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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

CENTER FOR BIOLOGICAL
DIVERSITY, CONSERVATION
COUNCIL FOR HAWAI'I, AND KŪPA'A
KUILIMA,

Plaintiffs,

vs.

DEPARTMENT OF PLANNING AND
PERMITTING, CITY AND COUNTY OF
HONOLULU, and HOST HOTELS &
RESORTS, L.P.,

Defendants.

) Civil No. 1CCV-26-0000219 (SMK)
) (Environmental Court)
)
) ORDER GRANTING PLAINTIFFS'
) MOTION FOR SUMMARY JUDGMENT
) (DKT. NOS. 39-40)
)
)
) Hearing
) Date: July 2, 2026
) Time: 10:00 a.m.
) Judge: Hon. Shirley M. Kawamura
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ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(DKT. NOS. 39-40)

On March 27, 2026, Plaintiffs Center for Biological Diversity, Conservation Council for Hawai'i, and Kūpa'a Kuilima (collectively, "**Plaintiffs**") filed their Motion for Summary Judgment as Docket Nos. 39-40 ("**Motion**"). On June 24, 2026, Defendant Department of Planning and Permitting, City and County of Honolulu ("**DPP**") filed its Memorandum in Opposition as Docket Nos. 61-144, and Defendant Host Hotels &

Resorts, L.P. (“**Host**”)¹ filed its Memorandum in Opposition as Docket Nos. 147-149 (collectively, “**Oppositions**”). On June 29, 2026, Plaintiffs filed their Combined Reply in Support of Motion as Docket No. 159 (“**Reply**”).

Plaintiffs’ Motion came on for hearing before the above-entitled Court on July 2, 2026, at 10:00 a.m. Mahesh Cleveland and Dru Hara appeared on behalf of Plaintiffs. Brad Saito appeared on behalf of DPP. Sharon Lovejoy and Maile Miller appeared on behalf of Host.

The Court, having reviewed the Motion, the Opposition, and the Reply, having heard the arguments of counsel at the hearing on the Motion, and being duly advised of the record and files herein and finding good cause therefor, rules as follows:

A. Background & Undisputed Facts

1. As summarized by the Hawai‘i Supreme Court in *Unite Here! Loc. 5 v. City & Cnty. of Honolulu*, 123 Hawai‘i 150, 155, 231 P.3d 423, 428 (2010) (“*Unite Here!*”), the original environmental impact statement (“**EIS**”) for the Turtle Bay Resort expansion project was prepared in 1985 and accepted by DPP’s predecessor on October 30, 1985. The proposed expansion included the construction of three new hotel buildings and over 2,000 condominium units. However, between 1985 and 2005, only some aspects of the project, including renovation of the existing hotel and golf course, and the addition of nine condominium units, were completed. “As of November 2005,

¹ As noted at the hearing on Host’s Motion to Dismiss (Dkt. 25), the parties are in agreement as to the dismissal of Host from this action, and the Court anticipates receipt of either a stipulation or a motion seeking proper relief (e.g., intervention or substitution of the proper party in interest). Dismissal of Host is effective upon filing of the written Order Granting in Part and Denying in Part Host’s Motion to Dismiss.

construction on the major components of the [p]roject, including the hotel rooms and the [remaining] condominium units, had not begun.” *Unite Here!* at 157, 231 P.3d at 430.

2. In November 2005, the prior Turtle Bay Resort owner and developer submitted to DPP a subdivision application seeking to restart the proposed resort expansion. After DPP determined that no supplemental EIS (“**SEIS**”) would be required, a coalition of advocacy groups filed suit, ultimately leading to the issuance of the Hawai‘i Supreme Court’s opinion in *Unite Here!*. There, the court held that “plaintiffs have clearly presented ‘new’ evidence that was not considered at the time the 1985 EIS was prepared and could likely have a significant impact on the environment[.]” and as such, a SEIS was required under the Hawai‘i Environmental Policy Act (“**HEPA**”). *Unite Here!* at 179, 231 P.3d at 452.

3. On October 13, 2013, pursuant to the Hawai‘i Supreme Court’s holding that a SEIS was required for restarting the Turtle Bay expansion project, DPP accepted the 2013 Final SEIS. The 2013 EIS addressed environmental impacts across an 851.9-acre Project Area stretching from Kawela Bay in the west to Kahuku Point and Marconi Road in the east (“**Project Area**”). See Dkt. 40, MSJ Exh. N; Dkt. 132, Exh. DPP-2 (Project Area Map, excerpted from SEIS at Vol I., ES-5).

