*, 91 Haw. at 100, 979 P.2d at 1126.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 101, 979 P.2d at 1127.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 101-02, 979 P.2d at 1127-28.

¹¹⁶ *See supra* note 108.

¹¹⁷ *North Kohala*, 91 Haw. at 101-02, 979 P.2d at 1127-28.

¹¹⁸ *Id.* at 103, 979 P.2d at 1129.

to *Kahana Sunset* and setting up the future rulings discussed later in this article.¹¹⁹

Second, Justice Klein concluded that it was not too early to prepare the EIS given that the underpasses were an “integral” part of the project and that the developer had committed to the underpasses, therefore meeting “the earliest practicable time” requirement for the EIS.¹²⁰ He stated that “decisions reflecting environmental considerations can most easily be made when other basic decisions are also being made, that is, during the early stages of project conceptualization and planning.”¹²¹ Therefore, the court remanded for further proceedings consistent with the ruling that an EIS was required.¹²² Overall, the decision was a major victory for Citizens—and small “c” citizens—and another brick in the wall of Hawai‘i Supreme Court cases enforcing a broad interpretation of the chapter 343 funnel.¹²³

D. Koa Ridge: *The Third Decision in the Trilogy*

The third decision in the trilogy of major decisions regarding the “use of state or county lands” trigger is the 2006 ruling *Sierra Club v. State Office of Planning*,¹²⁴ commonly referred to by its place and project name, “Koa Ridge.” In that case, Justice James Duffy, writing for a unanimous court, upheld First Circuit Court Judge Elizabeth Hifo’s decision that the State Land Use Commission’s (LUC) reclassification of 1274 acres in Central O‘ahu from agriculture to urban—for Castle & Cooke’s “Koa Ridge” development—required at least an EA because the project required tunneling under four state highways for a large sewage line and new water lines.¹²⁵

The massive size and scope of the Koa Ridge development undoubtedly helped to persuade the court that the project triggered the environmental review process. In 2000, Castle & Cooke and Pacific Health Community, Inc. (PHC) petitioned the LUC to amend the land use boundary to allow for the

¹¹⁹ See *Sierra Club v. State Office of Planning (Koa Ridge)*, 109 Haw. 411, 126 P.3d 1098 (2006).

¹²⁰ *North Kohala*, 91 Haw. at 104-05, 979 P.2d at 1130-31 (citing NEPA cases).

¹²¹ *Id.* at 105, 979 P.2d at 1131.

¹²² *Id.* at 107, 979 P.2d at 1133.

¹²³ The victory was not 100%, however. The court held that “mere impact” on the shoreline and conservation areas was not sufficient itself to trigger H.R.S. section 343-5(a)(2) or (a)(3) because Chalon’s use was not proposed “within” the shoreline area. *Id.* at 105-06, 979 P.2d at 1131-32. The court also upheld the circuit court orders on the other issues (county code compliance and boundary amendment for 14.5 acres). *Id.* at 107, 979 P.2d at 1133.

¹²⁴ 109 Haw. 411, 126 P.3d 1098.

¹²⁵ *Id.* at 413, 126 P.3d at 1100. In 2003, Judge Hifo ruled in favor of the Sierra Club, vacating the decision of the LUC. *Id.* at 414, 126 P.3d at 1101.

development.¹²⁶ The proposed project, still alive today despite substantial community opposition,¹²⁷ consisted of “thousands of homes, a commercial center, an elementary school, a park, a church/day care, a recreational center, and the Pacific Health Center.”¹²⁸ As part of the development, Castle & Cooke planned to build a thirty-six-inch pipeline to transmit sewage to the Waipahu Sewage Treatment Plant and construct a new water transmission line, both of which would require tunneling under Kamehameha Highway, the H-1 Freeway, the H-2 Freeway, and Farrington Highway, all of which are state land.¹²⁹

In 2001, the Sierra Club asked the LUC to stop processing the boundary amendment petition until Castle & Cooke and PHC complied with chapter 343 because the project would use state lands.¹³⁰ In a little-noted portion of the record, Castle & Cooke and PHC “admit[ted] that an EA was required but argu[ed] that it would be prepared later.”¹³¹ Thus, the issue became a matter of “when,” not “whether.” With one opposing vote (University of Hawai'i environmental law professor M. Casey Jarman, now Leigh),¹³² the LUC denied the Sierra Club's motion and reclassified 762 acres from agriculture to urban without requiring an EA.¹³³ In 2002, the Sierra Club filed a judicial challenge and, in 2003, Judge Hifo ruled in its favor.¹³⁴ Only the State Office of Planning, a party to the LUC proceeding, appealed to the Supreme Court.

The key ruling in *Koa Ridge* focused on the timing of the EA requirement: Was the reclassification process “too soon” for kick-starting the chapter 343 process? The Hawai'i Supreme Court's answer: No. Surprisingly, the case has become renowned not for that ruling but for an issue that was not even disputed: Was chapter 343 triggered by the development's “use” of the state highways? The court's answer: Yes. In fact, the developer admitted that the use triggered chapter 343.¹³⁵ Nonetheless, Justice Duffy examined this threshold issue in detail. First, he reviewed the state environmental review

¹²⁶ *Id.* at 413, 126 P.3d at 1100.

¹²⁷ Andrew Gomes, *Koa Ridge Project Given Green Light*, HONOLULU STAR-ADVERTISER, Sept. 24, 2010, http://www.staradvertiser.com/news/hawaii/news/20100924_Koa_Ridge_project_given_green_light.html.

¹²⁸ *Koa Ridge*, 109 Haw. at 413, 126 P.3d at 1100.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See State Land Use Comm'n, In the Matter of the Petition of Castle & Cooke Homes Hawaii, Inc. and Pacific Health Community, Inc. to Amend the Agricultural Land Use District Boundary into the Urban District Land Use District, Docket No. A00-734, Findings of Fact, Conclusions of Law, Decision and Order, June 27, 2002, at 79-80.

¹³³ *Koa Ridge*, 109 Haw. at 413, 126 P.3d at 1100.

¹³⁴ *Id.* at 413-14, 126 P.3d at 1100-01.

¹³⁵ *Id.* at 413, 126 P.3d at 1100.

process.¹³⁶ He then found, without difficulty, that the proposal was an “action” by an applicant subject to environmental review.¹³⁷ He then concluded that the project would use state lands, citing *North Kohala*, which found that the proposed construction of two highway underpasses constituted use of state lands,¹³⁸ and *Kahana Sunset*, where the court held that “construction of the sewage and water transmission lines will require tunneling beneath state highways.”¹³⁹ Accordingly, Justice Duffy found that “the Project is an action that proposes the use of state lands, and an EA that addresses the environmental effects of the entire Project is required.”¹⁴⁰ Thus, the decision became the third in the “use” trilogy even though this “use by tunneling” issue was only jurisprudential road-kill on the way to the court’s major ruling about timing.

The more notable part of Justice Duffy’s *Koa Ridge* decision addressed the sometimes tricky issue of the timing of the environmental review process.¹⁴¹ The Hawai‘i courts have consistently interpreted chapter 343 to require environmental review at the “earliest practicable time,” relying on the plain language of the statute. In *Kahana Sunset*, the court had emphasized that the agency “receiving the request for approval”¹⁴² has the responsibility to prepare the EA and could not delegate that process to another agency.¹⁴³ In *Koa Ridge*, the developer argued that its reclassification petition to the LUC was too early to start the environmental review process.¹⁴⁴ To the contrary, Justice Duffy found that early environmental review was consistent with the purpose of chapter 343, concluding that the LUC (like the County of Maui in *Kahana Sunset*) was the “receiving” agency with substantial authority over the entire project, that it had an important role,¹⁴⁵ and that its discretionary approval was

¹³⁶ *Id.* at 415, 126 P.3d at 1102.

¹³⁷ *Id.*

¹³⁸ *Id.* (citing *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai‘i (North Kohala)*, 91 Haw. 94, 103, 979 P.2d 1120, 1129 (1999)).

¹³⁹ *Id.* at 416, 126 P.3d at 1103 (citing *Kahana Sunset Owners Ass’n v. Cnty. of Maui*, 86 Haw. 66, 74, 947 P.2d 378, 386 (1997)).

¹⁴⁰ *Id.*

¹⁴¹ Hawai‘i appellate courts have issued four decisions addressing this “timing” issue: Two decisions relating to when to prepare the review document (*Kahana Sunset*, 86 Haw. 66, 947 P.2d 378, and *Koa Ridge*, 109 Haw. 411, 126 P.3d 1098), one on when to prepare supplemental documents (*Unite Here! Local 5 v. City & County of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010)) and, indirectly, one on “tiering,” that is, linking, earlier and later review documents (*‘Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008)).

¹⁴² *Kahana Sunset*, 86 Haw. at 75, 947 P.2d at 387.

¹⁴³ *Id.*

¹⁴⁴ *Koa Ridge*, 109 Haw. at 416, 126 P.3d at 1103.

¹⁴⁵ *Id.* at 417, 126 P.3d at 1104. The court found that the LUC did a comprehensive review of the project and imposed a variety of conditions, that the project required the LUC’s approval before it could proceed, that the LUC’s decision was a “discretionary approval” that the project

required for the project to move forward, even if it did not have final approval authority.¹⁴⁶ Specifically, the court reasoned that reclassification “in and of itself” does not trigger chapter 343,¹⁴⁷ but that the statute applies if the project trips one of the statutory triggers.¹⁴⁸ Here, the reclassification proposed the use of state land; therefore reclassification was “the earliest practicable time” to do the EA.¹⁴⁹

In reaching this conclusion, Justice Duffy anticipated and addressed an objection commonly heard from the development and consulting community—that early review is, in fact, premature because the contours of the project are not sufficiently developed, putting the developer at risk of a chicken-and-egg process.¹⁵⁰ He found that “early environmental assessment” would avoid the influence that investments of time and money have on later review,¹⁵¹ explaining that “while projects indeed may change in response to public input, actions of agencies, economic conditions, or other factors, requiring early environmental assessment comports with the purpose of HEPA to ‘ensure that environmental concerns are given appropriate consideration in decision making,’¹⁵² and provides a safeguard against a ‘post hoc rationalization[] to support action already taken.’”¹⁵³

Ironically, *Koa Ridge* has become a boogeyman in the minds of the development community¹⁵⁴ and an example of the Hawai'i Supreme Court

needed to move ahead, meeting the requirements of chapter 343, and that nothing exempted the project from the environmental review law. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 416, 126 P.3d at 1103 (emphasis omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 416-17, 126 P.3d at 1103-04.

¹⁵⁰ *Id.* at 418-20, 126 P.3d at 1105-07.

¹⁵¹ *Id.* at 419, 126 P.3d at 1106 (citations omitted). Handing a final loss to the LUC and the developer, Justice Duffy rejected their last-ditch argument that, even if chapter 343 applied, the LUC's process could be substituted for environmental review, thereby giving them an escape from the Sierra Club's lawsuit, implicitly rejecting the functional equivalence doctrine. *Id.* at 420, 126 P.3d at 1107. See *supra* note 63 for more discussion of this doctrine.

¹⁵² *Id.* at 418, 126 P.3d at 1105 (citing HAW. REV. STAT. § 343-1).

¹⁵³ *Id.* (citing *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i*, 91 Haw. 94, 105, 979 P.2d 1120, 1131 (1999) (brackets in original)).

¹⁵⁴ *Koa Ridge* has often been cited by developers as a flawed decision. See, e.g., Derrick DePledge, *Chamber Urging Review Law Exemption*, HONOLULU ADVERTISER, Jan. 20, 2008, available at <http://the.honoluluadvertiser.com/article/2008/Jan/20/hn/hawaii801200357.html>. Two years later, that boogeyman arose again in the Intermediate Court of Appeals (ICA) decision *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008). The ICA held that chapter 343 review was required for the State Department of Agriculture's granting of a permit to Mera Pharmaceuticals to import genetically engineered algae for a project at the state-run Natural Energy Laboratory of Hawaii (NELH) facility in Kona because the importation proposal constituted “use of state land,” *id.* at 254, 188 P.3d at 768, and section 343-5 “plainly and unambiguously required preparation of an EA before the Board could

going too far on the “use of state or county lands or funds.”¹⁵⁵ Yet, as to that ruling, Justice Duffy was well within the clear boundaries of the two prior cases directly on point. The defendants admitted as much. The lesser-examined ruling about timing is the more powerful one. With the court’s clarification that “earliest practicable time” means during the zoning stages of development, *Koa Ridge* sets up many possible scenarios where a developer will later be required to supplement the early EA or EIS due to the changes in the project itself or the lapse in time. Large projects, particularly master planned projects that are phased over many years, sometimes decades, fall under this scenario. The court’s ruling put all the more pressure on the supplementation process, a controversial issue that would squarely come before the court four years later in the *Turtle Bay* case.¹⁵⁶

E. Game-Changers and Ferry-Stoppers: Superferry I and Superferry II

Arriving on Hawai‘i’s shores in 2003, the privately owned and operated Hawaii Superferry project involved high-speed catamaran-style vessels that would travel between O‘ahu, Maui, Kaua‘i, and the island of Hawai‘i, using state harbor facilities on each island.¹⁵⁷ The ferries were 350-foot long and capable of carrying 866 passengers and 282 cars per trip.¹⁵⁸ To accommodate the new vessels, the State Department of Transportation (DOT) proposed spending \$40 million on harbor improvements, starting with \$10 million in upgrades at Kahului Harbor.¹⁵⁹ In February 2005, DOT determined that the project was exempt from environmental review under chapter 343.¹⁶⁰ On March 21, 2005, Sierra Club, Maui Tomorrow Inc., and the Kahului Harbor Coalition filed a complaint in the Second Circuit Court on Maui challenging the lack of an EA.¹⁶¹ Ultimately, the plaintiffs prevailed in two game-changing and, ultimately, ferry-stopping Hawai‘i Supreme Court decisions: *Superferry*

approve Mera’s application.” *Id.* This decision, too, has caused great consternation among some, particularly among the university research community. KIM, ANTOLINI & RAPP, *supra* note 16, at 17.

