NO. 28602

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

Civil No. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL; TODD A. K. MARTIN,

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU, a municipal corporation; KUILIMA RESORT COMPANY, a Hawai'i corporation; DOE DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawai'i general partnership,

Counterclaim Plaintiff,

v.

UNITE HERE! LOCAL 5 HAWAI'I, a Hawai'i labor partnership; ERIC W. GILL, an individual,

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawai'i general partnership,

Counterclaim Plaintiff,

v.

UNITE HERE!, a New York labor organization; DOE DEFENDANTS 1-10

Additional Counterclaim Defendants.

) Civil No. 06-1-0265
) Civil No. 06-1-0867
)
) APPEAL FROM THE AMENDED FINAL JUDGMENT, filed on June 4, 2007
)
) FIRST CIRCUIT COURT
)
) HONORABLE GARY W.B. CHANG
) HONORABLE SABRINA S. McKENNA
) Judges

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Civil No. 06-1-0867

KEEP THE NORTH SHORE COUNTRY, a Hawai'i non-profit corporation, and SIERRA CLUB, HAWAI'I CHAPTER, a foreign non-profit corporation,

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU; HENRY ENG, Director of Department of Planning and Permitting, in his official capacity; KUILIMA RESORT COMPANY, a Hawai'i general partnership; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNESHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITTIES 1-10; and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICI CURIAE

MEMORANDUM IN SUPPORT OF MOTION

EXHIBIT "A"

CERTIFICATE OF SERVICE

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NO. 28602

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Defendants.

MOTION FOR LEAVE TO APPEAR AND FILE A BRIEF AS AMICI CURIAE

Conservation Council for Hawai'i, Surfrider Foundation, Hawai'i's Thousand Friends, Life of the Land, Maui Tomorrow Foundation, and KAHEA (collectively, the "citizen groups"), by and through their attorney Earthjustice, hereby moves this Court for leave to appear and file a brief as amici curiae in support of the pending application for a writ of certiorari filed by plaintiffs-appellants Keep the North Shore Country and Sierra Club, Hawai`i Chapter. A copy of the citizen groups' proposed amicus brief is attached hereto as Exhibit "A."

This motion is made pursuant to Rule 27 and 28(g) of the Hawai`i Rules of Appellate Procedure and is based upon the records and files herein, this motion and attachments, and such further matters as may be presented to this Court.

DATED: Honolulu, Hawai'i, September 11, 2009

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Defendants.

MEMORANDUM IN SUPPORT OF MOTION

Conservation Council for Hawai'i, Surfrider Foundation, Hawai'i's Thousand Friends, Life of the Land, Maui Tomorrow Foundation, and KAHEA (collectively, the "citizen groups") hereby respectfully move this Court for leave to appear and file a brief as amici curiae in the above-captioned appeal concerning the duty to supplement environmental reviews under the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ch. 343. A copy of the citizen groups' proposed brief is attached hereto as Exhibit "A."

The citizen groups seek to file an amicus brief to apprise this Court of the important legal issues and public interests at stake in this precedent-setting case of first impression. As detailed in the proposed brief, the panel majority of the Intermediate Court of Appeals ("ICA") committed grave error in arbitrarily precluding consideration of changed circumstances or new

evidence in determining the need for supplemental HEPA review. This ruling flies in the face of basic principles and settled precedent underlying such environmental review laws and holds broad ramifications for the integrity of the HEPA process.

As summarized below, the citizen groups are all non-profit, public interest organizations involved in the protection of Hawai'i's unique natural and cultural resources and, in that capacity, are directly familiar with, interested in, and affected by the application of HEPA and its federal counterpart, the National Environmental Policy Act ("NEPA"):

- Conservation Council for Hawai'i ("CCH") is a non-profit citizens' organization with about 5,500 members in Hawai'i, the United States mainland, and abroad, and is the Hawai'i affiliate of the National Wildlife Federation, a non-profit organization with over 5.8 million members and supporters nationwide. Established in 1950, CCH's mission is to protect native Hawaiian species and ecosystems for future generations. To this end, CCH engages in wide-ranging education and advocacy activities and has participated in cases before the courts to enforce environmental laws, including Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280 (D. Haw. 1998). CCH has also participated specifically in this case on appeal, submitting an amicus brief to the ICA discussing the need for supplemental review to address the potential impacts of the proposed project on the endangered Hawaiian monk seal.