4. The “Proposed Action” for the 2013 SEIS reduced the development density of the original resort expansion by over 60%. Dkt. 64, SEIS Vol. I at ES-4. The “Proposed Action” is also described in the SEIS summarily as follows:

- a. 2 new full-service hotels with a combined total of 625 units, which may be operated as time-share or traditional service hotels;

- b. 590 new Resort Residential Units, consisting of a combination of multi-family and single-family units;
- c. 160 Community Housing Units, in excess of the 59 units required, that will be priced to be affordable to residents of the Koʻolau Loa/North Shore region;
- d. Approximately 73 acres of park area distributed among five parks;
- e. A total of 12 new public shoreline access ways;
- f. An approximate 100-acre Punahoʻolapa Marsh wildlife preserve;
- g. Shoreline setbacks in excess of minimum requirements and ranging from 150 feet to 300 feet and resulting in a combined total of approximately 42 acres of setback area;
- h. A new resort entrance near Kawela Bay and a new lateral roadway (tentatively named Kaihalulu Drive) extending the length of the resort generally parallel to the shoreline;
- i. Improvements to Marconi Road and the eventual signalization of all three resort's intersections with Kamehameha Highway (Kaihalulu, Kuilima and Marconi);
- j. The renovation of the Fazio Golf Course to be combined with the existing Palmer Golf Course to create a 27-hole golf complex, with a new Golf Clubhouse;
- k. A new Equestrian Center to replace the existing facility;
- l. A network of interior pedestrian paths and equestrian trails;
- m. A Farmers' Market; and

- n. A new low-density commercial resort center called “The Gathering Place,” which will also host guests and regional visitors.

Dkt. 64, SEIS Vol. I at ES-4 & ES-6. The Project Area Map (Dkt. 132, Exh. DPP-2) identifies the different development sites for the various project components. As relevant to this case, the SEIS identifies the “H-1” development site (consisting of three parcels labeled H-1a, H-1b and “The Gathering Place”) as the location for a new hotel with 375 units and The Gathering Place. *Id.*

5. Pursuant to extensive settlement efforts, the prior owners of Turtle Bay Resort, the State of Hawai‘i, and various entities, including the Trust of Public Land, reached an agreement to (i) preserve approximately 568 acres of the former 2013 SEIS Project Area through a Conservation Easement, and (ii) allow the State to acquire various private parcels totaling approximately 53 acres at Kawela Bay, with a 65-year ground lease back to the owner of the Turtle Bay Resort from the Department of Land and Natural Resources (“**DLNR**”). See Dkt. 148, Host Exh. 2 (DLNR Staff Submittal dated Sept. 25, 2015); Dkt. 40, MSJ Exh. I (City and County Dept. of Housing and Land Management publication). The City and County of Honolulu additionally acquired roughly 7.5 adjacent acres at Kawela Bay in fee simple for use as a beach park. See Dkt. 148, Host Exh. 2 at 6, Exh. A (DLNR map of conserved land areas); Dkt. 40, MSJ Exh. I at 7; see *also* Dkt. 149, Host Exh. 7.

6. On October 23, 2015, the prior owner of the Turtle Bay Resort closed the series of transactions necessary to convey the fee simple parcels to the State and the

City, and to grant the Conservation Easement to the State over 568 acres in the former Project Area. Dkt. 133, Exh. DPP-3 at 2.²

7. Nearly ten years later, on August 7, 2025, counsel for Defendant Host and affiliated landowner North Shore Bay TRS Development LLC sent a Letter to DPP regarding development of the H-1 site, requesting confirmation that no further environmental review would be required under HEPA, Hawai'i Revised Statutes ("**HRS**") Chapter 343. Dkts. 133-134, Exh. DPP-3 ("**Developer Letter**"). After providing DPP with background information, the Letter described the current proposal for the H-1 site with assertions that development would be within the range of alternatives considered by the 2013 SEIS. Specifically, the Letter stated:

North Shore Bay is now considering a project on the following parcels: (i) Lot 6, TMK 5-7-006-029, net area of 7.869 acres; (ii) Lot 9, TMK 5-7-00 1-044, net area of 24.229 acres, and (iii) Lot 10-A, TMK 5-7-00 1-055, net area of 9.025 acres. **These parcels, totaling approximately 41 acres, are known as development site H-1 and are located adjacent to the existing Ritz-Carlton O'ahu Turtle Bay hotel.**

. . .