¹⁵⁵ See HAW. REV. STAT. § 343-5(a)(1) (2010).

¹⁵⁶ See *infra* Part II.F.

¹⁵⁷ *Superferry I*, 115 Haw. 299, 305, 167 P.3d 292, 298 (2007). The State Public Utilities Commission granted Superferry an operating permit in 2004, *id.* at 305 n.5, 167 P.3d at 298 n.5, but demurred on whether an EA was required. See State Pub. Utils. Comm’n, In the Matter of Application of Hawaii Superferry Inc., for a Certificate of Public Convenience and Necessity To Engage in Operations as a Water Carrier, Docket No. 04-0180 (2004), Decision and Order No. 21524, at 25 (conditioning its approval on compliance with chapter 343).

¹⁵⁸ *Superferry I*, 115 Haw. at 305, 167 P.3d at 298.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 311 n.15, 167 P.3d at 304 n.15.

¹⁶¹ *Id.* at 311, 167 P.3d at 304.

I,¹⁶² issued by the court in August 2007 on the merits and standing; and two years later, *Superferry II*,¹⁶³ decided in March 2009, on the constitutionality of Act 2 and attorneys' fees. Ultimately, the Hawaii Superferry never completed the environmental review process ordered by the court or the "faux" review process required by the Legislature. The Hawaii Superferry went bankrupt.¹⁶⁴

The *Superferry I* and *II* decisions, both written by Justice Duffy for a unanimous¹⁶⁵ court, were blockbusters in the field of Hawai'i environmental law in five main ways. First, the court took a firm stance in continuing to interpret chapter 343 according to its plain language and in favor of public participation despite the very strong economic and political pressure to do otherwise. Second, the court issued a ground-breaking decision adopting "procedural standing," throwing open the courthouse doors in Hawai'i even more widely to citizen groups in chapter 343 cases. Third, the court boldly declared Act 2, a special law passed to allow Superferry to evade chapter 343—a law vociferously pushed by Superferry and Governor Linda Lingle in a special session and quickly adopted by a cowering legislature—unconstitutional and void. Fourth, the court embraced the powerful private attorney general theory, in addition to the little-used statutory fees statute (H.R.S. section 607-25), in upholding an attorneys' fees award to the plaintiffs against both Superferry and DOT.¹⁶⁶ Finally, the court stuck to its judicial guns in enforcing chapter 343 by shutting down Superferry until it complied with the law—despite heavy political maneuvering, an unprecedented outcry by vocal supporters of the company, and the fact that Superferry actually began operating in utter defiance of the court's order and continued to operate (under Act 2) for over a year before the court issued its final decision. The court showed true judicial grit.

1. Superferry I: Significant risks and a significant shift in standing jurisprudence

In the 2007 *Superferry I* decision, Justice Duffy, writing for a unanimous court, issued a forty-four-page opinion that reversed, remanded, and ordered the circuit court to enter summary judgment in favor of the plaintiffs on their request for an EA.¹⁶⁷ Initially, the court issued a "stunningly quick"¹⁶⁸ one

¹⁶² 115 Haw. 299, 167 P.3d 292.

¹⁶³ *Superferry II*, 120 Haw. 181, 202 P.3d 1226 (2009).

¹⁶⁴ *Hawaii Superferry Goes Bankrupt*, N.Y. TIMES, June 1, 2009, available at <http://www.nytimes.com/2009/06/01/us/01ferry.html>.

¹⁶⁵ See *infra* note 225 regarding Justice Nakayama and Chief Justice Moon's dissent on the sovereign immunity theory.

¹⁶⁶ See *infra* Part II.E.2.

¹⁶⁷ *Superferry I*, 115 Haw. 299, 167 P.3d 292.

page order,¹⁶⁹ finding a violation of chapter 343 only hours after a high-tension oral argument before the court on August 23.¹⁷⁰ This speedy order and the longer ruling issued one week later¹⁷¹ were shocking to those unfamiliar with the actual language of chapter 343 and became the spark for a most unusual chain of events that led to a constitutional crisis in Hawai'i state government.

In the full opinion, Justice Duffy spent little time on the merits—finding without much difficulty that DOT violated chapter 343—but he then expended an enormous amount of judicial energy on a ground-breaking ruling on standing. On the merits, he addressed the core issues of applicability, scope, triggers, and exemptions. First, with a tip of the hat to defendants DOT and Superferry, he noted that chapter 343 did not apply to private projects “such as this one where government plays a facilitative role for a private project that itself does not constitute an applicant action.”¹⁷² Moreover, he rejected the Sierra Club’s claim that the project involved “connected actions,” finding that the private Superferry project was not an “action” as defined by chapter 343, and that the plaintiffs had not shown that the ferry required state approval to proceed.¹⁷³ The significance of this ruling has been buried, but it is worth pausing to consider. Despite popular perception, it was the *\$40 million state harbor project*, and not the Superferry itself, that triggered environmental review.¹⁷⁴

Second, reaching the heart of the Sierra Club’s claims, the court found that DOT erred by looking at the harbor improvement project “in isolation,”¹⁷⁵ and, “[p]urposely or not,”¹⁷⁶ that DOT failed to take “a hard look.”¹⁷⁷ In other words, DOT did not think much about examining the broader impacts of the project. Because “DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both

¹⁶⁸ Ken Kobayashi & Derrick DePledge, *Impact Study May Delay Superferry*, HONOLULU ADVERTISER, Aug. 24, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Aug/24/ln/hawaii708240371.html> (noting that the court issued its decision five hours after argument).

¹⁶⁹ *Sierra Club v. Dep’t of Transp.*, No. 27407, 2007 WL 2428467 (Haw. Aug. 23, 2007).

¹⁷⁰ See Brian Perry, *High Court Rules Against Superferry*, MAUI NEWS, Aug. 24, 2007, available at <http://www.mauinews.com/page/content.detail/id/33481/High-court-rules-against-Superferry.html>.

¹⁷¹ *Superferry I*, 115 Haw. at 305, 167 P.3d at 298.

¹⁷² *Id.* at 338, 167 P.3d at 331.

¹⁷³ *Id.* at 336-38, 167 P.3d at 329-31.

¹⁷⁴ See *id.* at 337, 167 P.3d at 330.

¹⁷⁵ *Id.* at 341, 167 P.3d at 334.

¹⁷⁶ *Id.* at 342, 167 P.3d at 335.

¹⁷⁷ *Id.* (citing *Price v. Obayashi Haw. Corp.*, 81 Haw. 171, 182 n.12, 914 P.2d 1364, 1375 n.12 (1996) (citation omitted)).

primary and secondary, on the environment,” the agency’s exemption determination was invalid.¹⁷⁸ Back to square one? Not yet.

Defendants DOT and Superferry had challenged the Sierra Club’s and Maui Tomorrow’s standing to bring their chapter 343 case. In foresight, it was perhaps an understandable move in light of the court’s 2002 *Sierra Club v. Hawaii Tourism Authority (HTA)* decision, where the Sierra Club lost on standing after advocating a cutting-edge procedural standing theory.¹⁷⁹ In hindsight, this was a strategic blunder by the defendants. The court ended up picking up the pieces from the split decision in *HTA* and issuing a game-changing opinion that, while well-grounded in federal NEPA case law,¹⁸⁰ substantially broadened the standing horizons for citizen groups in chapter 343 challenges for the foreseeable future.

In adopting the procedural standing theory that Justice Nakayama had articulated in *HTA*, Justice Duffy carefully and painstakingly explored the history, nature, and contours of substantive versus procedural standing under both Hawai‘i and federal environmental review case law. After sixteen pages of analysis, he found that the plaintiffs had both “group” and “individual” standing,¹⁸¹ under both the traditional “injury in fact” test and the newer “procedural injury” test. Presciently, the court also noted that a “less rigorous” standing test in chapter 343 cases was grounded in the Hawai‘i constitutional provision, article XI, section 9, which guarantees a “clean and healthful environment.”¹⁸²

¹⁷⁸ *Id.* at 342, 167 P.3d at 335.

¹⁷⁹ See *Sierra Club v. Haw. Tourism Auth. (HTA)*, 100 Haw. 242, 257, 59 P.3d 877, 892 (2002). See discussion *infra* Part III.

¹⁸⁰ Stewart Yerton, Comment, *Procedural Standing and the Hawaii Superferry Decision: How a Surfer, a Paddler, and an Orchid Farmer Aligned Hawaii’s Standing Doctrine with Federal Principles*, 12 ASIAN-PAC. L. & POL’Y J. 330 (2010).

¹⁸¹ As for group standing, the court explained and embraced the well-accepted federal test that:

[a]n association may sue on behalf of its members—even though it has not itself been injured—when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Superferry I, 115 Haw. at 334, 167 P.3d at 327 (citing *Haw. Med. Ass’n v. Haw. Med. Serv. Ass’n, Inc.*, 113 Haw. 77, 95, 148 P.3d 1179, 1197 (2006) (citation omitted)).

¹⁸² *Id.* at 320, 167 P.3d at 313 (citing HAW. CONST. art. XI, § 9). The court squarely addressed the power of article XI, section 9 three years later in the 2010 *Ala Loop* decision, finding—outside of the chapter 343 context—that the constitutional provision packed a real punch, allowing a community group to bring a private right of action to challenge the County of Hawai‘i’s decision to allow the development of a charter school in violation of state land use laws. *Cnty. of Hawai‘i v. Ala Loop Homeowners*, 123 Haw. 391, 235 P.3d 1103 (2010).

Standing had come up frequently in the court's prior chapter 343 decisions, but never had the court taken such bold steps jurisprudentially. In *North Kohala*, where the plaintiffs sought declaratory relief, the court applied the traditional three-part "injury in fact" test and found that the citizens' group had adequately demonstrated standing to challenge the adverse ruling in the contested case hearing regarding the proposed resort development.¹⁸³ Although not a thorough analysis of standing under chapter 343, *North Kohala* reiterated that the Hawai'i courts have generally taken a broad view of standing in environmental cases.¹⁸⁴ Environmental standing had arisen most directly five years earlier in *HTA*, where a fractured court ultimately rejected the Sierra Club's standing to challenge the State's \$114 million tourism marketing plan on the basis of a lack of geographic nexus.¹⁸⁵ A majority of the court did, however, adopt in theory the more flexible "procedural standing" test offered in Justice Nakayama's concurrence,¹⁸⁶ and this later became the prevailing theory in *Superferry I*.¹⁸⁷

Consistent with the theory that the Moon Court viewed beneficial public participation as a normative underpinning of chapter 343, the court articulated a new, more flexible procedural injury test that further lowers the bar for citizens seeking to enter the courtroom. To establish a procedural injury, a plaintiff must show:

(1) the plaintiff has been accorded a procedural right, which was violated in some way, . . . [such as] a failure to conduct an EA; (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests.¹⁸⁸

The court's standing analysis has been described by one commentator as "well-articulated" but "tortured,"¹⁸⁹ and another criticized it as "throwing open the barn door after the horses have been let out."¹⁹⁰

¹⁸³ *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (North Kohala)*, 91 Haw. 94, 100-02, 979 P.2d 1120, 1126-28 (1999).

¹⁸⁴ *Id.*

¹⁸⁵ *Sierra Club v. Haw. Tourism Auth. (HTA)*, 100 Haw. 242, 59 P.3d 877 (2002).

¹⁸⁶ *Id.* at 265-68, 59 P.3d at 900-03 (Nakayama, J., concurring).

¹⁸⁷ *Superferry I*, 115 Haw. at 322, 167 P.3d at 315.