- Surfrider Foundation ("Surfrider") is a non-profit, grassroots environmental organization with over 55,000 members and 90 local chapters worldwide. Surfrider has over 2000 members in Hawai'i and 780 members in its O'ahu Chapter. Founded 25 years ago in 1984, Surfrider is dedicated to the protection and enjoyment of the world's oceans, waves, coasts, and beaches for all people, through conservation, activism, research and education. Surfrider also participates in legal proceedings before state and federal agencies and courts regarding issues such as coastal access and resource protection.

- Hawai'i's Thousand Friends ("HTF") is a non-profit organization with over 500 members in Hawai'i and elsewhere. Founded in 1980, HTF has over the years participated in many cases in state and federal court regarding Hawai'i's environment. The reported cases include: Hawai'i's Thousand Friends v. City and County of Honolulu, 806 F. Supp. 225 (D. Haw. 1992); Hawai'i's Thousand Friends v. City and County of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993); and In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Haw. 97, 9 P.3d 409 (2000) , subsequent appeal, 105 Haw. 1, 93 P.3d 643 (2004).

- Life of the Land ("LOTL") is a non-profit, Hawai'i-based environmental and community action group. Founded in 1970, LOTL's mission is to protect the life of the land in sustainable land use and energy policies and open government, through research, education, advocacy, and litigation. LOTL was the plaintiff in Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981), a seminal case on standing in environmental cases, and has been specifically involved for many decades in matters involving O'ahu's North Shore, including Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 78 P.3d 1 (2003).

- Maui Tomorrow Foundation ("MTF") is a non-profit, local organization with over 1000 supporters, including residents of the County of Maui, the State of Hawai'i, and the mainland United States. Since its inception in 1989, MTF has been actively and broadly engaged in issues of land and water use and planning, sustainable growth, and environmental stewardship in Maui and the state. MTF has been involved in numerous matters before state and county agencies and state courts on these issues. MTF participated as a plaintiff in the Superferry case, Sierra Club v. Department of Transp., 115 Haw. 299, 167 P.3d 292 (2007), subsequent appeal, 120 Haw. 181, 202 P.3d 1226 (2009), which enforced the HEPA law and citizens' rights to participate in the HEPA process.

- KAHEA: The Hawaiian-Environmental Alliance (KAHEA) is a non-profit, community-based organization founded in 2000. KAHEA's mission focuses on improving the quality of life for Hawai'i's present and future generations by protecting Hawai'i's unique environmental and cultural resources and rights and fostering multi-cultural understanding and environmental justice. KAHEA promotes these interests through public education and policy and legal advocacy. KAHEA has also participated in court cases enforcing environmental review requirements, including Center for Food Safety v. Johanns, 451 F. Supp. 2d 1165 (Haw. 2006).

Based on their background and interests, the citizen groups are well-situated to contribute as amici and provide helpful insight in this significant case affecting the citizen groups, their members, and the public at large. Accordingly, for the reasons stated herein, the citizen groups respectfully request this Court to grant their motion and allow them to appear as amici curiae and file their proposed amicus brief in this case.

DATED: Honolulu, Hawai'i, September 11, 2009

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Defendants.