H-1 would potentially be developed with not more than 375 units, possibly as a condominium hotel, and operated primarily as a full-service hotel (the "*Hotel Units*"). In addition, conceptual plans for H-1 include facilities related to the Hotel Units such as a fitness center, spa, and retail and food and beverage components (the "*Ancillary Hotel Facilities*").

. . .

. . . [T]he proposed H-1 plan is within the range of alternatives considered by the FSEIS. . . . Under the [2013] FSEIS, the portion of the proposed action relative to H-1 was the planned development of 375 "Hotel Units."

² Although no party offered a copy of the Conservation Easement for the record, per Rule 201 of the Hawai'i Rules of Evidence, the Court will take judicial notice of the fact that the relevant Deed of Conservation Easement and Restriction of Development Rights was recorded Double System on October 23, 2015, in the Land Court as Doc. No. T-9426035, on Cert. No. 1,073,398, and in the Bureau of Conveyances as Doc. No. A-57740339.

...

We believe that the proposed H-1 plan (i) is a component of or is substantially similar to the action proposed in the FSEIS, (ii) is anticipated to have cumulative effects similar to those analyzed within the range of alternatives in the FSEIS, and (iii) was analyzed within the range of alternatives in the FSEIS. In addition, none of the nine triggers for environmental review under HRS § 343-5(a) would apply to the proposed H-1 plan. However, in the unlikely event that the proposed H-1 plan will require environmental review, we believe that the FSEIS would satisfy such a requirement.

Dkt. 133, Exh. DPP-3 at 3-7 (emphasis added).

8. On December 8, 2025, the Director of DPP issued a response Letter (**"Determination Letter"**) setting forth the following determination:

1. **To the extent the need for environmental review may be triggered by the proposed Development Site H-1, the Final Supplemental Environmental Impact Statement (SEIS), accepted by the DSPP on October 3, 2013, would satisfy such a requirement, and therefore no further environmental review under [HRS] Chapter 343 will be required; and**
2. The proposed Development Site H-1 is allowed under the Special Management Area (SMA) Permit (File No. 86/SMA-45), approved by City Council under Resolution No. 86-308, and therefore no new SMA permit will be required.

According to your letter, the proposal will consist of a new hotel, operated primarily as a full-service hotel. The hotel will include up to 375 units, fitness center, spa, retail, and eating establishments. The Development Site H-1 is comprised of TMKs 5-7-001: 044, which has a lot area of 28.67 acres, 5-7-001: 055, which has a lot area of 10.83 areas, and 5-7-006: 029 which has a lot area of 9.77 acres. The parcels are located in B-1 Community Business District and Resort District.

...

The Final SEIS also evaluated a proposal for a "full build-out alternative," which proposed a much more substantial build out than the current proposal. In this full buildout alternative, the proposed Development Site H-1 was referred to as H-3 and was identified as containing 530 units[.] Thus, the potential environmental impacts considered by the Final SEIS where [sic] much greater than the

environmental impacts of the current proposal of 350 units. Therefore, **we find that the current proposal:**

1. **Is a component of or is substantially similar to the action proposed in the Final SEIS;**
2. **Is anticipated to have direct, indirect, and cumulative effects similar to those analyzed within the range of alternatives in the Final SEIS; and**
3. **Was analyzed within the range of alternatives in the Final SEIS.**

Dkt. 135, Exh. DPP-4 at 1-2 (emphasis added).

9. On January 8, 2026, the State Office of Planning and Sustainable Development published DPP's determination in The Environmental Notice. Dkt. 40, MSJ Exh. K at 8. This suit followed.

B. Legal Standard on a Motion for Summary Judgment

10. “[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Ralston v. Yim*, 129 Hawai‘i 46, 55–56, 292 P.3d 1276, 1285–86 (2013); *Flores v. Rawlings Co., LLC*, 117 Hawaii 153, 158, 177 P.3d 341, 346 (2008) (quoting *Coon v. City & Cnty. of Honolulu*, 98 Hawaii 233, 244–45, 47 P.3d 348, 359–60 (2002)).

11. In determining whether a genuine issue exists, the Court must view the evidence—pleadings, depositions, answers to interrogatories, admissions on file, and affidavits—in “the light most favorable to the non-moving party.” *Id.*

12. Summary judgment “should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes

affirmatively that the adverse party cannot prevail under any circumstances.” *Goran Pleho, LLC v. Lacy*, 144 Hawai‘i 224, 236, 439 P.3d 176, 188 (2019) (quoting *Balthazar v. Verizon Hawaii, Inc.*, 109 Hawai‘i 69, 72, 123 P.3d 194, 197 (2005)).

