



TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	QUESTIONS PRESENTED.....	1
III.	STATEMENT OF THE CASE.....	1
IV.	STANDARD OF REVIEW .....	4
V.	THE CIRCUIT COURT ERRED IN RULING THAT KDOW COMPLIED WITH HEPA.....	5
A.	KDOW’s EA Violates HEPA Because It Fails To Consider Secondary Effects. ....	6
1.	KDOW Did Not Analyze the Secondary Effects of the Kapaia Water Main .....	6
2.	KDOW’s Arguments Against Timely Review of the Project’s Secondary Effects Lack Merit. ....	8
B.	KDOW’s Failure to Make Key Documents Available to the Public Contravened HEPA’s Purposes. ....	10
VI.	THE CIRCUIT COURT ERRED IN RULING THAT KDOW COMPLIED WITH THE HAWAI‘I CONSTITUTION.....	11
VII.	CONCLUSION.....	12

TABLE OF AUTHORITIES

**PAGE(S)**

**HAWAII CASES**

*‘Ohana Pale Ke Ao v. Bd. of Agric.*,  
118 Hawai‘i 247, 188 P.3d 761 (Ct. App. 2008) .....9

*In re Gas Co.*,  
147 Hawai‘i 186, 465 P.3d 633 (2020).....11, 12

*Kahana Sunset Owners Ass’n v. County of Maui*,  
86 Hawai‘i 66, 71, 947 P.2d 378, 383 (1997).....8

*Ka Pa ‘akai O Ka ‘Āina v. Land Use Comm’n*,  
94 Hawai‘i 31, 7 P.3d 1068 (2000).....11

*Kauai Springs, Inc. v. Planning Comm’n*,  
133 Hawai‘i 141, 324 P.3d 951 (2014).....5, 11

*Sierra Club v. Dep’t of Transp.*,  
115 Hawai‘i 299, 167 P.3d 292 (2007).....4, 5, 6, 7

*Umberger v. Dep’t of Land & Nat. Res.*,  
140 Hawai‘i 500, 403 P.3d 277 (2017).....8

*In re Waiāhole Ditch Combined Contested Case Hr’g*,  
94 Hawai‘i 97, 9 P.3d 409 (2000).....11

**FEDERAL CASES**

*Barnes v. U.S. Dept. of Transp.*,  
655 F.3d 1124 (9th Cir. 2011) .....7

*Ocean Advocates v. U.S. Army Corps of Eng’rs*,  
402 F.3d 846 (9th Cir. 2005) .....7

*San Juan Citizens All. v. Bureau of Land Mgmt.*,  
326 F.Supp.3d 1227 (D.N.M. 2018) .....10

*WildEarth Guardians v. Montana Snowmobile Ass’n*,  
790 F.3d 920 (9th Cir. 2015) .....10

**HAWAII REVISED STATUTES**

HRS § 174C-3 .....12

HRS Ch. 343 .....9

HRS § 343-1 .....	5
<b>HAWAI‘I ADMINISTRATIVE RULES</b>	
HAR § 11-200-2 .....	5
HAR § 11-200-12 .....	6, 8
HAR § 11-200-13(b).....	9
HAR § 13-169-45 .....	9
<b>HAWAI‘I CONSTITUTIONAL PROVISIONS</b>	
Hawai‘i Constitution article XI, § 1.....	11
Hawai‘i Constitution article XI, § 7.....	11
Hawai‘i Constitution article XII, § 7 .....	11
<b>OTHER AUTHORITIES</b>	
Hawai‘i Rules of Evidence, Rule 201.....	2
40 C.F.R. § 1508.8 (1978) .....	7
Restatement (Second) of Torts § 850A cmt. c (1979) .....	12