BRIEF OF AMICI CURIAE
CONSERVATION COUNCIL FOR HAWAI'I, SURFRIDER FOUNDATION, HAWAI'I'S THOUSAND FRIENDS, LIFE OF THE LAND, MAUI TOMORROW FOUNDATION AND KAHEA

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I. INTRODUCTION

Amici curiae Conservation Council for Hawai'i, Surfrider Foundation, Hawai'i's Thousand Friends, Life of the Land, Maui Tomorrow Foundation, and KAHEA respectfully request this Court to grant the application for certiorari of plaintiffs-appellants Keep The North Shore Country and the Sierra Club, Hawai'i Chapter (together, the "community groups") and reverse the opinion of the panel majority of the Intermediate Court of Appeals ("ICA majority") in this case. As discussed below, the ICA majority gravely erred in precluding consideration of changed circumstances or new evidence in determining the need for supplemental environmental review under the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ("HRS") ch. 343. Under the blanket rule the ICA majority imposed, public agencies would never be required or even allowed to consider any changes in a project's context -- i.e., its environment -- no matter how potentially significant the environmental impacts. This cramped reading of the law produces absurd results and nullifies HEPA's purpose of informed decision making and public transparency. Amici request this Court to uphold the purpose of our fundamental and long-standing environmental law by reversing the ICA majority's opinion.

II. QUESTION PRESENTED

Can changed circumstances or new evidence regarding a project's context require supplemental review under HEPA to evaluate potentially significant changes in the project's environmental and community impacts?

III. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

Amici adopt by reference the background descriptions in the community groups' application and briefs and Conservation Council for Hawai'i's amicus brief filed on March 7,

2008. In summary, almost 25 years ago, in October 1985, the predecessor of Kuilima Resort Company ("KRC") submitted to the predecessor of the City and County of Honolulu's Department of Planning and Permitting ("DPP") a revised Environmental Impact Statement ("EIS") for the proposal to expand an existing resort. (ROA 5:4.)[1] In the project description, the EIS indicated the approximate timing of the development, projecting the construction of all of the 1,450 new hotel rooms and the bulk of over 2,000 new condominiums in Phases I and II beginning in 1986 and 1988-89, respectively, and the remaining construction in Phase III beginning between 1993-96. (ROA 5:43-44, 34-36.) The EIS considered impacts to the area's traffic and roads based on reports analyzing traffic conditions only through the year 2000. (ROA 5:129-40.) The EIS did not address impacts to threatened green sea turtles, which DPP identified as "one unresolved issue" requiring follow-up (ROA 4:213; ROA (Civ. No. 01-1-265) 4:95), and made no mention of endangered Hawaiian monk seals.

Other than certain renovations of the existing resort, no construction of the hotels and condominiums had started as of November 2005, when KRC submitted a subdivision application to DPP for approximately 744 of the resort's 808 acres. (ROA 4:393-94; 4A:466-71.) In the meantime, the 20 years that passed since the EIS's issuance in 1985 brought major changes in the community, including:

- The present-day traffic gridlock on the North Shore's sole access road, Kamehameha Highway, even without the proposed development (see, e.g., ROA 4A:164-65, 201, 224, 228), an impact which the 1985 EIS did not anticipate even after full completion of the project (ROA 5:129-40). Both DPP's Land Use Chief and the community groups' expert agreed that the 20-year old traffic analysis for the EIS is "not sufficient" and "outdated." (ROA 8:290-91, 263-65.)

- The emergence of the project area as habitat for protected species, particularly endangered monk seals, as established by expert testimony and

[1] Unless otherwise specified, the record citations refer to the record in the consolidated case, Civ. No. 06-1-867, by volume and page number ("ROA x:y").

> evidenced by an exponential increase of monk seal sightings in and around the project area, from usually zero and no more than two between the 1980s and 2000, to six in 2003, nine in 2004, 21 in 2005, and 54, including the first recorded pupping in the area, in 2006. (ROA 11:212-13, 215.)

In January 2006, DPP received letters from community members requesting the agency to require a supplemental analysis of the proposed project due to changed circumstances. (ROA 4:474-75, 538.) DPP denied the request outright without reviewing the 1985 EIS or considering any subsequent circumstances and information, because in its view there was "no substantive change in the project" and, therefore, no need to look any further. (ROA 4A:472-73; 8:332-33, 314-16.) See, e.g., ROA 4:316 (testimony of DPP official) ("Well, you know, everything has changed in 20 years. I mean, obviously, that's without even saying. You know, whether the project itself has changed, that's something that has not been shown to us.").