C. Legal Standard on HEPA Violation Claim Premised on Failure to Require SEIS

13. When a court reviews an agency determination with regard to whether or not a SEIS is required, the court must apply the “rule of reason” and “arbitrary and capricious” standards of review. *Unite Here!* at 181, 231 P.3d at 454.

14. When applied to the adequacy of an EIS, the “rule of reason” standard means 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 been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. *Id.* (quoting *Price v. Obayashi Hawaii Corp.*, 81 Hawai‘i 171, 182, 914 P.2d 1364, 1375 (1996)).

15. Under the “arbitrary and capricious” standard, “a court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a ‘hard look’ at environmental factors.” *Id.*

D. Plaintiffs have demonstrated the absence of a genuine issue of material fact that DPP did not take a “hard look” at relevant factors in its determination

16. In this case, DPP’s December 8, 2025 Determination Letter did not demonstrate that DPP looked at how relevant circumstances have changed since its

acceptance of the 2013 SEIS. Rather, the Determination Letter is focused almost exclusively on the fact that the current development of H-1 does not contemplate building more than 375 units, which was one of the acceptable alternatives considered in the 2013 SEIS.

17. If there is “any change” in “size, scope, intensity, use, location, or timing, among other things” which “may have a significant effect,” the prior EIS will “no longer be valid” because “an essentially different action would be under consideration.” Haw. Admin. R. 11-200.1-30(a).

18. Supplementation is warranted “where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.” Haw. Admin. R. 11-200.1-30(b).

19. Even viewing the evidence in the light most favorable to the nonmoving parties, the challenged Determination Letter, on its face, did not take a “hard look” with respect to a change in *timing*, one of the factors enumerated in HAR § 11-200.1-30(a). The passage of roughly 12 years between the acceptance of the 2013 SEIS and the issuance of DPP’s 2025 Determination Letter is a substantive change in timing, yet the Determination Letter is silent as to what factors might have changed at the H-1 site in those 12 years.

20. At the hearing, Deputy Corporation Counsel asserted that the issue of whether the change in “timing” could have a significant effect under HAR § 11-200.1-30(a) was “close” because (1) the completion of the Proposed Action was projected for 2025, and (2) there was no “good cause” to brief the change in timing in the absence of public comments.

21. On the first point, the language of HAR § 11-200.1-30(a) does not specify exactly how far a project can deviate from projected development phases and timelines before a change in timing becomes substantive. In the instant case, however, the 2013 SEIS anticipated the start of construction in 2015, with completion of the entire Proposed Action projected for 2025. By the time DPP issued its Determination Letter on December 8, 2025, the entire original 2013 Proposed Action was anticipated to be nearly completed.³

22. On the second point, HAR § 11-200.1-30 is silent as to whether DPP may solicit public comments for the purpose of assisting the agency in determining whether supplementation of an existing EIS is warranted. Regardless, HAR § 11-200.1-30(b) puts an affirmative responsibility on all accepting authorities and approving agencies to make such a determination after taking a “hard look” at all appropriate factors mentioned in HAR § 11-200.1-30(a), including timing. The overarching purpose of HEPA is 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. § 343-1.⁴ That HAR § 11-

³ See Dkt. 64, SEIS Vol. I at ES-13 (stating that “all information” in the comparative quantitative summary of the Proposed Action and the Alternatives “is projected from 2014 through the year 2025”); *id.* at ES-8 (projecting cumulative and secondary impacts, including job creation and population growth, “[t]hrough 2025” or “by 2025.”); Dkt. 77, SEIS Vol. I at 3-31 to 3-33 (stating “[c]onstruction of the hotel and residential units . . . is currently planned to be phased over eleven (11) years, with groundbreaking in approximately 2015” and that “[t]he development phasing plan forecasts Hotel site H-1 . . . as [one of] the first sites to be developed.”).

⁴ HEPA, like NEPA, “expressly places the burden of compiling information on the agency so that the public and interested government departments can conveniently monitor and criticize the agency’s action.” *Kia’i Wai v. Dep’t of Water*, 151 Hawai’i 442, 460–61, 517 P.3d 725, 743–44 (2022) (quoting *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1073 (1st Cir. 1980)).