## I. INTRODUCTION

Amici curiae Hui Ho‘opulapula Nā Wai o Puna and Sierra Club (collectively, “Amici”) submit this brief in support of Appellant Kia‘i Wai o Wai‘ale‘ale’s (“Kia‘i Wai’s”) appeal of the Circuit Court of the Fifth Circuit’s summary judgment rulings in favor of Appellee County of Kaua‘i, Department of Water (“KDOW”). As further discussed below, the circuit court erred for at least three reasons:

- First, KDOW violated the Hawai‘i Environmental Policy Act (“HEPA”), Hawai‘i Revised Statutes (“HRS”) Chapter 343, when it issued an environmental assessment (“EA”) that completely ignored the secondary effects that its proposed pipeline may have on the source streams that supply the Līhu‘e municipal water system. *See* Part V(A).
- Second, KDOW violated HEPA’s purpose and Kia‘i Wai’s and the public’s procedural rights by relying on documents that were unavailable to the public, in making its finding of no significant impacts (“FONSI”). *See* Part V(B).
- Finally, KDOW breached its duties under the Hawai‘i Constitution by ignoring the impacts that increasing transmission capacity into the Līhu‘e system may have on public trust resources and Native Hawaiian rights. *See* Part VI.

Given these fundamental legal errors, Amici request that this Court reverse the circuit court and direct it to enter summary judgment in favor of Kia‘i Wai on its claims that KDOW’s environmental review violated HEPA and the Hawai‘i Constitution.

## II. QUESTIONS PRESENTED

- A. Did the circuit court err by ruling that KDOW’s environmental assessment and FONSI satisfy HEPA’s procedural and informational requirements?
- B. Did the circuit court err by ruling that KDOW complied with its constitutional duties to protect public trust water resources?

## III. STATEMENT OF THE CASE

Amici briefly highlight the following key facts. Installation of the proposed 18” Kapaia water main will facilitate the transfer of water from Wailua and Hanamā‘ulu Streams for consumption in KDOW’s Līhu‘e service area. Record on Appeal Vol. 1 (“RA1”) Dkt. 18 at 205;

Dkt. 19 at 265; FEA at 36, 443.<sup>1</sup> KDOW’s EA sets forth the following facts in support of the project:

- In 1994, Amfac/JMB Hawaii, Inc.’s Līhu‘e-Hanamā‘ulu Master Planned Community (“Līhu‘e Development Plan”) proposal received . . . Land Use Commission approval.
- Grove Farm Company, Inc. (“Grove Farm”), as the successor in interest to Amfac/JMB Hawaii, Inc., is required to participate in the funding and development of water source, storage, and transmission facilities for the Līhu‘e Development Plan.
- In 2009, Kodani & Associates Engineers, LLC prepared the Līhu‘e-Hanamā‘ulu Master Planned Community Water Master Plan (“Water Master Plan”) to address the water requirements of the Līhu‘e Development Plan.
- The Water Master Plan identified a decrease in system pressures and flows as a result of the Līhu‘e Development Plan unless transmission and distribution improvements were provided.
- The proposed [Kapaia water main] is necessary to address this capacity limitation.

RA1 Dkt. 18 at 180-81; FEA at 11-12.

During the comment period, Kia‘i Wai and other members of the public expressed concern that increasing transmission capacity in the Līhu‘e system could detrimentally affect source streams and interfere with constitutionally protected Native Hawaiian rights. For example, Sustainable Resources Groups International, Inc. (“SRGII”) submitted a letter on behalf of Kia‘i Wai noting the EA did not provide sufficient information for the public to verify KDOW’s conclusion that the project will not increase withdrawal of water from source streams.