¹⁸⁸ *Id.* at 329, 167 P.3d at 322 (internal citation omitted).

¹⁸⁹ Yerton, *supra* note 180, at 369 (suggesting a simpler test for standing).

¹⁹⁰ Robert Thomas, *Superferry EIS Case Summary: Part II*, INVERSECONDEMNATION.COM (Sept. 30, 2007), <http://www.inversecondemnation.com/inversecondemnation/2007/09/superferry-ei-1.html>.

2. Superferry II: *A constitutional show-down and more open doors for citizen plaintiffs*

The story of the Superferry itself after Justice Duffy's blockbuster decision is a legal, political, economic, and social tale almost beyond belief. The controversy included protests in the water and on land, heated and over-heated debates in high circles, a circuit court injunction against Superferry operations, painful legislative arm-twisting, a gubernatorial power-grab, a dissolved injunction, headlines galore, and neighbors arguing with neighbors in Longs Drugs.

Although the court's August 23, 2007 summary opinion had ruled squarely in favor of the plaintiffs and constrained the circuit court to issue summary judgment that defendants had violated chapter 343, the Superferry defiantly set sail with special media and employee passenger runs the day before, on August 22,¹⁹¹ and again on August 28, with hundreds of public passengers lured by \$5 inaugural fares.¹⁹² Chaos ensued. The boat first sailed to Maui, where it was greeted by angry but peaceful protesters.¹⁹³ Many drivers off-loaded their cars and trucks, not guessing that they would be stuck there for many days when the Superferry failed to return on schedule.¹⁹⁴ When the Superferry tried to sail into the harbor on Kaua'i, surfers, paddlers, and swimmers blocked its path, prompting the Coast Guard to battle the protesters and eventually forcing the vessel and anxious passengers to turn back to O'ahu.¹⁹⁵ One day after the August 23, 2007 opinion, Circuit Court Judge Cardoza followed the Hawai'i Supreme Court's orders and entered summary judgment in favor of the Sierra

¹⁹¹ See *Superferry Takes Virgin Voyage: Guests Kick Back with Free Food, Drinks*, KITV.COM, Aug. 22, 2007, <http://www.kitv.com/news/13945640/detail.html>.

¹⁹² Dan Nakaso & Christie Wilson, *Hawaii Superferry Starts Tomorrow for \$5*, HONOLULU ADVERTISER, Aug. 27, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Aug/25/ln/hawaii708250354.html> ("Flying in the face of possible legal action, the Hawaii Superferry will launch two days ahead of schedule tomorrow with \$5 one-way tickets for passengers and \$5 one-way tickets for vehicles, the company announced yesterday. Opponents, who plan to seek an injunction against Superferry operations on Monday, reacted angrily, saying the company is defying state laws and acting in bad faith.").

¹⁹³ Claudine San Nicholas, *Ferry Passengers Travel by Air Instead*, MAUI NEWS, Aug. 29, 2007, available at <http://beta100.mauinews.com/page/content.detail/id/33614/Ferry-passengers-travel-by-air-instead-.html?nav=10> ("About a dozen protesters greeted the first paying passengers into Kahului Harbor on Sunday with handmade signs saying 'Respect Our Home' and 'Stupid Ferry, Stupid Riders.'").

¹⁹⁴ *Id.*

¹⁹⁵ See Jan TenBruggencate & Rick Daysog, *Surfers Block Hawaii Superferry*, USA TODAY, Aug. 27, 2007, available at http://www.usatoday.com/travel/news/2007-08-27-hawaii-superferry_N.htm. See also Dan Nakaso & Derrick DePledge, *Hawaii Superferry Halts Kauai Route*, HONOLULU ADVERTISER, Aug. 29, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Aug/29/ln/hawaii708290426.html>.

Club.¹⁹⁶ A few days later, on August 27, 2007, the Sierra Club moved ex parte for a temporary restraining order (TRO) to stop DOT and Superferry operations at Kahului Harbor on Maui.¹⁹⁷ Judge Cardoza granted the TRO for ten days “to avoid immediate and irreparable injury” because the Superferry was operating.¹⁹⁸ Judge Cardoza required the Superferry to immediately cease operations at Kahului Harbor and return stranded passengers “home.”¹⁹⁹ The entire state seemed in turmoil over the Superferry. That same day, the Sierra Club sought a permanent injunction.²⁰⁰ On October 9, 2007, after presiding over hearings lasting several weeks, Judge Cardoza granted the Sierra Club’s request and permanently enjoined Superferry operations.²⁰¹ The judge stated the injunction would remain in place while the EA was prepared and until the environmental review process under chapter 343 “has been lawfully concluded.”²⁰² The judge also voided the operating agreement between DOT and Superferry for Kahului Harbor for lack of compliance with chapter 343.²⁰³ Opening the way for a major ruling on attorneys’ fees by the Hawai’i Supreme Court in *Superferry II*, Judge Cardoza then authorized the Sierra Club to request attorneys’ fees as the prevailing party.²⁰⁴

Shut down and stopped almost literally in the water, Superferry appealed to Governor Lingle for relief.²⁰⁵ On October 23, 2007, the Governor issued an unusual Proclamation convening both houses of the State Legislature into a special session to dissolve the injunction against the Superferry.²⁰⁶ The next day, on October 24, 2007, the Legislature convened.²⁰⁷ A week later, on November 2, 2007, the Legislature passed and advanced to the fifth floor of the Capitol a most unusual bill that Governor Lingle signed as Act 2 of the second special session.²⁰⁸ The Act waived the chapter 343 requirements for “a large capacity ferry vessel,”²⁰⁹ created a “faux” environmental review process,²¹⁰ and required the Governor to determine whether certain “conditions” were met for

¹⁹⁶ *Superferry II*, 120 Haw. 181, 187, 202 P.3d 1226, 1232 (2009).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 188, 202 P.3d at 1233.

¹⁹⁹ *Id.* at 189, 202 P.3d at 1234.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 189-90, 202 P.3d at 1234-35.

²⁰² *Id.* at 190, 202 P.3d at 1235.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See *Auditor Finds Superferry Pressured Officials*, KITV.COM, Apr. 18, 2008, <http://www.kitv.com/news/15925418/detail.html>.

²⁰⁶ *Superferry II*, 120 Haw. at 190, 202 P.3d at 1235.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 191, 202 P.3d at 1236.

operations.²¹¹ Two days later, the Governor declared the conditions were met and cleared the way for Superferry, now identified as a “large capacity ferry vessel company,” to sail yet again.²¹² Ironically, five days later on November 9, 2007, Judge Cardoza entered his findings of fact and conclusions of law in favor of Sierra Club, noting that the “monetary loss” incurred by DOT and Superferry “is not a sufficient basis for forbearing to issue an injunction[,]”²¹³ adding that “[f]inancial losses do not outweigh the interest in environmental protection whenever the two clash, as they often do.”²¹⁴ But while Judge Cardoza was drafting those findings, Superferry and DOT had already asked him, based on the new Act 2, to dissolve the injunction and order vacating the operating agreement.²¹⁵ On the same day, the Sierra Club also asked for final judgment,²¹⁶ which the court later granted despite Act 2.²¹⁷ Nine days later, Judge Cardoza granted DOT and Superferry’s motions, dissolved the order, and un-voided the operating agreement.²¹⁸ The court, however, still allowed the Sierra Club to seek fees, which it did.²¹⁹ The parties filed cross-appeals, and Judge Cardoza granted the Sierra Club’s motion for fees and costs for a total of \$91,712.72 based on H.R.S. section 607-25.²²⁰ In April, the parties filed further cross-appeals.²²¹ In October, the Hawai’i Supreme Court took the appeal and, on December 18, 2008, it held another packed-house oral argument.²²² Thus, after the Superferry encountered months of literal and economic ups and downs²²³ of operating under the guise of Act 2, the company

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 192, 202 P.3d at 1237.

²¹⁶ *Id.*

²¹⁷ *Id.* at 193, 202 P.3d at 1238.

²¹⁸ *Id.* at 192, 202 P.3d at 1237.

²¹⁹ *Id.* at 192-93, 202 P.3d at 1237-38.

²²⁰ *Id.* at 194-95, 202 P.3d at 1238-39.

²²¹ *Id.* at 195, 202 P.3d at 1240.

²²² *Id.*

²²³ The Superferry experienced many weather obstacles, significant operational difficulties, and continued protests during its initial operating period under Act 2, as well as frequent reports of sick passengers. See Gene Park, *Aloha for the Alakai*, HONOLULU STAR-BULLETIN, Dec. 14, 2007, available at <http://archives.starbulletin.com/2007/12/14/news/story01.html> (describing rough weather, dock damage, and sick passengers on the prior day’s voyage); Gary Kubota, *Boat’s Protestors Create a Clamor in Kahului*, HONOLULU STAR-BULLETIN, Dec. 14, 2007, available at <http://archives.starbulletin.com/2007/12/14/news/story01.html> (reporting that about 300 protestors greeted the vessel, including paddlers and surfers, as well as “scores of law enforcement officers,” including a helicopter and water patrol); Claudine San Nicolas, *Ride ‘Really Really Rough,’* MAUI NEWS, Apr. 8, 2008, available at <http://www.mauinews.com/page/content.detail/id/502298.html?nav=10> (stating that

ended up right back under the steely gaze of the Hawai'i Supreme Court, this time through Sierra Club's constitutional challenge to Act 2. The Legislature's not-too-cleverly disguised "large capacity ferry vessel" exemption from chapter 343 was now up for judicial examination by a thoroughly un-amused court, which had seen the DOT and Superferry—and now the Governor and Legislature—belligerently defy its earlier ruling. It took little time for the Hawai'i Supreme Court to declare the law illusory and deliciously skewer Act 2 as unconstitutional.²²⁴

In *Superferry II*, issued on March 16, 2009, Justice Duffy wrote for a unanimous court on the question of Act 2's unconstitutionality; the court split slightly only on the issue of attorneys' fees.²²⁵ Justice Duffy wrote seventeen dense pages²²⁶ on why the Legislature had violated article XI, section 5 of the Hawai'i Constitution.²²⁷ He found that Act 2 was an exercise of legislative power over state lands at Kahului Harbor,²²⁸ and that it was an illegal "special law" because only the Superferry met the Act's limited requirements and the twenty-one-month sunset provision,²²⁹ creating an "illusory class" of one.²³⁰ Therefore, Act 2 was unconstitutional.²³¹

The court then turned to attorneys' fees. Usually litigants in the American legal system must pay their own costs and attorneys' fees whether they win or lose.²³² In the field of environmental law, however, Congress and state legislatures have sought to encourage public interest litigation by setting up a system for judicial awards of fees and costs to the prevailing party to counterbalance the high costs of bringing an enforcement action.²³³ Hawai'i's environmental laws do not generally have express fee award provisions similar

"[p]assengers arriving in Kahului said many of them were puking during the ride" and that the Superferry was out of service for weeks to undergo dry dock repairs for rudder damage).

²²⁴ *Superferry II*, 120 Haw. at 206, 202 P.3d at 1251.

²²⁵ Justice Duffy lost the votes of Justice Nakayama and Chief Justice Moon only on the last issue of whether sovereign immunity protected DOT from attorneys' fees. *Id.* at 231-36, 202 P.3d at 1276-81 (Nakayama, J., concurring and dissenting). Justice Nakayama, joined by Chief Justice Moon, agreed with the entirety of Justice Duffy's analysis and holdings, except for this immunity issue, reasoning that the State cannot waive its immunity. *Id.*

²²⁶ *Id.* at 197-214, 202 P.3d at 1242-59 (majority opinion).

²²⁷ Article XI, section 5 of the Hawai'i Constitution limits the legislative power over state lands to "general laws," *id.* at 231, 202 P.3d at 1276, and prohibits "special" or "illusory" laws in favor of specific parties. *Id.* at 199-214, 202 P.3d at 1244-59.

²²⁸ *Id.* at 198-99, 202 P.3d at 1243-44.

²²⁹ *Id.* at 199-203, 202 P.3d at 1244-48.

²³⁰ *Id.* at 203-14, 202 P.3d at 1248-59.

²³¹ *Id.* at 214, 202 P.3d at 1259.

²³² *Id.* at 218, 202 P.3d at 1263.

²³³ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS 8-2 (1995).

to those common at the federal level.²³⁴ Justice Duffy, however, found that Judge Cardoza had correctly found the Sierra Club and the other plaintiffs to be the prevailing parties under HRS section 607-25,²³⁵ and that Act 2's attempt to pull the legal rug out from under the plaintiffs had not changed their winning status.²³⁶

The court then proceeded to address the novel theory raised by the Sierra Club that the plaintiffs were *also* entitled to fees under the private attorney general theory even though Act 2 changed (at least temporarily) the law of the land.²³⁷ In thirteen pages of ground-breaking analysis, Justice Duffy applied the private attorney general doctrine to the plaintiffs' request for reimbursement of attorneys' fees.²³⁸ Using analysis from a case decided a few years before, *Maui Tomorrow v. Board of Land & Natural Resources*,²³⁹ the court recognized its own approval, in principle, of the "equitable rule that allows courts in their discretion to award [attorneys'] fees to plaintiffs who have vindicated important public rights."²⁴⁰ Although the court had only mentioned but not applied the doctrine in *Maui Tomorrow*, it was primed and ready to do so in *Superferry II*.