200.1-30 does not contain an express requirement that the agency solicit public commentary does not create “good cause” for the agency to omit any examination of substantive changes in size, scope, intensity, use, location, or timing, among other things.

23. Accordingly, Plaintiffs have demonstrated that there is no genuine issue of material fact whether DPP’s Determination Letter violated HEPA and was thus invalid. This is not because DPP arrived at the “right or wrong” substantive answer per se, but because it is undisputed that DPP’s decision was made in the absence of sufficient analysis as to how the substantive change in timing for the proposed action may or may not “have a significant effect.”⁵ As such, the Court respectfully finds that DPP’s determination was “arbitrary and capricious.”⁶

E. Regardless of DPP’s determination, supplementation of the 2013 SEIS is warranted

i. Change in Project Scope

24. Per *Unite Here! Loc. 5 v. PACREP LLC*, 157 Hawai‘i 442, 465, 580 P.3d 622, 645 (2025), this Court may further “address whether, under the rule of reason, the [2013 SEIS was] sufficient in addressing the environmental effects” of the current

⁵ See *Unite Here!* at 181, 231 P.3d at 454 (2010) (rejecting DPP’s “seemingly cursory consideration of whether a SEIS was warranted” as “arbitrary and capricious.”)

⁶ The Court further rejects DPP’s contention that its decision was not “arbitrary and capricious” due to a perceived “lack of authority over endangered species and the substantial protections afforded to endangered species under the state and federal endangered species acts.” See DPP Opp., Dkt. 61, at 17-19. As the Hawai‘i Supreme Court has repeatedly emphasized, “[i]f the fact that other laws and rules that facially appear to bear upon the environmental effects of an activity would exclude the activity from HEPA’s purview, then this would frustrate HEPA’s purpose of requiring agencies to appropriately consider environmental concerns in their decision-making process.” *Kia‘i Wai v. Dep’t of Water*, 151 Hawai‘i 442, 460, 517 P.3d 725, 743 (2022) (quoting *Umberger v. Dept. of Land & Nat. Res.*, 140 Hawai‘i 500, 518, 403 P.3d 277, 295 (2017)).

proposed development of H-1, and if not, “whether a new . . . EIS . . . must be prepared.”

25. DPP’s Determination Letter found that the current proposal for the H-1 site is “a component of or is substantially similar to the action proposed in the [2013] Final SEIS.” Dkt. 135, Exh. DPP-4 at 2. In this action, Plaintiffs argue that DPP’s assessment of the H-1 site as a “component” of the 2013 Proposed Action constituted improper segmentation. See Reply, Dkt. 159, at 2-3.

26. On the one hand, this case does not present a traditional “segmentation” violation of HEPA, where a developer has improperly isolated particular components of a larger project for environmental review,⁷ because the development of the H-1 site (including the new hotel site with 375 units and ancillary facilities comprising The Gathering Place) was originally contemplated as one component of the 2013 Proposed Action. Dkt. 76, SEIS Vol. I at 3-11; Dkt. 132, Exh. DPP-2.

27. Yet, it is precisely the reason *why* the H-1 site alone is now being proposed for development—rather than the original 2013 Project Area—which contradicts DPP’s finding that the proposed development of H-1 remains a mere “component” of the 2013 Proposed Action. It is undisputed that the H-1 site is now adjacent to both (i) approximately 568 acres of privately-owned lands subject to the Conservation Easement, and (ii) approximately 53 acres of conservation lands at

⁷ *E.g.*, *Kahana Sunset Owners Ass’n v. Cnty. of Maui*, 86 Hawai’i 66, 74, 947 P.2d 378, 386 (1997) (holding that the EA for a drainage system needed to address an entire residential development, even though only the drainage lines triggered HEPA); *Sierra Club v. Off. of Plan.*, 109 Hawai’i 411, 413, 416, 126 P.3d 1098, 1100, 1103 (2006) (holding that a development project triggered HEPA review because drinking water and sewage lines would eventually be installed under state land; the EA had to address “the environmental effects of the entire Project[,]” not just the water lines).

Kawela Bay that are now owned by the State or City and County of Honolulu. Both sets of circumstances exist specifically due to the commendable settlement efforts of all interested parties.⁸

28. In other words, though the design plans for the new hotel and The Gathering Place may not have changed, the *scope* of the proposed action *has* substantively changed. In other words, “an essentially different action [is now] under consideration” because of the subsequent designation of large parcels of adjacent lands for conservation. This significant change to the scope of the project not only required a “hard look” from DPP in the first place, but also constitutes “new circumstances” leading to “likely increased environmental impacts not previously dealt with,” warranting supplementation. Haw. Admin. R. § 11-200.1-30(a), (b).