RA1 Dkt. 18 at 221; FEA at 361. SRGII also requested the hydraulic analyses supporting

---

<sup>1</sup> The RA is divided between several locations. The two volumes filed with the Intermediate Court of Appeals (“ICA”) are cited as “RA1” and “RA2.” Additional portions of the record filed with the Circuit Court that were not transmitted to the ICA are cited herein as “5CC.” The final EA (“FEA”), complete with exhibits and appendices, is not part of the RA, but is appropriately subject to judicial notice under Hawai‘i Rules of Evidence, Rule 201, because its contents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Citations to the online FEA are to the electronic page number, with a parallel citation to the RA when available. The FEA is available online at: [http://oeqc2.doh.hawaii.gov/\\_layouts/15/start.aspx#/EA\\_EIS\\_Library/Forms/AllItems.aspx#InplviewHashab4a558e-f8f6-4ea9-94b5-523258e1eeaa=FilterField1%3DIsland0-FilterValue1%3DKauai](http://oeqc2.doh.hawaii.gov/_layouts/15/start.aspx#/EA_EIS_Library/Forms/AllItems.aspx#InplviewHashab4a558e-f8f6-4ea9-94b5-523258e1eeaa=FilterField1%3DIsland0-FilterValue1%3DKauai).

KDOW's conclusion that the project is necessary to relieve pressure in the system. RA1 Dkt. 18 at 220, 221; FEA at 360, 361.<sup>2</sup>

In response to SRGII, KDOW stated that the hydraulic analyses requested by SRGII are "included by reference only," but it did not provide the studies or indicate where and how the studies could be publicly accessed. RA1 Dkt. 18 at 223, 225, 226; FEA at 363, 365, 366.

Concerning protection of source streams, KDOW referred SRGII to its agency consultation with the Commission on Water Resource Management ("CWRM"), RA1 Dkt. 18 at 226; FEA at 366, which consisted of a "Memo to File" noting that KDOW spoke with CWRM staff. FEA at 118.

Bridget Hammerquist, co-founder of Kia'i Wai, submitted comments attaching minutes from KDOW's December 2009 and January 2010 meetings. RA1 Dkt. 18 at 227; FEA at 371. The minutes concern Grove Farm's plans to increase potable water output from the Waiahi surface water treatment plant ("SWTP") by up to 2.0 million gallons per day ("mgd"). In the December meeting, both KDOW and Grove Farm opined that increasing transmission capacity into the Lihue system is necessary to expand the plant.<sup>3</sup> At the December meeting, KDOW also questioned whether the capacity of the Waiahi SWTP can be expanded based on existing capacity in the Kapaia reservoir (*i.e.*, without additional stream diversions), and requested that Grove Farm complete a flow-duration study. RA1 Dkt. 19 at 270-72; FEA at 380-82, 392-94.

---

<sup>2</sup> DHHL also submitted comments raising concerns with the impacts that diversion into the Lihue system may have on DHHL's downstream Wailua landholdings. FEA at 133, 443. DHHL also flagged for KDOW that water diversions may affect the exercise of traditional and customary practices in the Wailua watershed. *Id.* at 136-37.

<sup>3</sup> *See, e.g.*, RA1 Dkt. 19 at 272; FEA at 384 (minutes noting Grove Farm's statement that "in order to expand this plant . . . they need to install this line now"); FEA at 389 (minutes noting KDOW's statement that "they knew if they were to expand the plant, they would have to put in the Ehiku line to address the pressures and the velocity going down that line on Maalo Road").

The following month, KDOW approved Grove Farm’s request to expand the plant, without any record that Grove Farm had prepared the requested study. 5CC Dkt. 42 at 42; FEA at 421.

In responding to Ms. Hammerquist, KDOW did not address whether installation of the Kapaia water main is necessary for Grove Farm to expand the Waiahi SWTP. Instead, KDOW emphasized that the “scope” of the project is limited to the pipeline. RA1 Dkt. 18 at 234; FEA at 447. As with the SRGII response, KDOW referred Mrs. Hammerquist to extrinsic documents, RA1 Dkt. 18 at 234, 238, 244; FEA at 447, 451, 457, that were not readily available to the public for review. RA1 Dkt. 19 at 263.