The court first set out the three-part test to assess the "strength or societal importance of the public policy vindicated by the litigation," "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and "the number of people standing to benefit from the decision."²⁴¹ On the first prong, the court agreed with the Sierra Club that the "litigation [was] responsible for establishing the principle of procedural standing in

²³⁴ Other than HRS section 607-25, the only Hawai'i environmental laws with an explicit attorneys' fees provision are (1) the Hawaii Air Pollution Control Act, HRS chapter 342B, of which section -56 allows for citizens' suits and subsection -56(f) allows for attorneys' fees and costs, and (2) Hawai'i's environmental response law, HRS chapter 128D, which also allows for citizens' suits and fees at section -21. HRS chapter 195, Hawai'i's endangered species law, allows for citizens' suits, but does not provide for fees. For more on the lack of Hawai'i citizens' suits and attorneys' fees, see David Frankel, *Enforcement of Environmental Laws in Hawaii*, 16 U. HAW. L. REV. 85, 136-141 (1994).

²³⁵ In 1986, the Hawai'i Legislature enacted what became Hawai'i Revised Statutes section 607-25, providing that successful citizen-plaintiffs in some limited situations could seek a reasonable award of attorneys' fees from a defendant found to have violated a permitting law. Until *Superferry II*, plaintiffs had not been successful in using section 607-25 to recover fees. *Superferry II*, 120 Haw. at 214-17, 202 P.3d at 1259-62.

²³⁶ *Id.* at 218, 202 P.3d at 1263.

²³⁷ *Id.*

²³⁸ *Id.* at 218-31, 202 P.3d at 1263-76.

²³⁹ 110 Haw. 234, 131 P.3d 517 (2006).

²⁴⁰ *Superferry II*, 120 Haw. at 218, 202 P.3d at 1263 (citing *Maui Tomorrow*, 110 Haw. at 244, 131 P.3d at 527 (quoting *In re Water Use Permit Applications*, 96 Haw. 27, 29, 25 P.3d 802, 804 (2001))).

²⁴¹ *Id.* at 218, 202 P.3d at 1263.

environmental law in Hawai'i and clarifying the importance of addressing the secondary impacts of a project in the environmental review process pursuant to HRS chapter 343.²⁴² On the second prong, the court again agreed with the Sierra Club that the plaintiffs "were solely responsible for challenging DOT's erroneous application of its responsibilities under HRS chapter 343."²⁴³ Showing its displeasure with DOT's behavior, the court stated: "in this case DOT wholly abandoned that duty ['to consider both the primary and secondary impacts of the Superferry project on the environment'] by issuing an erroneous exemption to Superferry."²⁴⁴ On the last prong, directly addressing the public benefit theory, the court again agreed with the plaintiffs, citing back to the *Superferry I* quote that leads off this article, emphasizing that everyone benefits from public participation. Formally, the court adopted the private attorney general doctrine and concluded that the Sierra Club met its requirements.²⁴⁵ The court, however, was not quite done with the defendants.

The court then addressed DOT and Superferry's arguments that H.R.S. section 607-25 was the exclusive means for an attorneys' fees award for violations of chapter 343 and that, under that statute and sovereign immunity, only Superferry and not DOT was subject to a fee award.²⁴⁶ Superferry also continued to argue it was not subject to any fee award. The court showed no mercy. It concluded that H.R.S. section 607-25 was not the "the exclusive means" for awarding fees,²⁴⁷ that the section did not prevent an award of fees against Superferry under the private attorney general doctrine,²⁴⁸ and that sovereign immunity did not prevent an award against DOT.²⁴⁹ The court agreed with Superferry that the company's use of facilities already constructed (by DOT) did not fit the term "development" under H.R.S. section 607-25,²⁵⁰ rendering Superferry not subject to *that* fee statute.²⁵¹ Nonetheless, the court imposed attorneys' fees on Superferry under the private attorney general theory.²⁵² The court observed that

in this case[,] Superferry worked hand-in-hand with DOT throughout the planning and implementation of the Superferry project and throughout this

²⁴² *Id.* at 220, 202 P.3d at 1265.

²⁴³ *Id.*

²⁴⁴ *Id.* at 221, 202 P.3d at 1266.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 222, 202 P.3d at 1267.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 222, 225-30, 202 P.3d at 1267, 1270-75.

²⁵⁰ *Id.* at 225, 202 P.3d at 1270.

²⁵¹ *Id.*

²⁵² *Id.* ("[W]e see no reason not to apply the private attorney general doctrine to a private defendant.").

litigation, in promoting its own private business interests. Under these facts, we see no unfairness in requiring Superferry, jointly with DOT, to pay Sierra Club’s attorney’s fees awarded by the circuit court.²⁵³

Superferry II not only was a resounding endorsement of the public benefit theory applied to chapter 343, it changed the landscape of this already lively field of litigation. Undoubtedly, environmental groups in the future will be encouraged to be even bolder in seeking judicial review. If the potential public benefit is large enough, even the slim hope of attorneys’ fees can magnify the incentive to bring a difficult chapter 343 case.

F. Turtle Bay: *The Citizen Watchdog Never Sleeps*

Most Hawai‘i court decisions under chapter 343 focus on the top of the “applicability funnel,” that is, determining when the law applies and the breadth of projects subject to its scope. If the environmental review process moves along competently, from drafts and final EAs to drafts and final EISs (FEISs), the opportunities for successful citizen suits diminish rapidly. Once the agency has accepted a final EIS, the chances for a winning citizen suit are slim but not zero. The Hawai‘i Supreme Court’s 2010 decision in what is commonly known as the “*Turtle Bay*” case, and officially as *Unite Here! Local 5 v. City and County of Honolulu*,²⁵⁴ represents another monumental decision by the Moon Court, this time authored by Chief Justice Moon himself. The case indicates that the citizen watchdog under chapter 343 never truly sleeps; it endorses the right of citizens to keep the review process alive in certain circumstances long after the completion of the FEIS.²⁵⁵

²⁵³ *Id.*

²⁵⁴ *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010).

²⁵⁵ Although not directly a “supplemental” case, the ICA decision in *‘Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008), addressed a related issue of the role of initial and subsequent environmental review (called “programmatic” and “tiering” in the federal NEPA system). The Natural Energy Laboratory of Hawaii (NELH) prepared EISs during its early years about the state research facility itself, and had anticipated that more specific review of particular research projects would follow. *Id.* at 249, 188 P.3d at 763. Essentially, by ordering the EA on Mera’s proposed biopharm-algae project, the court was requiring a tiered EA, where the project-specific impacts would be addressed in the framework of the overall impacts. *See id.* at 255, 188 P.3d at 769.

The State Department of Business, Economic Development & Tourism (DBEDT) and the federal Department of Energy are currently preparing a programmatic joint state-federal EIS for the undersea energy cable project connecting the Lana‘i and Moloka‘i wind farms with O‘ahu energy grids. Notice of Intent To Prepare a Programmatic Environmental Impact Statement for the Hawaii Interisland Renewable Energy Program: Wind (DOE/EIS-0459), Dec. 14, 2010, available at <http://www.federalregister.gov/articles/2010/12/14/2010-31310/notice-of-intent-to-prepare-a-programmatic-environmental-impact-statement-for-the-hawaii-interisland-renewable-energy-program-wind>

Turtle Bay addresses when citizen plaintiffs may successfully re-open an otherwise moribund environmental review process. The *Turtle Bay Resort* EIS had been completed in 1985 for an economically ambitious master plan expansion—including 1,450 new hotel units, 2,063 new condominium units, two golf courses, large commercial centers, and related amenities.²⁵⁶ Various components of the project started, then stopped, including the pouring of now-unearthly concrete pilings for one of the hotels proposed near Kawela Bay.²⁵⁷ Due to economic volatility, the master development lay dormant for the next twenty years until the efforts of the Kuilima Resort Company, the newest owners, to restart the project sparked public protest and lawsuits. Writing for a unanimous court, Chief Justice Moon agreed with the plaintiffs that the administrative rules required a supplemental EIS (SEIS), consistent with public policy and the purpose of chapter 343.²⁵⁸ The court stated that an EIS cannot remain valid “in perpetuity”²⁵⁹ and found that ignoring the implicit time frame in an EIS would allow unlimited delays in projects and negative impacts on the environment to go unchecked.²⁶⁰

The initial plaintiff in *Turtle Bay* was labor union Unite Here! Local 5, which in early 2006 was in contract negotiations with the venture capital owners of the *Turtle Bay Resort*. The resort had begun to revive its old master plan by asking for a subdivision of the property from the City and County of Honolulu.²⁶¹ When the union began to settle the lawsuit and labor negotiations simultaneously, two citizens’ groups—Keep the North Shore Country and the Sierra Club—stepped in to file a “back up” lawsuit in May and June 2006.²⁶²

prepare-a-programmatic-environmental-impact-statement-for-the-hawaii-interisland. This PEIS will be followed by site-specific EAs or EISs for particular sited projects. See Frequently Asked Questions, InterislandWind.com, <http://www.interislandwind.com/FAQ.aspx#A5-1> (“These site-specific environmental studies by the two wind farm developers, Hawaiian Electric and Maui Electric companies and the State of Hawaii are to be tiered under the umbrella programmatic EIS for the Interisland Wind project.”). Thus, this issue of downstream environmental review will likely continue to be a very hot issue in Hawai‘i until best practices emerge as they have done at the federal level under NEPA.

²⁵⁶ GROUP 70, REVISED ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1: KUILIMA RESORT EXPANSION 24 (Oct. 7, 1985), available at <http://www.defendoahucoalition.org/eis/eis05%20-%20part%20iii.pdf>.

²⁵⁷ *Turtle Bay*, 123 Haw. at 157, 231 P.3d at 430 (“Over the next twenty years, only certain aspects of the [p]roject were completed.”); the comment regarding the pilings for the first hotel reflects the author’s personal observations from visits to the area in the early 1990s through recent years at Kawela Bay.

²⁵⁸ *Id.* at 154, 231 P.3d at 427.

²⁵⁹ *Id.* at 181-82, 231 P.3d at 454-55.

²⁶⁰ *Id.* at 179, 231 P.3d at 452.

²⁶¹ *Id.* at 160, 231 P.3d at 433.

²⁶² The union dismissed its case, as predicted, in August 2006, leaving only the KNSC/Sierra Club action, *id.*, although the caption was never changed.

The groups expressed concern about the lack of an SEIS given the staleness of the original 1985 EIS and the subsequent developments in environmental conditions, particularly traffic congestion, the resurgence of the threatened green sea turtle (for which Turtle Bay was named), and the re-appearance in the area of the endangered Hawaiian monk seal.²⁶³ Community groups had vigorously opposed the expansion back in the 1980s as part of the “Keep the Country Country” movement,²⁶⁴ but when the project went dormant due to changing owners and the economic downturn, the community focused on other battles. That is, until about 2005, when new owners decided to re-start the subdivision process in an effort to maximize the resale value of what would be smaller, packaged-for-development pieces of the 426-acre makai parcel.²⁶⁵

The sleeping community giant awoke, galvanizing broad support to stop the expansion. The union and environmental groups’ lawsuits focused on whether Kuilima’s 2005 subdivision application to the City and County of Honolulu’s Department of Planning and Permitting (DPP) to facilitate the parceling of the expansion of the resort—from one existing hotel to six hotels and several condominium projects that would bring an average of “4,783 persons on any given day” to the North Shore²⁶⁶—triggered the need for a SEIS, pursuant to Hawai’i Administrative Rules sections 11-200-26 and -27.²⁶⁷ In 1985, DPP’s predecessor agency, the Department of Land Utilization, had accepted an EIS for the Kuilima resort expansion.²⁶⁸ The plaintiffs argued that DPP should require a supplemental analysis to update the twenty-year-old document before reviewing the subdivision application because the initial time frame for the project and EIS analysis had been exceeded and new information had emerged about impacts of the resort expansion on traffic and protected species.²⁶⁹

Then-Circuit Court Judge Sabrina McKenna entered summary judgment for Kuilima Resort and the City,²⁷⁰ agreeing with the defendants that under H.A.R. sections 11-200-26 and -27, “a SEIS is required *only* when there is a substantive project change and determined that, as a matter of law, the timing

²⁶³ *Id.* at 164, 231 P.3d at 437-38.