The community groups brought this action against KRC and DPP (together, "appellees"). The parties moved for summary judgment, and the circuit court ruled for appellees, concluding inter alia that no substantive change in the project occurred. (ROA 12:14-15.)

The community groups then appealed, and the ICA denied the appeal in a split decision. The ICA majority read the HEPA regulations, Haw. Admin. R. ("HAR") §§ 11-200-26, -27 (1996), to eliminate any changes from consideration unless it is "a substantive change in the action (the Project)." Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 465, 209 P.3d 1271, 1279 (App. 2009). The majority then disregarded any changed circumstances such as "increased traffic, other planned developments near the Project, and the existence of endangered or threatened species." Id. at 466, 209 P.3d at 1280. It also denied that any change in the project's timing occurred because "[n]either the Revised EIS nor the governmental entities imposed a timing condition." Id.

The dissent recognized that agencies must consider environmental changes when determining whether supplemental review is required. Given the "overriding purpose of HEPA to provide relevant information about the environmental impacts . . . so that the agency can make informed decisions," the dissent saw "no logical reason to distinguish" between potentially significant impacts from a change in the project, changed circumstances, or new information. Id. at 471, 209 P.3d at 1285 (Nakamura, J., dissenting). "The agency must be apprised of and consider significant changes to the project's anticipated environmental impacts, regardless of the source of or basis for such changes, in order to make informed decisions." Id.

IV. ARGUMENT

A. HEPA's Purpose Is Informed Decision Making And Full Disclosure.

This Court has repeatedly recognized HEPA's purpose of establishing a review process to "ensure that environmental concerns are given appropriate consideration in decision making" and "alert decision makers to significant environmental effects which may result from the implementation of certain actions," so 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." HRS § 343-1 (1993).[2] As this Court explained, HEPA review is not a mere formality, but should function:

> to provide the agency and any concerned member of the public with the information necessary to evaluate the potential environmental effects of a proposed action . . . . 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.

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[2] See, e.g., Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 70, 947 P.2d 378, 382 (1997); Citizens for the Prot. of the N. Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 104, 979 P.2d 1120, 1130 (1999); Sierra Club v. Department of Transp., 115 Hawai'i 299, 342, 167 P.3d 292, 335 (2007).

Kahana Sunset, 86 Hawai'i at 72, 947 P.2d at 384. In short, HEPA's "extensive environmental review process" evaluates the action not in a benign vacuum, but together with "any detriment to the surrounding community." Price v. Obayashi, 81 Hawai'i 171, 180, 914 P.2d 1364, 1373 (1996).

In this case, however, the ICA majority's reading of HEPA stifles review of impacts by artificially restricting consideration of current, changed circumstances, regardless of the potential significance of the impacts. This interpretation adopts a strained view of the HEPA rules, subverts the statute's overall purpose, and produces absurd results.

B. The ICA Majority Opinion Advances An Overly Rigid View Of HEPA's Rules.

The ICA majority reached its conclusion based on its gloss on particular portions of the HEPA rules, making much ado about language that "no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things," HAR § 11-200-26, The ICA majority read this language to impose a threshold barrier in a "two-part test," which first eliminates any changes from consideration unless it is "a substantive change in the action (the Project)," then only afterwards allows consideration whether the change will "likely have a significant effect." Unite Here!, 120 Hawai'i at 465, 209 P.3d at 1279.

The HEPA rules are not as stilted as the ICA majority would suggest. First, the sentence immediately following the clause quoted above states:

> If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter.