On March 12, 2018, the same day the comment period closed, KDOW transmitted its Final EA and FONSI to the Office of Environmental Quality Control. RA1 Dkt. 18 at 170; FEA at 1. In a one-page “Secondary and Cumulative Impacts” section, the EA acknowledges without any further analysis that: “[I]ncreasing the size of the pipe, may result in the availability of additional transmission capacity. *Such additional capacity would be available to future development.*” RA1 Dkt. 18 at 207; FEA at 38 (emphasis added).

During summary judgment briefing, Kia‘i Wai’s expert hydrologist submitted a declaration testifying that installation of the Kapaia water main will increase transmission capacity between the Waiahi SWTP and the Līhu‘e system from 3.05 million gallons per day to 5.41 million gallons per day, an increase of 2.36 million gallons per day or 78%—all of which was factually undisputed. 5CC Dkt. 42 at 31. The hydrologist also submitted a permitting document indicating that expansion of the Waiahi SWTP is pending. 5CC Dkt. 42 at 31, 45, 49.

#### IV. STANDARD OF REVIEW

This Court reviews the circuit court’s summary judgment ruling de novo. *Sierra Club v. Dep’t of Transp.*, 115 Hawai‘i 299, 312, 167 P.3d 292, 305 (2007) (“*Superferry*”). On appeal of an agency determination under HEPA, the “appropriate standard of review depends on the

specific question under consideration.” *Id.* at 315, 167 P.3d at 308. Whether or not KDOW followed HEPA procedures and considered the appropriate factors in reaching its FONSI—namely the Kapaia water main’s secondary effects—are *questions of law* this court reviews de novo. *See id.* Questions of constitutional law require the Court to “exercis[e] its own independent judgment based on the facts of the case” under the right or wrong standard. *Kauai Springs, Inc. v. Planning Comm’n*, 133 Hawai‘i 141, 165, 324 P.3d 951, 975 (2014).

V. THE CIRCUIT COURT ERRED IN RULING THAT KDOW COMPLIED WITH HEPA

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.” HRS § 343-1. To facilitate informed agency decision-making, an EA must be prepared “at the earliest practicable time to determine whether an environmental impact statement shall be required.” *Id.* § 343-5(b). An environmental impact statement “shall be required” if, after preparing an environmental assessment, an agency “finds that the proposed action may have a significant effect on the environment.” *Id.* § 343-5(c)(4). In making a significant effects determination, an agency must consider “every phase of a proposed action, the expected consequences, **both primary and secondary**,<sup>[4]</sup> and the cumulative as well as the short-term and long-term effects of the action.” Hawai‘i Administrative Rules (“HAR”) § 11–200–12 (1996) (emphasis added).

---

<sup>4</sup> Secondary impacts are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” including “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” HAR § 11-200-2 (1996).

As discussed below, KDOW's EA and FONSI violate HEPA for at least two reasons. First, KDOW failed to consider the secondary effects of the project, HAR § 11-200-12; and second, KDOW contravened HEPA's purposes of information disclosure and transparency, by refusing to make publicly available numerous key documents upon which KDOW's EA and FONSI purported to rely.

A. KDOW's EA Violates HEPA Because It Fails To Consider Secondary Effects.

KDOW's EA is deficient for failure to consider secondary effects of the project, *see supra* note 4, consistent with HEPA law establishing that a project that accommodates expansion of existing operations or facilitates future growth requires examination of the environmental effects of these secondary impacts. Further, KDOW's various fallback arguments for evading review of the project's secondary effects lack merit.

1. KDOW Did Not Analyze the Secondary Effects of the Kapaia Water Main

Hawai'i case law is clear that HEPA analysis that turns a blind eye to secondary impacts is erroneous as a matter of law. In *Superferry*, this Court rejected the state Department of Transportation's exemption determination because it was "studiously restricted" to the physical improvements to Kahului harbor and ignored the potential environmental impacts of interisland ferry operations that the harbor upgrades would accommodate. 115 Hawai'i at 341, 167 P.3d at 334. Here, installation of the Kapaia water main will accommodate expanded operations at the Waiahi SWTP of an additional 2.0 million gallons in potable water per day, yet the EA completely ignores how these expanded operations may affect source streams that supply water to the plant. Instead, just as in *Superferry*, the EA focuses studiously and narrowly on the environmental effects in the direct physical path of the pipeline. KDOW's failure to consider reasonably foreseeable secondary effects of the proposed pipeline is the same error this Court found fatal in the *Superferry* case.