²⁶⁴ For a history of the Keep the Country Country movement, see Curt Sanburn, *Keeping the Country Country: A North Shore Couple’s Never-Ending Battle with the City*, HONOLULU WEEKLY, Mar. 2, 2011, available at <http://honoluluweekly.com/cover/2011/03/keeping-the-country-country/>. For background on the current coalition of local groups involved in opposing the resort expansion, see the web sites of Ko’olauloa North Shore Alliance (www.knsalliance.org), Defend Oahu Coalition (www.defendoahucoalition.org), and Keep the North Shore Country (www.keepthenorthshorecountry.org).

²⁶⁵ *Turtle Bay*, 123 Haw. at 159, 231 P.3d at 432.

²⁶⁶ *Id.* at 155, 231 P.3d at 428.

²⁶⁷ *Id.* at 171, 231 P.3d at 444.

²⁶⁸ *Id.* at 155, 231 P.3d at 428.

²⁶⁹ *Id.* at 164-65, 231 P.3d at 437-38.

²⁷⁰ *Id.* at 154, 231 P.3d at 427.

of the project had not substantially changed.”²⁷¹ On appeal to the Intermediate Court of Appeals (ICA), however, the panel split in a May 2009 opinion. Writing for the majority, Judge Dan Foley and Acting Chief Judge Corinne Watanabe agreed with Judge McKenna and found that DPP did not need to require a SEIS because there had not been a substantive change in the project.²⁷² Judge Craig Nakamura dissented.²⁷³ Looking to the “overriding purpose of HEPA[,] . . . [i.e.,] to ensure that an agency is provided with relevant information about the environmental impacts of a proposed project so that the agency can make informed decisions about the project,”²⁷⁴ Judge Nakamura found that, even if a project has not itself changed, it can become “an essentially different action” because of changed circumstances and “the discovery of new information.”²⁷⁵

Examining the SEIS issue on appeal, Chief Justice Moon engaged in a two-step inquiry: (1) due to the change in timing, was there essentially a different action under consideration, and (2) if so, was the change in the project “significant”?²⁷⁶ He answered both questions in the affirmative.²⁷⁷ In some of the strongest language the court has used in chapter 343 cases, Chief Justice Moon excoriated the City for its poor decision-making process and for cutting the public out of the discussion. He concluded that “the plaintiffs have clearly presented ‘new’ evidence that was not considered at the time the 1985 EIS was prepared and that could likely have a significant impact on the environment.”²⁷⁸

He hammered the point home: “Any other result would be absurd and contrary to public policy in Hawai‘i.”²⁷⁹ Citing Judge Nakamura’s dissent, Chief Justice Moon criticized the notion that a permitting process without specific deadlines could “remain valid in perpetuity.”²⁸⁰ He emphasized: “Indeed, ignoring the implicit time condition dictated by the anticipated life of the project upon which an original EIS has been based would allow unlimited delays and, in turn, permit possible resulting negative impacts on the environment to go unchecked.”²⁸¹

²⁷¹ *Id.* at 167, 231 P.3d at 440 (emphasis in original).

²⁷² *Unite Here! Local 5 v. City & Cnty. of Honolulu*, 120 Haw. 457, 209 P.3d 1271 (App. 2009).

²⁷³ *Id.* at 468, 209 P.3d at 1282 (Nakamura, J., dissenting).

²⁷⁴ *Id.* at 471, 209 P.3d at 1285 (citing HAW. REV. STAT. § 343-1 (1993)).

²⁷⁵ *Id.*

²⁷⁶ *Turtle Bay*, 123 Haw. at 177-79, 231 P.3d at 450-52.

²⁷⁷ *Id.* at 178-80, 231 P.3d at 451-53.

²⁷⁸ *Id.* at 177, 231 P.3d at 450 (citation omitted).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 179, 231 P.3d at 452 (citing *Unite Here! Local 5*, 120 Haw. at 472, 209 P.3d at 1286 (Nakamura, J., dissenting)) (emphasis omitted).

²⁸¹ *Id.*

When focusing on DPP's lack of a "hard look" at the subdivision application, Chief Justice Moon indicated that the agency had stuck its head in the sand, perhaps deliberately. He stated that "DPP ignored the most obvious fact that the 1985 EIS was based on detailed information *current as of 1985*, *i.e.*, that the conditions upon which the 1985 EIS was based were over twenty years old."²⁸² He called DPP's assumption that conditions had not changed in twenty years "unreasonable,"²⁸³ finding that its "unreasonable and seemingly cursory consideration of whether a SEIS was warranted" was arbitrary and capricious.²⁸⁴ In his concurring opinion, Justice Acoba emphasized that "the DPP had a duty to make an independent determination as to whether the EIS contained sufficient information to enable it to make an informed decision regarding the subdivision application."²⁸⁵ Moreover, Justice Acoba (who later dissented on the motion for reconsideration)²⁸⁶ concluded the agency had relied on projections of "questionable value."²⁸⁷

Prior to chastising DPP, Chief Justice Moon repeated the now-familiar theme of chapter 343 that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole."²⁸⁸ Thus, *Turtle Bay* completes, for now, the long line of chapter 343 cases where the court strongly endorses the value of citizen participation, even decades after the initial EIS is complete. Although the legal analysis of *Turtle Bay* falls squarely within the statutory ambit, the implications of latent public challenges to slow-moving development projects—particularly master planned communities—could be profound.

Already, the new owners of the Turtle Bay Resort have announced that they "support the SEIS undertaking,"²⁸⁹ and have begun to revamp the master plan,

²⁸² *Id.* at 181, 231 P.3d at 454 (emphasis in original).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 183, 231 P.3d at 456 (Acoba, J., concurring). On July 20, 2010, the court denied a motion for reconsideration by defendants. *Unite Here! Local 5 v. City & Cnty. of Honolulu*, No. 28602, 2010 WL 2844362 (Haw. July 20, 2010). The majority reaffirmed the earlier decision, tersely ordering the supplemental review, *id.* at *1, in spite of a dissent by Justice Acoba, where he argued that the DPP should be given the opportunity to make a new determination on requiring the SEIS. *Id.* at *1-8 (Acoba, J., dissenting).

²⁸⁶ *Unite Here! Local 5*, 2010 WL 2844362, at *1-8.

²⁸⁷ *Turtle Bay*, 123 Haw. at 184, 231 P.3d at 457.

²⁸⁸ *Id.* at 180, 231 P.3d at 453 (majority opinion) (citing *Kahana Sunset Owners Ass'n v. Cnty. of Maui*, 86 Haw. 66, 70, 947 P.2d 378, 382 (1997) (citation omitted)); see *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i*, 91 Haw. 94, 104 n.11, 979 P.2d 1120, 1130 n.11 (1999) (citation omitted); see also *Superferry I*, 115 Haw. 299, 327, 342, 167 P.3d 292, 320, 335 (2007) (citation omitted).

²⁸⁹ Letter from Drew Stotesbury, Replay Resorts Inc./Turtle Bay Resort, to the community (Jan. 28, 2011) (on file with author) ("While the SEIS was a result of a decision by the Hawai'i

trying to start afresh with the community.²⁹⁰ DPP has apparently created a new system for keeping track of when SEISs are warranted on projects undergoing discretionary approvals within the department.²⁹¹ The *Turtle Bay* decision will not cause the collapse of Hawai'i's economy, as claimed by the defendants and amicus curiae in the flood of briefs on the post-decision motion for reconsideration,²⁹² but the decision should give serious pause to agencies and developers who have issued open-ended discretionary permits as well as to phased developments with latent permits and approvals.²⁹³ Until no further agency discretion remains to be exercised, the projects may continue to be subject to public scrutiny under chapter 343.

Turtle Bay was not just about supplemental EISs, however. The decision also contained some very strong language endorsing the authority of the citizen-based State Environmental Council, which is authorized under chapter 341 to promulgate the administrative rules for chapter 343. Although prior cases had acknowledged the role of the Environmental Council in promulgating rules for chapter 343, not until *Turtle Bay* did the court directly examine the scope of the Council's authority to interpret the statute. The governance issue arose because the defendants challenged the validity of the Council's rules regarding supplemental impact statements, which are not expressly referred to in chapter 343.²⁹⁴ The court noted that the Legislature not only directed the Council to promulgate rules, but also gave it authority to further interpret the statute.²⁹⁵

Supreme Court, just as importantly, it reflected the coordinated efforts of various stakeholders motivated to ensure the responsible development of the resort. We support the SEIS undertaking.”).

²⁹⁰ Curt Sanburn, *Shoreganized*, HONOLULU WEEKLY, Apr. 6, 2011, available at <http://honoluluweekly.com/diary/2011/04/shoreganized/>.

²⁹¹ David Arakawa, Exec. Dir., Land Use Research Found., Presentation for the Hawaii State Bar Association Annual Meeting's Panel on Turtle Bay (Sept. 17, 2010) (author's observations).

²⁹² See Defendant/Counterclaim-Plaintiff/Appellee Kuilima Resort Co.'s Motion for Reconsideration at 24, *Unite Here! Local 5 v. City & Cnty. of Honolulu*, No. 28602, 2010 WL 2844362 (Haw. July 20, 2010), available at <http://keepthenorthshorecountry.org/Documents/SC%20-%20Motion%20to%20Reconsider.pdf> (referring to the amicus curiae brief of First Hawaiian Bank, stating that “such litigation would certainly cause a lengthy construction delay and cause construction to come to a grinding halt”).

²⁹³ As Kuilima's attorneys have stated: “[T]he Decision has, at a minimum[,] armed any ‘concerned citizen’ with the legal authority under the SEIS Rules to challenge developments that are outside of the time frame analyzed in its EIS, and which ha[ve] not received all of its governmental approvals, regardless of the depth and breadth of other review of project impact, or other state and federal laws governing and protecting the area.” Motion for Reconsideration, *supra* note 292, at 23-24.

²⁹⁴ See *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 174, 231 P.3d 423, 447 (2010).

²⁹⁵ *Id.* at 175-76, 231 P.3d at 448-49.

Citing established administrative law principles, the court noted that agencies have “implied powers that are reasonably necessary to carry out the powers expressly granted” and found that the Council’s SEIS rules were consistent with chapter 343.²⁹⁶

This little-noticed ruling could have significant implications for the future of chapter 343. Although the Environmental Council was stymied in its efforts to promulgate rule changes during the Lingle Administration, and the Council suspended all meetings for over a year out of frustration over this and other political roadblocks,²⁹⁷ the newly re-started and re-invigorated Environmental Council appears to have considerable interest in taking an active role in shaping chapter 343 policy and practice.²⁹⁸ Although not directly linked to citizen suits for chapter 343 violations, the court’s endorsement of the role of the all-volunteer citizen Environmental Council—which includes representatives from many sectors, including business, military, planning, and conservation, as well as the new OEQC Director, former Senator Gary Hooser²⁹⁹—adds to the overall checks and balances in the state environmental review system.

Moreover, *Turtle Bay* kept the door widely ajar for citizen suits in an area that often trips them up³⁰⁰—the appropriate application of the statute of limitations under chapter 343. The defendants challenged whether the plaintiffs had filed their lawsuit seeking a supplemental EIS within the required time frame under H.R.S. section 343-7.³⁰¹ Noting that section 343-7 does not expressly address the question of supplemental documents, the court applied the 120-day limitation of -7(a), running the time from the date of DPP’s approval of the subdivision application.³⁰² The court rejected the defendants’

²⁹⁶ *Id.* at 176, 231 P.3d at 449 (emphasis and citation omitted) (“Moreover, the SEIS process established by the Environmental Council is consistent with HEPA and its objectives—*i.e.*, ‘environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole,’ HRS § 343-1—and furthers environmental review.”).

²⁹⁷ Sean Hao, *Delays in State Waivers Stall Environmental Projects*, HONOLULU STAR-ADVERTISER, Aug. 1, 2010, available at http://www.staradvertiser.com/news/20100801_Delays_in_state_waivers_stall_environmental_projects.html (“The volunteer Environmental Council suspended work last August, complaining, among other things, that the state was not providing it with adequate resources such as meeting rooms and staff support.”).

²⁹⁸ *See, e.g.*, Senate Committee on Energy and Environment, Standing Committee Report No. 1276 on Governor’s Message Nos. 547, 548, 550, 573, 609, 610, and 638, 2011 Sess. (Haw. 2011) (Environmental Council appointments), http://www.capitol.hawaii.gov/session2011/CommReports/GM550_SSCR1276_.HTM.

²⁹⁹ Léo Azambuja, *Hooser Appointed to Office of Environmental Quality Control*, THE GARDEN ISLAND.COM, Feb. 8, 2011, available at http://thegardenisland.com/news/local/govt-and-politics/article_9e9362ac-3421-11e0-803d-001cc4c03286.html.

³⁰⁰ *See supra* note 32.

³⁰¹ *Turtle Bay*, 123 Haw. at 174, 231 P.3d at 447.