29. HRS Chapter 198 defines conservation easements generally and provides a mechanism for their enforcement. Pursuant to HRS § 198-1, a “conservation easement” is “an interest in real property created by deed, restrictions, covenants, or conditions,” the purpose of which is to:

- (1) Preserve and protect land predominantly in its natural, scenic, forested, or open-space condition;
- (2) Preserve and protect the structural integrity and physical appearance of cultural landscapes, resources, and sites which perpetuate indigenous native Hawaiian culture;
- (3) Preserve and protect historic properties [. . .]; or
- (4) Preserve and protect land for agricultural use.

Haw. Rev. Stat. § 198-1.

⁸ The Developer Letter also recounted these facts for DPP’s review. Dkt. 133 at 2, Dkt. 134 at Exh. 8; see *also* Dkt. 148, Host Exh. 2 at Exh. A; Dkt. 149, Host Exh. 7.

30. All conservation easements are “perpetual in duration,” but the “particular characteristics of a conservation easement shall be those granted or specified in the instrument creating or transferring the easement.” Haw. Rev. Stat. § 198-2(b), (d).

31. Here, the 2013 SEIS identified the anticipated future Conservation Easement as an “unresolved issue,” acknowledging only that “[a] conservation easement has been proposed to protect the long-term use of the resort’s agricultural lands *mauka* of Kamehameha Highway,” Dkt. 64, SEIS Vol. 1 at ES-10.

32. The 2013 SEIS did not—because it could not—account for all the specific ways in which management of the lands now subject to the Conservation Easement must meet the requirements of the written instrument that created the easement pursuant to HRS Chapter 198. Nor could the SEIS have accounted for how construction, development, and future use of the adjacent H-1 site may or may not impact the land uses now specifically protected by the terms of the Conservation Easement, whether those impacts are considered primary, secondary, or cumulative. See HAR § 11-11-200.1-2 (defining “effects” or “impacts”).

33. The Court acknowledges that the creation of the Conservation Easement was the result of good faith collaboration and stewardship efforts from all involved. That the Conservation Easement exists at all evidences that the lands subject thereto and their natural resources are exceptional and worthy of special protection and preservation efforts, in perpetuity. Requiring further review of the proposed development in light of these preservation efforts is consistent with the purpose of HEPA to “ensure that environmental concerns are given appropriate consideration in decision making,” 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.” Haw. Rev. Stat. § 343-1; *Unite Here!* at 180, 231 P.3d at 453.

ii. Potential Impact on Hawaiian Yellow-faced Bees (Nalo Meli Maoli)

34. Moreover, at this stage of the action, Plaintiffs have raised “substantial questions” as to whether development at H-1 “may have a significant effect” on endangered Hawaiian yellow-faced bees, or nalo meli maoli.

35. Plaintiffs’ Motion is supported by uncontroverted expert opinion testimony submitted by Dr. Jason Graham, a leading researcher of Hawaiian yellow-faced bees, whose familiarity with the various species, recent survey work, and published scientific research reliably evidence all of the following:

a. All species of nalo meli maoli “are highly susceptible to habitat loss, reduction, and alteration.” Graham Dec. ¶ 6.

b. Nalo meli maoli have adapted to coastal strand habitats like those found along the Kuilima coast. Graham Dec. ¶ 6, 8. Per the U.S. Fish and Wildlife Service, “[n]ative coastal habitat is one of the rarest habitats on each island.” Dkt. 40, Exh. D at 30.

c. From December 2014 to January 2015, the Turtle Bay research site for Dr. Graham’s study of nest architecture “consisted of a few small *H. anthracinus* populations nesting and foraging within a ~20m patch of habitat populated by small patches of tree heliotrope (*H. foertherianum*) and naupaka (*S. taccada*), growing on a rock jetty adjacent to the resort beach.” Dkt. 39, Exh. B at 363.

d. As of Dr. Graham's August 2025 survey of the coastal strand habitat of Ko'olaupia, the nalo meli maoli "seem to have spread from their known population on the jetty to surrounding coastal habitat." Dkt. 39, Exh. C, PDF 60. "*Hylaeus anthracinus* populations seemed to have shifted in recent years. . . found for the first time during this survey in areas where they were not observed previously despite being monitored frequently during 2014-2018 research." *Id.*

e. Dr. Graham personally observed nalo meli maoli and reported his sightings at multiple locations throughout the original 2013 Project Area, including locations nearer to the H-1 site than were previously documented. *Id.* at PDF 67-68.