While the record indicates Grove Farm’s plans to expand the Waiahi SWTP, even apart from this plant expansion, the Kapaia water main will expand the capacity of the Līhu‘e system by 2.36 mgd or 78 percent, which in itself requires analysis of growth-inducing secondary impacts under HEPA. 5CC Dkt. 42 at 31. In *Barnes v. U.S. Dept. of Transp.*, 655 F.3d 1124 (9th Cir. 2011),<sup>5</sup> the Ninth Circuit rejected an EA because the agencies could not “point to anything in the record showing that they in fact considered the possibility that expanding [airport] capacity would lead to increased demand and increased aircraft operations.” *Id.* at 1134. The court emphasized that: “even if the *stated* purpose of the project is to increase safety and efficiency, the agencies *must analyze the impacts* of the increased demand attributable to the additional runway as *growth-inducing effects*.” *Id.* at 1139 (emphasis added).<sup>6</sup> Here, KDOW not only failed to consider the possibility or eventuality of such growth-inducing effects, but it also explicitly rejected any such consideration, despite acknowledging in the EA that the additional pipeline capacity “would be available to future development.” RA1 Dkt. 18 at 207; FEA at 38.

As in *Barnes*, KDOW must analyze the secondary effects of increasing overall transmission capacity in the Līhu‘e system, and not conveniently ignore such effects by declaring that the project’s purpose is only to reduce hydraulic pressure and increase redundancy, and not expand transmission capacity. 655 F.3d at 1139. It is the agency’s burden to show that it took secondary effects into account and had a valid basis for any determination that such secondary effects will not be significant. *See id.* at 1134. Here, KDOW did nothing to analyze whether

---

<sup>5</sup> Hawai‘i courts regularly consult case law on HEPA’s federal counterpart, the National Environmental Policy Act (“NEPA”). *See Superferry*, 115 Hawai‘i at 306, 167 P.3d at 299. NEPA law has historically referred to “indirect” effects, which is equivalent to “secondary” effects under HEPA. *See* 40 C.F.R. § 1508.8 (1978).

<sup>6</sup> *See also Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 870 (9th Cir. 2005) (holding agency violated NEPA by failing to analyze a potential increase in vessel traffic and increased risk of oil spills induced by harbor expansion).

increasing transmission capacity will enable the expanded capacity of the Waiahi SWTP or any other increase in diversions of the source waters of Wailua and Hanamā‘ulu Streams. Instead, KDOW willfully ignored the issue, after providing a one-line acknowledgment that such secondary effects will in fact occur. RA1 Dkt. 18 at 207; FEA at 38.

Because KDOW’s EA fails to consider secondary effects of the Kapaia water main as required by HEPA’s implementing regulations, HAR § 11-200-12, and pertinent case law, the EA and the FONSI are void as a matter of law.

2. KDOW’s Arguments Against Timely Review of the Project’s Secondary Effects Lack Merit.

In arguing its summary judgment motions to the circuit court, KDOW variously argued that environmental review can be postponed, punted to another agency, or avoided based on undisclosed documents. Each of these spurious legal arguments fails.

First, KDOW argued that “theoretical impacts” such as increased water withdrawals were not “ripe” for adjudication by the circuit court. RA2 Dkt. 30 at 169; 5CC Dkt. 44 at 9-10. Ripeness is a separate judicial doctrine with no legal relevance to HEPA’s requirements, which mandate that environmental review must address all impacts, including the secondary impacts discussed above, “at the earliest practicable time.” *Kahana Sunset Owners Ass’n v. County of Maui*, 86 Hawai‘i 66, 71, 947 P.2d 378, 383 (1997) (quoting HRS §§ 343-5 (1993)).