³⁰² *Id.* at 173-74, 231 P.3d at 446-47.

arguments that either the thirty-day time limit of -7(b), which would have required that the DPP file a notice with OEQC of a “negative declaration,”³⁰³ or the sixty-day time limit of -7(c), for reviewing a decision to require an EIS, applied.³⁰⁴ The court also rejected the defendants’ argument that the time frame ran from the date of the plaintiffs’ “actual knowledge” of the DPP’s decision not to require an SEIS.³⁰⁵ Because the plaintiffs had filed “well before” the 120-day period after the DPP’s formal decision, the lawsuit was not barred.³⁰⁶

In short, *Turtle Bay* deserves to be among the ranks of ground-breaking chapter 343 cases like *Kahana Sunset* and *Superferry I and II*. The Hawai‘i Supreme Court again united to strongly endorse the power of the chapter 343 process and the beneficial role of citizens’ groups. The court’s endorsement for citizen participation does, however, have sensible boundaries.

III. BOUNDARIES: BALANCING THE BENEFITS OF PUBLIC PARTICIPATION UNDER CHAPTER 343 AGAINST THE RISK OF NEW EXPANSES OF ENVIRONMENTAL REVIEW

Two of the Moon Court’s environmental review decisions signal that, despite the string of resounding victories for environmental plaintiffs, the court has set boundaries on the reach of the fundamental public participation principles that support chapter 343. In *Sierra Club v. Hawaii Tourism Authority* and *Nuuuanu Valley Association v. City and County of Honolulu*, the court looked over the precipice and declined to parachute into a world that might have allowed much wider application of chapter 343. Both cases provide citizens’ groups, agencies, and developers a clearer picture of what chapter 343 litigation theories are less likely to succeed and, more importantly, how facts really do matter.

A. HTA: Peering over the Procedural Standing Precipice

In 2002, in *Sierra Club v. Hawaii Tourism Authority (HTA)*,³⁰⁷ the Hawai‘i Supreme Court issued a rare fractured opinion, cracking open the door for later adoption of procedural standing in *Superferry I*. The *HTA* case involved an innovative argument by the Sierra Club that a tourism marketing plan proposed

³⁰³ A “negative declaration,” meaning that the agency determines that a full EIS is *not* required, is now called a “finding of no significant impact.” HAW. REV. STAT. § 343-2 (2010).

³⁰⁴ *Turtle Bay*, 123 Haw. at 173, 231 P.3d at 446.

³⁰⁵ *Id.* at 174, 231 P.3d at 447.

³⁰⁶ *Id.*

³⁰⁷ 100 Haw. 242, 59 P.3d 877 (2002).

by the State required review under chapter 343.³⁰⁸ A two-justice plurality of the court rejected the Sierra Club's standing altogether—both on traditional and procedural injury grounds.³⁰⁹ A three-justice majority of the court supported the proposed “procedural injury” theory,³¹⁰ but only two of them found that the Sierra Club met the standard in this case.³¹¹ The Sierra Club lost the battle but it would later win the war.

In 1999, the Hawai'i Tourism Authority (HTA) drafted a strategic marketing plan for the State (Tourism Strategic Plan or TSP),³¹² held public meetings and received public input on the draft TSP,³¹³ issued a request for proposals, selected the winning bidder, and signed the contract for \$117 million in February 2000 with the Hawai'i Visitors and Convention Bureau.³¹⁴ Concerned about the impacts of bringing even more tourists to Hawai'i, in June 2000, the Sierra Club brought a chapter 343 lawsuit directly to the Hawai'i Supreme Court³¹⁵ for failure to prepare an EA.³¹⁶

In their plurality decision, Justices Acoba and Ramil found that “[w]hile we are not unsympathetic to the concerns it raises,” the Sierra Club did not meet the traditional three-part injury-in-fact test for standing to challenge HTA's tourism marketing plan for lack of an EA.³¹⁷ The plurality found that the Sierra Club: did not establish an actual or threatened injury as a result of the marketing services proposed by HTA; did not establish that the actual or

³⁰⁸ *Id.* at 245, 59 P.3d at 880.

³⁰⁹ *Id.* (Justices Acoba and Ramil rejecting Sierra Club's standing).

³¹⁰ *Id.* at 265-66, 275, 59 P.3d at 900-01, 910 (Chief Justice Moon and Justice Levinson supporting the “procedural injury” theory with Justice Nakayama concurring).

³¹¹ *Id.* at 275-81, 59 P.3d at 910-16 (Moon, C.J., dissenting).

³¹² *Id.* at 245-46, 59 P.3d at 880-81 (plurality opinion).

³¹³ *Id.* at 246, 59 P.3d at 881.

³¹⁴ *Id.* at 247, 59 P.3d at 882. As the plurality noted, chapter 343 applies to use of state “funds” not just “lands” (the “language clearly indicates that HRS § 343-5(a)(1) applies to more than just land related matters”). *Id.* On the other hand, Justice Nakayama found the “use” trigger is restricted to land-related impacts: “It is clear that the legislature contemplated that the expenditure of funds must have a direct correlation to the use of lands designated in HRS §§ 343-5(a)(2)-(8). Therefore, I would hold that HRS § 343-5(a)(1) does not support standing to challenge the failure to conduct an EA when a state or county agency simply expends funds. Rather, HRS § 343-5(a)(1) requires an EA for those projects that have a sufficient nexus to the purposes intended by the legislature in enacting HEPA.” *Id.* at 270, 59 P.3d at 905 (Nakayama, J., concurring).

³¹⁵ The lawsuit was brought under a special provision of the statute establishing the HTA (H.R.S. § 201B-15). *Id.* at 247-48, 59 P.3d at 882-83 (plurality opinion). Note that the Legislature removed this direct appeal provision in the next legislative session. *Id.* at 247-48 n.8, 59 P.3d at 882-83 n.8.

³¹⁶ HTA challenged the Sierra Club's standing in its answer to the complaint; in March 2000 the parties filed cross motions for summary judgment on standing. *Id.* at 249-50, 59 P.3d at 884-85.

³¹⁷ *Id.* at 245, 59 P.3d at 880.

threatened injury would be fairly traceable to the expenditures; and did not show that such injury, if it occurred, would likely be remedied by a favorable judicial decision.³¹⁸ The plurality also rejected the theory that “informational injury” is sufficient to confer standing³¹⁹ and concluded that the Sierra Club had not established a procedural right to protect its interest and so could not rely on “procedural standing.”³²⁰

The middle ground, later embraced by the court in *Superferry I*, was presented by Justice Nakayama. She adopted the Sierra Club’s proposed procedural standing test, but agreed with the plurality that the Sierra Club did not meet that test because of the lack of correlation between the HTA plan and the Sierra Club’s alleged adverse environmental effects.³²¹ She first found that procedural standing is appropriate under chapter 343: “federal courts’ construction of procedural standing is appropriate as applied to HEPA because, similar to its federal counterpart, NEPA, HEPA sets forth various requirements that are inherently procedural.”³²² She added: “Consequently, HEPA does not confer substantive rights or remedies. To insist that a prospective plaintiff demonstrate substantive standing pursuant to a statute that confers only procedural rights ignores the plain language of HRS § 343-7(a).”³²³ Therefore, the plaintiff should not have to meet the “normal standards for redressability and immediacy.”³²⁴

³¹⁸ *Id.* The plurality found that the HTA program was designed to increase visitor spending not arrivals, and that the Sierra Club’s affidavits lacked specific link to impacts from the HTA program as opposed to “general laments.” *Id.* at 251, 59 P.3d at 886. The plurality distinguished other environmental cases where it found standing. *Id.* at 252-53, 59 P.3d at 887-88.

³¹⁹ *Id.* at 257, 59 P.3d at 892. Justices Acoba and Ramil further noted that the issue was a matter of first impression, and they agreed with the D.C. Circuit 1991 *Lyng* decision that rejected informational standing in NEPA cases. *Id.* (citing *Found. on Econ. Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991)). They also observed that the procedural standing issue had barely been raised in the briefs but had “been seized upon by the concurrence and dissent.” *Id.* at 258, 59 P.3d at 893.

³²⁰ *Id.* at 245, 59 P.3d at 880. The court concluded:

It is evident that the federal construct of a procedural right is not germane in this case because (1) HRS § 343-7, the Hawai’i statute at issue, establishes who and under what circumstances the lack of an EA, may be challenged, and (2) federal cases recognizing this standard are inapposite, as they rest on non-analogous statutes. Thus, Petitioner cannot be afforded so-called “procedural standing” under HRS § 343-7(a).

Id. at 260, 59 P.3d at 895. However, the plurality did seem to bend backwards to declare its track record that it has consistently ruled in favor of standing of environmental plaintiffs, citing a string of pro-plaintiffs environmental cases. *Id.* at 256, 59 P.3d at 891.

³²¹ *Id.* at 265, 59 P.3d at 900 (Nakayama, J., concurring).

³²² *Id.* at 266, 59 P.3d at 901.

³²³ *Id.* at 267, 59 P.3d at 902.

³²⁴ *Id.* (citations omitted).

But Justice Nakayama concluded that the Sierra Club's case tripped up on the facts; it did not meet even that lower standard: "Sierra Club's allegation that it has a geographic nexus to various sites on the island that may be affected by increased visitor traffic as a result of HTA's marketing plan is not sufficient to establish such a concrete interest in this case."³²⁵ The Sierra Club did not prove that "it has a concrete interest because the nexus between the HTA's proposed marketing plan and the alleged environmental effects is dependent upon the decisions of independent acts of prospective visitors."³²⁶ With three justices holding "no standing," the Sierra Club lost the proverbial battle.

Chief Justice Moon and Justice Steven Levinson dissented, finding that the procedural injury rule should be adopted by the court *and* that the Sierra Club met that test. As Chief Justice Moon explained:

the plurality raises the standing hurdle higher than even the showing necessary for success on the merits of Sierra Club's claim, insofar as Sierra Club need show only that: (1) HTA was required to conduct an EA; (2) HTA failed to do so; and (3) as a result, Sierra Club's plaintiff members—not the environment—have been or will be harmed.³²⁷

He reminded the plurality that the Hawai'i courts have liberally granted standing: "we have recently reiterated that, 'where the interests at stake are in the realm of environmental concerns, 'we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.'"³²⁸

Because the focus of chapter 343 is procedural, not substantive,

any alleged injury resulting from HTA's purported failure to follow the provisions of chapter 343 is in the nature of a "procedural" injury. In other words, the alleged injury is that the agency acts without considering potentially "significant effects" of the environmental consequences of its actions, irrespective of whether there is actual environmental harm.³²⁹

Chief Justice Moon drove home the point of chapter 343: "The failure to follow the applicable procedures increases the risk that significant environmental effects will be overlooked by the relevant decision-makers. The injury—the increased risk of significant environmental effects due to uninformed decision making—is precisely the type of injury that Chapter 343

³²⁵ *Id.* at 269, 59 P.3d at 903.

³²⁶ *Id.* at 270-71, 59 P.3d at 904-05.

³²⁷ *Id.* at 271, 59 P.3d at 906 (Moon, C.J., dissenting).

³²⁸ *Id.* (quoting *Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (North Kohala)*, 91 Haw. 94, 100-01, 979 P.2d 1120, 1126-27 (1999) (quoting *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982))).

³²⁹ *Id.* at 272, 59 P.3d at 907.

was designed to prevent.”³³⁰ Presaging its ground-breaking 2010 opinion in *County of Hawai‘i v. Ala Loop Homeowners (Ala Loop)*,³³¹ Chief Justice Moon then referenced a little-used provision in the Hawai‘i constitution to support liberalized standing.³³²

With respect to the legislative and constitutional declarations of policy relevant to Sierra Club’s claim that the HTA failed to do an EA as required under HRS § 343-5(b), article XI, section 9 of the Hawai‘i Constitution states unambiguously that “each person has the right to a clean and healthful environment” and that “any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” Moreover, the legislature has clearly declared the policy of this state with respect to the environmental review process in HRS § 343-1
³³³

In short, Chief Justice Moon strongly supported adopting the procedural standing test proposed by the Sierra Club,³³⁴ paving the way for the *Superferry I* and *Ala Loop* decisions. In almost summary fashion, he found that the Sierra Club affidavits met that new test.³³⁵

In summary, *HTA* counts as a temporary loss for environmental plaintiffs who might have reached too far with difficult facts given the diffuse nature of the marketing plan’s harm. Skeptical of the long chain of causality between the HTA marketing plan and the plaintiff’s injuries, the court pulled back.

³³⁰ *Id.* at 276, 59 P.3d at 911. Contrary to the plurality’s view that HEPA standing is narrower than NEPA standing, *id.* at 261, 59 P.3d at 986 (plurality opinion), according to Chief Justice Moon, “this court had also made it clear that its own standing requirements, particularly in the realm of environmental litigation, may be less stringent than the federal requirements.” *Id.* at 276, 59 P.3d at 911 (Moon, C.J., dissenting) (citing *North Kohala*, 91 Haw. at 100, 979 P.2d at 1126 (noting that “standing principles are governed by ‘prudential’ considerations.”)).