f. "Due to the small size and elusive nature of these bee species, it is certain that they occur in this area to a much greater extent than [Dr. Graham] was able to observe during [his] brief five-day survey." Graham Dec. ¶ 13.

g. "Because of their small size and tendency to nest in dry branches or coral rubble, development activities and even routine landscape maintenance are likely to cause irreparable harm to Hawaiian yellow-faced bees and their habitat, including through habitat destruction or modification and fragmentation of inhabited areas." *Id.* ¶ 14.

h. "Construction-related dust can contaminate bee food sources by settling on flowers, and can carry toxic substances, which ultimately can contaminate pollen and nectar collected by bees. The use of dust barriers can physically impede bee movement, foraging, and navigation, and installation of solid or continuous fencing risks blocking bee movement to nesting sites, which can lead to egg mortality." *Id.* ¶ 15.

i. “The use of pesticides or herbicides should be strictly limited or avoided altogether, as the use of such products harms bees directly and can reduce the abundance and diversity of flowering plants essential for bee foraging and nesting. If vegetation management is necessary, manual or mechanical methods such as hand-pulling of weeds or careful mowing outside of flowering seasons is less harmful than chemical treatment.” *Id.* ¶ 16.

36. DPP concedes that the 2013 SEIS never addressed Hawaiian yellow-faced bees specifically. Opp., Dkt. 61, at 7. DPP points out, however, that the SEIS does address the coastal strand habitat in the Project Area due to its importance for native plants, and the SEIS identifies how impacts to the coastal strand will be mitigated, particularly through increased shoreline setbacks. *E.g.*, Dkt. 80, Vol. 1 at 5-2 (stating that the “overall site coverage of vegetation within the SEIS Lands will be reduced proportionate to the extent of new development footprints[.]” but this “is not considered to be a significant adverse impact because the proposed development areas . . . are located well inland from the most sensitive plant areas (the coastal strand).”); Dkt. 84, Vol. 1 at 5-104 (“the Coastal Strand is generally located within proposed shoreline setback areas.”). The SEIS further identifies anticipated impacts to the coastal strand from increased human activity, unauthorized entry of off road vehicles, vegetation disturbance, pesticide and fertilizer use, erosion, and fugitive dust. See Dkt. 61 at 7-12 (providing SEIS pincites).

37. The identified mitigation measures, however, were made without the benefit of Dr. Graham’s new testimony that “even routine landscape maintenance” can cause “irreparable harm” to Hawaiian yellow-faced bees. Graham Dec. ¶ 14. Further,

though the SEIS specifically identified fugitive dust as an environmental impact that could be mitigated through compliance with existing regulations, including the “use of silt fencing and screens,” Dkt. 80, Vol. 1 at 5-2, even the well-intentioned installation of dust barriers “can physically impede bee movement, foraging, and navigation, and installation of solid or continuous fencing risks blocking bee movement to nesting sites, which can lead to egg mortality.” Graham Dec. ¶ 15. This is sufficient new evidence that has “brought to light different or likely increased environmental impacts not previously dealt with.” Haw. Admin. R. 11-200.1-30(b).

38. Given the uncontroverted evidence that nalo meli maoli have been found in the 2013 Project Area—and closer to the H-1 site than previously realized—Plaintiffs are not required, on their HEPA violation claim, to go further and prove that nalo meli maoli nest at or otherwise frequent the H-1 site. Not only did DPP have the burden of compiling this information in the first instance, *Kia’i Wai v. Dep’t of Water*, 151 Hawai’i at 460–61, 517 P.3d at 743–44, but per *Unite Here!*,

the phrase “may have a significant effect” as used in HEPA means “whether the proposed action will ‘likely’ have a significant effect on the environment.” *Kepo’o v. Kane*, 106 Hawai’i 270, 289, 103 P.3d 939, 958 (2005) (construing HRS § 343–5(c)). Further, the United States Court of Appeals for the Ninth Circuit has held that, under the aforementioned standard, plaintiffs “need not show that significant effects will in fact occur” but instead need only “raise [] **substantial questions whether a project may have a significant effect** [].” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir.2006) (underscored emphasis in original) (bold emphasis added).