Second, KDOW argued that Kia‘i Wai should raise any concerns related to stream water diversions with CWRM, rather than through the environmental review process. 5CC Dkt. 61 at 21:13-22:77 (Sept. 18, 2019). This Court has already rejected such arguments that the existence of other environmentally protective laws relieves an agency of its duty under HEPA to examine the environmental effects of its actions. *See Umberger v. Dep’t of Land & Nat. Res.*, 140 Hawai‘i 500, 518, 403 P.3d 277, 295 (2017) (“If 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.”<sup>7</sup> In other words, regardless whether CWRM *may*, at some imagined future time, consider the instream flow standards for Wailua and Hanamā‘ulu Streams, KDOW cannot avoid its responsibility to comply with HEPA *now*, including assessing secondary effects of its project on the streams that supply the Waiahi SWTP.<sup>8</sup>

Finally, KDOW argued that “it is well-settled law that an environmental assessment for a minor project need not consider the environmental impact of the already completed infrastructure for which an environmental assessment was already done.” 5CC Dkt. 37 at 20. The record is devoid of any evidence that environmental review was conducted for any earlier phase of development related to the Waiahi SWTP or KDOW’s Līhu‘e system.<sup>9</sup> In any event, KDOW must demonstrate that any earlier-in-time HEPA document “has logical relevancy and bearing to the action being considered.” HAR § 11-200-13(b). KDOW has not shown that any HEPA document properly addresses the impacts of the proposed pipeline expansion in this case.

---

<sup>7</sup> See also *‘Ohana Pale Ke Ao v. Bd. of Agric.*, 118 Hawai‘i 247, 255, 188 P.3d 761, 769 (Ct. App. 2008) (“[T]he requirements of HRS chapter 343 were intended to supplement decision-making by agencies involved in a permitting process.”).

<sup>8</sup> The status quo interim instream flow standards in place for the source streams that supply the Waiahi SWTP, RA1 Dkt. 18 at 206; FEA at 37, involved no individualized review by CWRM, but rather simply rubberstamped the status quo diversions when the State Water Code was adopted. See HAR § 13-169-45.

<sup>9</sup> KDOW’s other summary judgment motions discuss a 1994 EA that Grove Farm prepared for its Līhu‘e Development Plan, but it is unclear if Grove Farm’s 1994 EA is what KDOW is referring to here—and even more unclear how this previous EA is relevant, since the document is not part of the record.

B. KDOW’s Failure to Make Key Documents Available to the Public Contravened HEPA’s Purposes.

As this Court explained in *Kahana Sunset*, “[t]he purpose of preparing an [EA] is 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.” 86 Hawai‘i at 72, 947 P.2d at 384 (emphasis added). The Court emphasized 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.” *Id.*

The record in this case demonstrates that KDOW did not provide the public with the necessary information to evaluate the environmental effects of the Kapaia water main. At various points in its EA and responses to public comments, KDOW relied upon Grove Farm’s Water Master Plan, KDOW’s Water Plan 2020 (hydraulic analyses),<sup>10</sup> and an unrecorded consultation with CWRM. Yet, KDOW did not describe or include any of this critical information in the EA, nor did they make the underlying documents available for public review, or provide any information for accessing the documents, even when specifically requested. RA1 Dkt. 18 at 223, 225, 226, 234, 238, 244; Dkt. 19 at 263; FEA at 363, 365, 366, 447, 451, 45.

Based on HEPA’s fundamental purpose and goals, this Court should hold that documents that agencies rely on for their HEPA analysis must be reasonably available to the public for review.<sup>11</sup> The failure to disclose key documents such as those cited and relied upon in KDOW’s

---

<sup>10</sup> Portions of KDOW’s Water Plan 2020 are currently available online, but not the capital improvement sections. See [http://www.kauaiwater.org/ce\\_waterplan2020app.asp](http://www.kauaiwater.org/ce_waterplan2020app.asp).