³³¹ 123 Haw. 391, 235 P.3d 1103 (2010).

³³² *HTA*, 100 Haw. at 276, 59 P.3d at 911 (Moon, C.J., dissenting).

³³³ *Id.* (quoting HAW. CONST., art. XI, § 9).

³³⁴ The Moon/Levinson test stated:

Consistent with the analogous federal law in this area, I would formulate the injury in fact test in this case as follows. First, Sierra Club must demonstrate that HTA failed to conduct an EA before undertaking its tourism marketing plan. Second, tracking the statutory purpose of an EA, Sierra Club must demonstrate that HTA’s failure to conduct the EA resulted in an increased risk that its marketing plan may have a “significant effect” on environmental quality, as defined in HRS § 343-2. Third, in order to ensure that the injury is concrete and particularized, Sierra Club must show that the increased risk of a significant effect on environmental quality injures its members personally by demonstrating a “geographic nexus” between individual members and the site of the injury. Finally, Sierra Club’s purported injury must be within the “zone of interests” sought to be protected by HEPA.

Id. at 281, 59 P.3d at 916.

³³⁵ *Id.* at 285, 59 P.3d at 920.

Ultimately, the court concluded that chapter 343 was not well suited to this particular factual claim, but the rulings of the majority adopting procedural standing came roaring back—to the Sierra Club's benefit—just a few years later in *Superferry I*.

B. Nuuanu Valley Association: *Setting the Boundaries of the "Use" Trilogy*

In 2008, two years after *Koa Ridge*, Justice Nakayama wrote *Nuuanu Valley Association v. City and County of Honolulu*³³⁶ for a unanimous bench,³³⁷ pulling the court back from the precipice of an unlimited definition of "use of state or county lands" that might have resulted from an extreme interpretation of the *Kahana Sunset*, *North Kohala*, and *Koa Ridge* trilogy. She held that a proposed connection to existing city drainage and sewage lines by the forty-five acre Laumaka subdivision in Nu'uuanu Valley for nine residential lots on land zoned "residential" since 1943 did *not* constitute the "use" of state or county lands.³³⁸

The neighborhood controversy started in early 2005 when the non-profit Nuuanu Valley Association (NVA) expressed concern about the proposed development on the steep mountainside slopes of the valley. NVA asked to examine various reports in DPP's files related to the subdivision application of the prior owner, Pu'u Paka DP LLC.³³⁹ DPP declined to provide the requested reports to NVA.³⁴⁰ DPP deferred the subdivision application and, after it expired, Pu'u Paka sold the property to Laumaka LLC, which proceeded with the subdivision plans.³⁴¹ NVA again submitted a request for engineering reports related to the project.³⁴²

After DPP initially declined to release a geotechnical report due to the deliberative process privilege, NVA notified DPP of its intent to sue.³⁴³ DPP then "accepted" the report and made it available to the public³⁴⁴ and released a requested drainage report.³⁴⁵ In May 2006, after the circuit court denied NVA's preliminary injunction request, DPP approved the tentative subdivision

³³⁶ 119 Haw. 90, 194 P.3d 531 (2008).

³³⁷ Justice Acoba wrote a brief concurrence that emphasized the lack of showing by the plaintiff on "use," not differing significantly from the majority opinion. *Id.* at 107-08, 194 P.3d at 548 (Acoba, J., concurring).

³³⁸ *Id.* at 94, 194 P.3d at 535 (majority opinion).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 94-95, 194 P.3d at 535-36.

³⁴⁵ *Id.* at 95, 194 P.3d at 536.

for the parcel.³⁴⁶ One year later, after disposing of further motions, the circuit court entered final judgment against NVA on all counts, including that an EA was not required because there was no “use” of state or county lands.³⁴⁷

On appeal, Justice Nakayama’s decision primarily addressed the issues of public records and administrative law, ruling partially in favor of the plaintiff.³⁴⁸ With regard to chapter 343, Justice Nakayama examined the project’s proposed connection to existing city drainage and sewer utilities and rejected the plaintiff’s expansive position that chapter 343 applied “[s]o long as there is a ‘use’ of city or state lands,” without regard to “the size of the ‘use’ and comparisons to the scope and size of the overall project.”³⁴⁹ Referring to, and circumscribing, the implications of the trilogy of *Kahana Sunset*,³⁵⁰ *North Kohala*, and *Koa Ridge*, Justice Nakayama emphasized the extensive nature of the tunneling or construction proposed in those cases and held they did not reach as far as the plaintiffs suggested.³⁵¹ She stated: “This court has not held that *merely connecting* privately-owned drainage and sewage lines to a state or county-owned drainage and sewage system is sufficient to satisfy HEPA’s requirement of ‘use of state or county lands.’”³⁵² Absent “tunneling or construction” of some significance, she concluded, there was no “use.”³⁵³

The court declined to apply the “ordinary meaning” of the word “use,” which would have resulted in the state or county lands trigger being applied “no matter what or how benign that ‘use may be.’”³⁵⁴ In her view, the Legislature did not intend such “countless possibilities of ‘uses.’”³⁵⁵ “[D]rainage and sewer lines [that] merely connect” to existing utilities “without requiring

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 95-96, 194 P.3d at 536-37. The case skipped the ICA when, at plaintiff’s request, the Supreme Court transferred the case under Hawai‘i Revised Statutes section 602-58(a)(1)-(b)(1) on the basis that it raised an important or novel question. *Id.* at 96, 194 P.3d at 537.

³⁴⁸ The court held that, prior to acceptance, the engineering report submitted by the developer to (and commented upon by) DPP was not a “public document,” and therefore DPP did not need to release it to the public under the State Uniform Information Practices Act (UIPA). *Id.* at 96-98, 194 P.3d at 537-39. The court did find, however, that DPP violated the Hawaii Administrative Procedure Act (HAPA), *id.* at 98-99, 194 P.3d at 539-40, when DPP “refus[ed] to make available to the public any unaccepted engineering reports and written comments thereon.” *Id.* at 99-100, 194 P.3d at 540-41.

³⁴⁹ *Id.* at 101, 194 P.3d at 542.

³⁵⁰ Justice Nakayama noted that the “use” of state or county lands in *Kahana Sunset* was “undisputed between the parties.” *Id.*

³⁵¹ *Id.* at 101-02, 194 P.3d at 542-43.

³⁵² *Id.* at 103, 194 P.3d at 544 (emphasis added). *See also id.* at 103-04, 194 P.3d at 544-55 (discussing the trilogy, again emphasizing the extent of the use).

³⁵³ *Id.* at 103, 194 P.3d at 544. Justice Nakayama noted that the cases had “so far been limited to projects that require tunneling or construction beneath state or county land.” *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

construction or tunneling beneath state or county lands” did not trigger chapter 343.³⁵⁶ The court further rejected the argument that a “slope stability analysis” performed on state forestry land above the subdivision was a “use,” again citing the trilogy.³⁵⁷ It also declined to find that a Territory of Hawai‘i-era hiking easement within the subdivision itself constituted a “use.”³⁵⁸

On the one hand, *Nuuanu* is a decision where the complaining homeowners lost. Even though the court viewed NVA’s concerns about the risks of the subdivision as “understandable,” the court viewed the plaintiff’s view of “use” as too far to stretch the law, stating, “[W]e must remain mindful of our duties to follow the law.”³⁵⁹ On the other hand, the court firmly reinforced its prior rulings in the *Kahana Sunset* trilogy that it meant what it said—chapter 343 applied when the connections involved non-de minimis tunneling or construction on state or county lands. This ruling was bitter for the plaintiff but bittersweet for the broader environmental community.

Like in *HTA*, where the causal chain was too attenuated in the court’s view, a major factor that may have influenced the court’s narrower view of *Nuuanu* was the smaller size of the proposed development. Unlike the large new development proposed in *Kahana Sunset* (312 multi-family units), *North Kohala* (387-acre resort plan), and *Koa Ridge* (1274-acre reclassification), the subdivision in *Nuuanu* involved nine lots (potentially eighteen homes) that the court noted had been zoned for residential use “since approximately 1943.”³⁶⁰ While not unsympathetic to the risks cited by the plaintiff,³⁶¹ the court was unwilling to force development in an area zoned for residential development over sixty years ago through the chapter 343 process when, in the court’s view, the factual connection was tenuous and the impact did not rise to the level that the Legislature had in mind for triggering environmental review. Thus, the top of the chapter 343 “use” funnel gained definite boundaries in the little-acknowledged *Nuuanu* decision.

³⁵⁶ *Id.* at 104, 194 P.3d at 545. NVA argued that the connection did involve construction or tunneling, but had not provided sufficient support for that assertion to support reconsideration by the court. *Id.* at 104-05, 194 P.3d at 545-46. *See also id.* at 108, 194 P.3d at 548 (Acoba, J., concurring) (“[T]here was a lack of evidence as to whether the subdivision hookup to the sewer system would be constructed under state or county land.”).

³⁵⁷ *Id.* at 105, 194 P.3d at 546 (majority opinion).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 104, 194 P.3d at 545.

³⁶⁰ *Id.* at 94, 102, 194 P.3d at 535, 543.

³⁶¹ *Id.* at 104, 194 P.3d at 545.

C. Harder Boundaries, When Quixotic Plaintiffs Lose: Price and Morimoto

During the Moon era, the court handed losses to plaintiffs in only two environmental review decisions: *Price v. Obayashi Hawaii Corp.*³⁶² and *Morimoto v. Board of Land and Natural Resources.*³⁶³ Even though these cases involved major controversial land developments—the Obayashi Corp. (or “Lihi Lani”) project on the North Shore of O‘ahu in the *Price* case, and the Saddle Road realignment on the island of Hawai‘i in the *Morimoto* case—the court turned down the plaintiffs’ request for more process in light of the extensive proceedings and reviews already vetted for the proposed developments.

1. Price: Quixotic “fly-specking”³⁶⁴?

The court’s unanimous 1996 decision in *Price*, written by Justice Ramil, found that the plaintiff’s request for additional environmental review under chapter 343 was unwarranted.³⁶⁵ After allowing Kamuela Price, an eccentric North Shore resident, to overcome the strict circuit court filing barriers and spending some time chastising the circuit court clerk’s office,³⁶⁶ Justice Ramil began examining the court’s decision on the merits of Price’s chapter 343 claim by reviewing the fundamental goals of the EIS process.³⁶⁷ The fatal flaw in Price’s case was his primary theory that “disagreement between experts” merited re-opening the FEIS.³⁶⁸ This theory is almost always a losing argument in the world of environmental review law when there is an extensive record of review and no glaring omissions or procedural errors. The court reasoned that the EIS process was not intended to resolve conflicting views but rather to “provide information to the deciding agency.”³⁶⁹ The court concluded,

³⁶² 81 Haw. 171, 914 P.2d 1364 (1996).

³⁶³ 107 Haw. 296, 113 P.3d 172 (2005).

³⁶⁴ See *infra* note 373 and accompanying text.

³⁶⁵ The Hawai‘i courts have made similar sufficiency findings in only two other cases. See *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 1116 (1978) (rejecting plaintiffs’ request that the court enjoin construction of the Central Maui Water Transmission System due to an inadequate EIS, finding that the claim lacked support in the administrative record); *Medeiros v. Hawaii Cnty. Planning Comm’n*, 8 Haw. App. 183, 797 P.2d 59 (1990) (stating in dicta that an EA for a proposed geothermal research project did not need to analyze the impact of future geothermal energy businesses on the environment).

³⁶⁶ *Price*, 81 Haw. at 179, 914 P.2d at 1372.

³⁶⁷ *Id.* at 180, 914 P.2d at 1373.

³⁶⁸ *Id.* at 181, 914 P.2d at 1374.

³⁶⁹ *Id.* (citing *Anson v. Eastburn*, 582 F. Supp. 18, 24 (S.D. Ind. 1983)); see also *id.* at 181 n.10, 914 P.2d at 1374 n.10 (citing *Residents in Protest-I-35E v. Dole*, 583 F. Supp. 653, 662 (D. Minn. 1984) (stating that NEPA “does not require scientific unanimity”)).

therefore, that the adequacy of an EIS was a question of law that could be “properly addressed through the summary judgment procedure.”³⁷⁰ Applying the “rule of reason” standard of review for the adequacy of an EIS,³⁷¹ the court slammed the door on Price’s complaints.³⁷² Justice Ramil concluded that the statute and administrative rules were designed “to give latitude” to the agencies about the details of the contents of the EIS document.³⁷³

Turning to Price’s core argument, the court noted that he had challenged twelve different aspects of the EIS.³⁷⁴ The court emphasized the “breadth and depth” of Obayashi’s EIS,³⁷⁵ listing the numerous topics covered³⁷⁶ and finding they were adequately covered in the EIS itself or through accompanying technical studies.³⁷⁷ Justice Ramil concluded that Obayashi’s FEIS—which the court specifically noted was more than 400 pages long and accompanied by

³⁷⁰ *Id.* at 182, 914 P.2d at 1375.