HAR § 11-200- 26 (emphasis added). Contrary to the ICA majority's artificial separation of the two sentences into a "two-part test," the reading of the sentences in pari materia establishes that

§ 11-200-26 equates a "substantive change" in an action to any change in any of the action's characteristics that may[3] have a significant effect and would thus give rise to an essentially different action. This language does not preclude consideration of the action's context. Rather, in requiring consideration of an expansive and expressly open-ended list of "characteristics" that may change and result in an "essentially different action," the language encompasses the totality of an action's circumstances.

For example, while the characteristic of "intensity" is not defined, § 11-200-27 refers to "intensity of the environmental impacts," an increase in which requires a supplemental statement. This parallels the National Environmental Policy Act ("NEPA"), which states that intensity "refers to the severity of impact." 40 C.F.R. § 1508.27 (1987).[4] The intensity of environmental impacts necessarily depends on context and can change because of changes in context. Similarly, while the HEPA rules establish that a change in an action's "timing" alone can warrant a supplemental statement, changed timing means nothing in a vacuum and can only bear any significance if the action's context changes during that time. Moreover, the HEPA rules indicate that the "characteristics" of an action, which all environmental assessments

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[3] The term "may" sets a "low standard" for an EIS or supplemental EIS: plaintiffs "need not show that significant effects will in fact occur," but only raise "substantial questions whether a project may have a significant effect." Klamath Siskiyou Wildlands Ctr. v. Booty, 468 F.3d 549, 562 (9th Cir. 2006); see infra note 4. Moreover, "it is the agency, not the environmental plaintiff, that has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions," and the project proponent that bears the responsibility to conduct the analysis of impacts; "fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559 (9th Cir. 2000) (emphasis added) (internal quotation marks omitted). Thus, while the ICA erroneously imposed an absolute rule against supplemental review absent a project change, appellees' additional arguments that the community groups have not shown significant impacts in this case equally miss the mark.

[4] This Court has consistently consulted NEPA as the model for HEPA. See, e.g., Citizens, 91 Hawai'i at 105, 979 P.2d at 1131; Sierra Club, 115 Hawai'i at 340-41, 167 P.3d at 333-34.

("EAs") and EISs must address, include "the action's technical, economic, social, and environmental characteristics." HAR §§ 11-200-10(4), -17(e)(3) (1996) (emphasis added). See also id. § 11-200-2 (1996) (defining "environment" as "inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action"). The ICA majority allowed for none of this, but rather strained to restrict its reading of the rule.

In addition, § 11-200-27 states unequivocally:

> A supplemental statement shall be warranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

(Emphasis added.) As stated above, "environmental impacts" are defined in relation to the environment and can increase based solely on changed context. Finally, if any doubt remained whether changed circumstances can require a supplemental statement, the rule expressly says so by requiring supplementation based on "new circumstances or evidence." The ICA majority's reading eliminates this language from the rules, contravening the "cardinal rule" that "no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the [rule]." State v. Gomes, 117 Hawai'i 218, 232, 117 P.3d 928, 942 (2008).[5] In sum, far from establishing an arbitrary bar against considering new circumstances or evidence, as the ICA majority maintained, the HEPA rules state the opposite, requiring agencies to consider situations when "new circumstances or evidence" produce an "essentially different action" with "different or likely increased environmental impacts not previously dealt with."

[5] See generally Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 454, 99 P.3d 96, 105 (2004) (recognizing administrative rules are interpreted in the same way as statutes).

C. The ICA Majority Opinion Negates HEPA's Underlying Purpose.

However straightforward the language of the rules may have appeared to the ICA majority, the Court "must read [the] language in the context of the entire [law] and construe it in a manner consistent with its purpose." Kahana Sunset, 86 Hawai'i at 71; 946 P.2d at 383. The "plain language" guides interpretation only insofar as the "administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result." Ponce, 105 Hawai'i at 454, 99 P.3d at 105. Indeed, "it is well settled that this court may depart from a plain reading of a [law] where a literal interpretation would lead to absurd and/or unjust results." Morgan v. Planning Dept., 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004).