<sup>11</sup> See, e.g., *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 927 (9th Cir. 2015) (invalidating an EIS that did not disclose underlying data); *San Juan Citizens All. v. Bureau of Land Mgmt.*, 326 F.Supp.3d 1227, 1247 (D.N.M. 2018) (acknowledging that

EA precludes the public from effective participation in the environmental review process. This is particularly true here, where KDOW should have provided further information on how to locate documents in its response to public comments specifically inquiring about the contents of these documents. KDOW's failure to disclose these key documents contravenes HEPA's purpose focused on disclosure and transparency and subverts the public's procedural rights to participate in the environmental review process.

VI. THE CIRCUIT COURT ERRED IN RULING THAT KDOW COMPLIED WITH THE HAWAI'I CONSTITUTION

Hawai'i Constitution article XI, sections 1 and 7, adopt "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000). "The purpose of the state water resource public trust is to protect certain uses," including the maintenance of natural flow, and the exercise of DHHL's water rights and traditional and customary Native Hawaiian practices. *Kaua'i Springs*, 133 Hawai'i at 172, 324 P.3d at 982. As a county government agency, KDOW has an "affirmative duty . . . to protect public trust water uses wherever feasible." *Id.* Similarly, article XII, § 7 confers on KDOW the "the power to protect [Native Hawaiian] rights and to prevent any interference with the exercise of these rights," together with "an affirmative duty . . . to preserve and protect" these rights "to the extent feasible." *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 45-46, 7 P.3d 1068, 1082-83 (2000).

In *In re Gas Co.*, 147 Hawai'i 186, 465 P.3d 633 (2020), this Court recognized that the agency in that case (the state Public Utilities Commission) was subject to these constitutional

---

providing a URL to the supporting documents satisfies the requirement to make them reasonably available to the public).

duties to protect the public trust and Native Hawaiian rights and directed the agency to “consider its constitutional obligations” on remand. *Id.* at 206-07, 465 P.3d at 644-45. Rejecting the assertion that no change in the use of public trust water resources was involved, this Court emphasized that agencies have “a *continuing* duty” to monitor and protect the public trust, and that these “obligations are ongoing, regardless of the nature of the proceeding.” *Id.* at 207, 465 P.3d at 645. Here, nothing in the record indicates KDOW has *ever* considered the impacts of its diversions on the public trust and Native Hawaiian rights, including in this EA. Instead, KDOW simply dismissed any such consideration by limiting its analysis to the pipeline footprint, and asserting that “the use of . . . water for domestic purposes<sup>[12]</sup> does not constitute an irrevocable commitment to loss or destruction of any natural or cultural resource.” FEA at 139. This made-up standard has no basis in the law and eviscerates KDOW’s constitutional obligations to consider and protect the public trust and Native Hawaiian rights to the extent feasible. As in *Gas Co.*, KDOW should be required to fulfill its constitutional obligations on remand.

## VII. CONCLUSION

For the foregoing reasons, Amici request that this Court reverse the circuit court and direct it to enter summary judgment in favor of Kia‘i Wai on its claims that KDOW’s environmental review violated HEPA and the Hawai‘i Constitution.

DATED: Honolulu, Hawai‘i, August 11, 2021.

/s/Leinā‘ala L. Ley  
LEINĀ‘ALA L. LEY  
ISAAC H. MORIWAKE  
EARTHJUSTICE

---

<sup>12</sup> It should be noted that KDOW’s use is for “municipal” purposes, which is distinct from the established legal definition of “domestic” use. *See* HRS § 174C-3 (defining “domestic” and “municipal” uses separately); Restatement (Second) of Torts § 850A cmt. c (1979) (making clear that “domestic” use does not “extend to withdrawals by a municipality”).