³⁷¹ *Id.* (citing *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978)).

³⁷² *Id.* at 184, 914 P.2d at 1377. Justice Ramil reiterated that 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 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.

Id. at 182, 914 P.2d at 1375 (citing *Ariyoshi*, 59 Haw. at 164, 577 P.2d at 1121); *see also id.* at 182 n.11, 914 P.2d at 1375 n.11 (proposing that “it is not possible to draft an EIS that is perfect in all respects”) (citing *Envtl. Def. Fund, Inc. v. Corps of Eng’rs of U.S. Army*, 342 F. Supp. 1211, 1217 (E.D. Ark. 1972)). Justice Ramil also noted the well-known 1982 decision by the U.S. District Court for the District of Hawai’i, *Stop H-3 Association v. Lewis*, 538 F. Supp. 149 (D. Haw. 1982), where Judge Sam King found that the courts’ role in reviewing a complete EIS was “very narrow.” *Id.* at 182, 914 P.2d at 1375.

³⁷³ *Id.* at 183, 914 P.2d at 1376. The court then mentioned a famous pro-defendant metaphor from a 1982 federal case, that courts are “not to ‘fly speck’ EISs.” *Id.* at 182 n.12, 914 P.2d at 1375 n.12 (citing *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 695 (9th Cir. 1986) (citation omitted)).

³⁷⁴ *Id.* at 183 n.13, 914 P.2d at 1376 n.13. The court quickly stated that review would be limited under H.R.S. § 343-7(c) to the five concerns raised in his comments on the draft EIS. *Id.* at 183, 914 P.2d at 1376.

³⁷⁵ *Id.* at 184 n.15, 914 P.2d at 1376 n.15.

³⁷⁶ *Id.* On Price’s first areas of concern, infrastructure and water supplies, the court noted that the EIS had “an entire section” on each of the topics of concern, where the issues were discussed “in detail” and that the FEIS had a “comprehensive discussion of traffic impacts.” *Id.* at 184, 914 P.2d at 1377. The court concluded on this issue that the EIS’s discussion was “in good faith” and “sufficient.” *Id.* at 184-85, 914 P.2d at 1377-78. Price’s concerns about the other issues—pesticides/herbicides, flooding/erosion, and Native Hawaiian archaeological sites—were also addressed, in the view of the court. *Id.* at 185, 914 P.2d at 1378.

³⁷⁷ *Id.* at 183-85, 914 P.2d at 1376-78.

twenty-four technical reports—supported the agency's recommendations and complied with H.R.S. chapter 343 and the administrative regulations.³⁷⁸

In short, *Price* is the bookend example for the court's chapter 343 cases. The opinion provides a clear boundary to the court's willingness to step into the muck of an agency's decision-making process. It also signals that the uphill battle of challenging an FEIS can be very hard, particularly for an individual plaintiff like Price who had limited community support. Justice Ramil's reasoning further underscores the theme of this article that where the additional public process requested does not offer a substantial benefit, the court will take a dim view of the plaintiff's chapter 343 claims. Nine years later, the court reinforced this message in the *Morimoto* case.

2. *Morimoto: No match for a mountain of process*

In 2005, with Justice Acoba writing the unanimous opinion, the Moon Court reviewed similar issues to *Price* in a case that was not a straight chapter 343 challenge but an attack on a state Conservation District Use Application (CDUA) for a federal highway project. In *Morimoto*, the court affirmed a Third Circuit Court judgment upholding BLNR approval of a DOT and Federal Highway Administration (FHA) application to use state conservation district land for the upgrade of Saddle Road on the Island of Hawai'i.³⁷⁹ Two individual plaintiffs, Daniel Morimoto, M.D. and Kats Yamada, were somewhat isolated voices in their challenge to the Saddle Road realignment.³⁸⁰ The selected federal-state alternative route (called PTA-1),³⁸¹ which proposed to cross 206 acres of state conservation-zoned land, had undergone a full environmental review process, jointly undertaken by DOT and FHA in compliance with chapter 343 and NEPA. In addition, because of the seven endangered species impacted—including the litigation-famed Palila³⁸²—the U.S. Fish and Wildlife Service (FWS) had conducted a formal consultation

³⁷⁸ *Id.* at 185, 914 P.2d at 1378. The decision reflected the court's lack of empathy for Price on the merits, but the court did not throw this essentially pro se plaintiff under the bus. At the very end of the opinion, in response to Obayashi's request for sanctions against Price and his attorney, the court declined to entertain the request, finding that "Price presented a good faith, although unsuccessful, argument." *Id.* at 185 n.18, 914 P.2d at 1378 n.18.

³⁷⁹ *Morimoto v. Bd. of Land & Natural Res.*, 107 Haw. 296, 297-98, 113 P.3d 172, 173-74 (2005).

³⁸⁰ Vicky Mouze, *Hawaii's PTA protects natural resources*, WWW.ARMY.MIL: THE OFFICIAL HOMEPAGE OF THE UNITED STATES ARMY (June 10, 2010), <http://www.army.mil/news/2010/06/10/40685-hawaiiis-pta-protects-natural-resources/>.

³⁸¹ *Morimoto*, 107 Haw. at 298, 113 P.3d at 174; National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (2006).

³⁸² For a discussion of the litigation history of the Palila, see Oliver Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331 (2004).

with FHA under Section 7 of the Endangered Species Act,³⁸³ resulting in a thorough Biological Opinion (BO).³⁸⁴ The BO called for the addition and restoration of 10,000 acres of new habitat on Mauna Kea as mitigation for the loss of 100 acres of Palila critical habitat, the relocation of the highway to avoid certain endangered plants, and other mitigation measures.³⁸⁵ In 1999, the FHA issued a Record of Decision (ROD) selecting PTA-1 and legally binding the agency and the state DOT to implement the selected mitigation measures.³⁸⁶ Of particular importance to the court's ultimate view of the case, Justice Acoba noted that "[t]he mitigation plan in the ROD received wide support from scientific, regulatory agency, and environmental communities, and segments of the local community."³⁸⁷

Justice Acoba explained that mitigation measures identified in the joint EIS must be considered by BLNR in its review of the CDUA.³⁸⁸ Similarly, the court dismissed the plaintiffs' other arguments about BLNR's failure to consider impacts on the Palila.³⁸⁹ In short, the court found that the EIS mitigation could be considered for the CDUA and that substantial evidence supported the BLNR's conclusion that the project would not cause substantial adverse effect of the natural resources of the area.³⁹⁰

Although not a true chapter 343 case, *Morimoto* echoes many of the same themes underlying the court's decision in *Price*. The road to challenging an

³⁸³ *Morimoto*, 107 Haw. at 299, 113 P.3d at 175. See also Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006).

³⁸⁴ See 16 U.S.C. § 1536(c) (requiring biological opinions).

³⁸⁵ *Morimoto*, 107 Haw. at 299, 113 P.3d at 175.

³⁸⁶ *Id.* at 299-300, 113 P.3d at 175-76.

³⁸⁷ *Id.* at 300, 113 P.3d at 176. The court emphasized the extensive public review process undertaken before the BLNR approved the realignment. In April 2000, BLNR held a public hearing that turned into a contested case hearing, in which the plaintiffs participated. *Id.* In October 2001, BLNR issued the CDUP subject to certain conditions, including all of the conditions in the Final EIS. *Id.* When the plaintiffs appealed, the Third Circuit Court upheld the BLNR decision. *Id.* at 301, 113 P.3d at 177. With those four strikes against them (similar to those in *Price*), *Morimoto* and *Yamada*, who were asking for further agency process on the mitigation, faced a skeptical Hawai'i Supreme Court.

³⁸⁸ In fact, BLNR itself had expressly linked the two processes. *Id.* at 303-04, 113 P.3d at 179-80 (mitigation in an EA or EIS [is] an automatic condition of a CDUP). Therefore, BLNR could consider those measures without the further rulemaking called for by the plaintiffs. *Id.* at 304, 113 P.3d at 180.

³⁸⁹ *Id.* at 304-06, 113 P.3d at 180-82. Justice Acoba found that the record supported the BLNR's finding that the endangered species "would not suffer substantial adverse impact," noting the substantial mitigation measures adopted for Palila, including restoration of 10,000 acres of "new" habitat. *Id.* at 308, 113 P.3d at 184.

³⁹⁰ *Id.* at 308, 113 P.3d at 184. No Hawai'i judicial decision has yet addressed the more direct questions of concern to most stakeholders in cases like this, which are the specificity and enforceability of mitigation measures in an EIS.

agency's decision that is based on a full good-faith review process is treacherous. The joint federal-state EIS process, the completed federal Section 7 process, and the extent of the Palila mitigation in particular appeared quite damaging to Morimoto's and Yamada's prospects in challenging the downstream BLNR decision. Like *Price*, *Morimoto* presents a cautionary tale for future challenges to completed chapter 343 processes that appear to lack procedural flaws and are undergirded (as in *Morimoto*) by parallel agency examination of sensitive environmental issues.

CONCLUSION

This review of the chapter 343 cases decided during the Moon Court era indicate a consistent and strong commitment by the court to follow the Legislature's intent to support robust public participation in the environmental review process, even when that participation may disrupt some decisions of agencies and settled expectations of developers. Taken together, those cases form a remarkably uniform body of case law that strongly encourages citizens to resort to judicial review to ensure compliance with chapter 343. From the merits, to standing, to attorneys' fees, the Moon Court has cleared the judicial review pathway of the many obstacles that substantially impede almost all other kinds of state environmental litigation in Hawai'i.³⁹¹

The major exception to this otherwise well-fitted line through the Hawai'i Supreme Court's environmental review opinions since 1993 was the court's split decision in *HTA*.³⁹² The court teetered at the edge of a sweeping pro-environmental standing ruling but ended up badly fractured over whether to liberalize standing for environmental plaintiffs.³⁹³ Five years later, however, in *Superferry I*,³⁹⁴ the court gave in to temptation and ruled wholeheartedly in favor of the Sierra Club on procedural standing.

A key condition of the court's endorsement of public participation has also been its *sotto voce* concern that such participation will likely be "beneficial," even if it might be disruptive. In numerous decisions, such as the blockbusters *Kahana Sunset*, *Superferry I* and *II*, and *Turtle Bay*, the court required a fresh round of public process despite the protests of the county and state agencies who had prematurely approved the projects and despite developers' loud claims of adverse economic impacts and even takings.³⁹⁵

³⁹¹ In this author's experience, chapter 343 litigation in Hawai'i constitutes probably seventy-five percent of all filed and reported cases by citizens' groups.

³⁹² See *Sierra Club v. Haw. Tourism Auth. (HTA)*, 100 Haw. 242, 59 P.3d 877 (2002).

³⁹³ *Id.*

³⁹⁴ *Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007).

³⁹⁵ Conversely, in the two cases where the citizen plaintiffs flat out lost, *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 914 P.2d 1364 (1996), and *Morimoto v. Board of Land & Natural*

Perhaps the icing on the cake of the Moon Court's chapter 343 decisions is, ironically, a decision that did not involve chapter 343. In 2010, the Moon Court flung the courthouse doors open even more broadly for environmental citizens' groups in *County of Hawai'i v. Ala Loop Homeowners*.³⁹⁶ In that case, the majority enthusiastically embraced the Hawai'i State Constitution's provision in article XI, section 9 referring to a "clean and healthful environment" as conferring a broad private right of action for environmental wrongs.³⁹⁷ *Ala Loop* further reinforces the notion that the Moon Court has consistently supported the beneficial role of citizen-plaintiffs in Hawai'i environmental review specifically, and environmental cases generally. Given that the author of *Ala Loop* was current Chief Justice Recktenwald, who was appointed to the high seat by Governor Lingle, the judicial generosity toward citizen participation that was strongly reinforced by the Moon Court in the chapter 343 cases may well continue for the foreseeable future.

Resources, 107 Haw. 296, 113 P.3d 172 (2005), the common thread of the court's treatment of the alleged chapter 343 violations seems to be that the quixotic individuals involved would not have brought beneficial light to the review process. In those cases, the court also seemed convinced that the agency or applicant had already extensively engaged the public in the environmental review process.

³⁹⁶ 123 Haw. 391, 235 P.3d 1103 (2010) (finding that article XI, section 9 creates a private right of action to enforce a chapter 205 challenge to a proposed charter school and finding that the plaintiff homeowners' association had standing under the traditional injury-in-fact test).

³⁹⁷ *Id.* at 425, 235 P.3d at 1137.