This Court has consistently interpreted environmental laws, including HEPA, to uphold, and not undermine, their underlying purpose.[6] Particularly instructive is the Morgan case, where the Court looked beyond the plain language of the Coastal Zone Management Act ("CZMA") and upheld the law's purpose by holding that an agency issuing an Special Management Area ("SMA") Use permit (in that case, for a seawall that subsequently damaged the environment) has

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[6] See, e.g., Pearl Ridge Estates Community Ass'n v. Lear Sigler, Inc., 65 Haw. 133, 648 P.2d 702 (1982) (rejecting an interpretation that would circumvent HEPA review) (discussed infra); Sierra Club, 115 Hawai'i at 343, 167 P.3d at 336 (rejecting as "contrary to the expressly stated purpose and intent of HEPA" the artificial exemption of the Superferry project from review by considering the physical harbor improvements "in isolation"); Kahana Sunset, 86 Hawai'i at 70-72; 946 P.2d at 382-84 (rejecting county's exemption of project from review because without such review, "the legislative intent that potential effects be studied and the public notified is undercut"); Citizens, 91 Haw at 104-05, 979 P.2d at 1130-31 (requiring review by county agency "[t]o achieve the salutary objectives of HEPA").

See also Morgan, 104 Hawai'i at 185-86, 86 P.3d at 994-95 (discussed infra); Curtis v. Board of Appeals, 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999) (reviewing the purpose of the state Land Use Law, HRS ch. 205, and holding that "the wholesale inclusion of cellular telephone towers in agricultural districts as 'utility lines' under [the law] unreasonably expands the intended scope of this term and frustrates the state land use law's basic objectives of protection and rational development").

the authority to revoke, amend, or modify those permits. See 104 Hawai'i at 175, 86 P.3d at 984. The Court specifically rejected the lower court's literal interpretation of HRS § 205A-29 (2001), which states: "Action on the special management permit shall be final unless otherwise mandated by court order." Notwithstanding this language, the Court found no express bar against modification of permits. The Court stated:

> [W]hen viewing the statute in its entirety, the CZMA's primary purpose was to establish a regulatory scheme to protect the environment and natural resources of Hawai'i's shoreline areas. However, pursuant to the circuit court's interpretation ... the Planning Commission would need to file a court action each time a SMA Use permit needs modification. This interpretation is unreasonable and circumvents the Planning Commission's statutorily mandated authority under the CZMA. This court will not permit an interpretation of HRS § 205A-29 that produces such an absurd result.

Morgan, 104 Hawai'i at 186, 86 P.3d at 995.

Likewise, in this case, the ICA majority's interpretation of HEPA is unreasonable, contradicts the law's purpose, and produces an absurd result. The HEPA statute contains no express bar against supplementing previous EISs. Moreover, as discussed above, not only do the HEPA rules not expressly preclude consideration of changed circumstances in determining the need for a supplement, they expressly require a supplement based on potentially significant changed circumstances. HAR § 11-200-27.[7] The ICA majority opinion, however, eliminates any consideration of changed context, regardless of the potential significance of the impacts. This is absurd, and it directly undercuts HEPA's purpose of informed decision making and full

[7] The Environmental Council, the agency charged with rulemaking for HEPA, see Sierra Club, 115 Hawai'i at 306 n.7, 167 P.3d at 299 n.7, and thus entitled to deference in the exercise of that role, see Del Monte Fresh Produce (Hawai'i), Inc. v. ILWU, Local 142, 112 Hawai'i 489, 499-500, 146 P.3d 1066, 1076-77 (2006), properly enacted the rules in line with the statute's underlying purpose.

public disclosure of environmental and community impacts. See Unite Here!, 120 Hawai'i at 471-72, 209 P.3d at 1285-86 (Nakamura, J., dissenting).[8]