Unite Here! at 178, 231 P.3d at 451 (footnote omitted).

39. Here, even viewing the evidence in the light most favorable to the nonmoving parties, Plaintiffs have demonstrated that nalo meli maoli are not only found in the 2013 Project Area but have an increased presence as of 2025, having been

sighted in areas where they were not previously observed despite frequent research monitoring. Dkt. 39, Exh. C, PDF 60. Even if the bees have not yet been sighted at H-1 specifically, on this record, Plaintiffs have shown that development of the H-1 site “may have a significant effect” within the meaning of HEPA, because it is more likely than not⁹ that such development will have impacts on the nalo meli maoli in the surrounding area, which were not previously considered and addressed by the 2013 SEIS.¹⁰

40. Therefore, supplementation of the SEIS is warranted as a matter of law.

F. Order

Based on the foregoing, IT IS ORDERED, ADJUDGED, and DECREED:

41. Plaintiffs’ Motion for Summary Judgment is GRANTED.

42. DPP’s Determination Letter was “arbitrary and capricious,” in violation of HEPA, because the agency’s decision does not demonstrate that DPP took the requisite

⁹ The *Unite Here!* court noted that “[l]ikely is a word of general usage and common understanding, broadly defined as of such nature or so circumstantial as to make something probable and *having better chance of existing or occurring than not.*” *Unite Here!* at 178 n. 22, 231 P.3d at 451 n. 22 (emphasis in original) (quoting *Kepo’o v. Kane*, 106 Hawai’i 270, 289 n. 31, 103 P.2d 939, 958 n. 31 (2005)).

¹⁰ The Court does not reach the same conclusion, *on this record*, as to the Hawaiian monk seal or the Laysan albatross, for the following reasons. As to the monk seal, the SEIS identified unavoidable impacts to monk seals and recommended mitigation measures, Dkt. 148, Exh. 4, and Plaintiffs have not shown how the updated designation of critical habitat alone—in the absence of any evidence of increased seal presence at H-1—goes beyond what the SEIS already considered. As to the Laysan albatross: (1) the SEIS identified threats to water birds from increased human activity, especially night lighting, and recommended mitigation measures; Dkt. 79, SEIS Vol I at 4-20, Dkt. 80, SEIS Vol I at 5-4 & 5-5; (2) the subsequently established albatross nesting colony at Kahuku Point is well beyond the H-1 site; and (3) even assuming that impacts from increased human activity and night lighting at H-1 would affect the colony at Kahuku Point, Plaintiffs have not shown how the mitigation measures already recommended in the SEIS fail to address such issues in ways not previously considered.

This conclusion does *not*, however, preclude DPP from considering new circumstances and new evidence as to Hawaiian monk seals or Laysan albatross on remand.

“hard look” in reaching its decision that no further environmental review was required. Therefore, DPP’s determination is invalid.

43. Supplementation of the 2013 SEIS is further warranted under HAR § 11-200.1-30, because:

- a. Significant changes in the *timing* of the proposed action after the passage of roughly 12-13 years have not been addressed.
- b. Significant changes in the *scope* of the proposed action due to the creation of the Conservation Easement and the transfers of adjacent fee-owned parcels to the State and the City have not been addressed.
- c. The increased presence of Hawaiian yellow-faced bees, or nalo meli maoli, in the area surrounding H-1 constitutes “new circumstances or evidence” which has “brought to light different or likely increased environmental impacts not previously dealt with.” Haw. Admin. R. 11-200.1-30(b).

44. This matter shall be REMANDED to DPP for preparation and consideration of the required supplemental EIS.

45. On remand, DPP must ensure that the supplemental statement addresses the above issues *at minimum*. In other words, this ruling is not meant to limit the supplemental statement to further consideration *only* as to the change in timing, the change in scope considering the Conservation Easement, and the Hawaiian yellow-faced bees. Per HAR § 11-200.1-30(c):

The contents of the supplemental EIS shall be the same as required . . . for [an] EIS and may incorporate by reference unchanged material from the same; however, in addition, **it shall fully document the proposed changes from the original EIS, including changes in ambient conditions or available information that have a bearing on a proposed action or its impacts**, the positive and negative aspects of

these changes, and shall comply with the content requirements of subchapter 10 as they relate to the changes.

Haw. Admin. R. § 11-200.1-30(c) (emphasis added).

DATED: Honolulu, Hawai'i, July 14, 2026.

/s/ Shirley M. Kawamura



Judge of the Above-Entitled Court