Along the same lines, in Pearl Ridge, this Court interpreted HEPA's requirement of an EA for any action using land classified as "conservation" under HRS ch. 205, see HRS § 343-5(a)(2) (1993), to require an EA also for a reclassification of land out of conservation. 65 Haw. at 134-35, 648 P.2d at 703-04. Quoting HEPA's statement of purpose in HRS § 343-1, the Court rejected a literal reading under which anyone "could, and would, avoid [the review] requirement entirely by simply applying . . . for a reclassification." Pearl Ridge, 65 Haw. at 134-35, 648 P.2d at 703-04.[9] Here, however, the ICA majority interpreted the HEPA rules to create such a loophole, such that a developer could, and would, avoid any further review simply by avoiding any substantive changes to the project (at least until after it has received all approvals). This may suit the purposes of individual parties, but in no way serves the public purpose of the law.

HEPA's purpose mirrors that of its federal counterpart, NEPA, see supra note 4. The U.S. Supreme Court has recognized that NEPA's "action-forcing" purpose dictates an implied requirement to supplement EISs to examine changes in environmental impacts. See Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 370-71 (1989). As the Court explained:

> It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

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[8] While the dissent raised an example of a hurricane transforming the area, the majority's ruling would preclude consideration of all kinds of information (e.g., uncovered toxic waste or sacred burials), at any time (decades or one day after EIS acceptance), not previously considered for whatever reason (new discovery or even a failure to disclose).

[9] The legislature later confirmed and codified this ruling in HRS § 343-5(a)(7) (1993).

Id. at 371.[10]

Indeed, the federal Council on Environmental Quality's guidance on NEPA states that "[a]s a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in [the rules] compel preparation of an EIS supplement." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, question 32, 46 Fed. Reg. 18026 (1981) (emphasis added). Here, almost 25 years have passed with no examination of the need for a supplement, and the ICA majority's ruling would allow such willful ignorance to extend indefinitely.

This NEPA authority only highlights that the ICA majority's interpretation of HEPA, allowing agencies to put on blinders to changed circumstances or new information, negates the law's purpose. If allowed to stand, agencies would never be required or even allowed to consider changes in a project's environment, no matter how potentially significant the environmental impacts. Moreover, under the ICA majority's reasoning, if the initial EIS or approval contained no "time condition," agencies will never consider updated information on potential impacts, no matter how much time passes and circumstances change.[11] The legislature and Environmental Council could not have intended to impose such a nonsensical blanket rule.

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[10] See also Friends of the Clearwater, 222 F.3d at 557 ("In view of [NEPA's] purpose, an agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis."); Idaho Sporting Congress v. Alexander, 222 F.3d 562, 566 n.2 (9th Cir. 2000) (recognizing that "NEPA imposes on federal agencies a continuing duty to supplement existing EAs and EISs in response to significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" (internal quotation marks omitted)).

[11] Even setting aside the ICA majority's arbitrary requirement of a "substantive change in the Project," its further assertion that no change in "timing" can occur absent an initial "timing condition" is a complete non-sequitur. The EIS in this case based its analysis on projected timeframes that passed years ago. See HAR § 11-200-26 (recognizing that an EIS is "qualified"

V. CONCLUSION

The wisdom of supplementing obsolete EISs, and the absurdity of barring such supplementation, are not legitimately in dispute. Even "[KRC] does not take issue with an argument that, as a matter of policy, EISs should have an end date," KRC's Ans. Br. at 1, n.2, although the issue here is not end dates for EISs, but simply meaningful, up-to-date EISs. The ICA majority, however, gravely erred by straining to establish a categorical rule that defeats, rather than upholds, HEPA's undisputed underlying purpose and ill-serves, rather than benefits, "all parties involved and society as a whole." Accordingly, for the reasons stated above and in the community groups' application, amici respectfully request this Court to grant certiorari and reverse the ICA majority's opinion.

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by various factors, including timing). An EIS based on outdated and incorrect information does not fulfill HEPA's purpose. Indeed, under the majority's reasoning, a developer is free to say anything in an EIS about its plans and the resulting impacts, yet later nullify the EIS at will as long as no specific "condition" exists.