DISSENTING OPINION BY NAKAMURA, J.

I respectfully dissent.

I interpret the controlling statute and administrative rules to require the preparation of a supplemental environmental impact statement (SEIS) when significant changes to the anticipated environmental impacts of a proposed action become apparent such that "an essentially different action" is being proposed. Significant changes to the anticipated environmental impacts of a development project can arise from changes to the design of the project itself, changes to conditions surrounding the project, or the discovery of new information. In my view, the controlling statute and administrative rules do not restrict the responsible agency by only permitting it to consider changes to a project's anticipated environmental impacts when the design of the project itself has changed. Rather, in determining whether an SEIS is warranted, I believe the agency is authorized to consider not only the potential effects of design changes to the project, but whether changes to the conditions surrounding the project and newly discovered information may significantly affect the project's anticipated environmental impacts.

In this case, the Department of Land Utilization (DLU), the predecessor to the Department of Planning and Permitting (DPP), of the City and County of Honolulu accepted an environmental impact statement (EIS) for the proposed development project in 1985 (hereinafter, the "1985 EIS"). Due to significant delays, construction on major portions of the proposed project had still not begun over twenty years later. In November 2005, the developer submitted a Site Development Division Master Application (hereinafter the "Subdivision Application") to the DPP, seeking subdivision approval with respect to 744 of the 808 acres underlying the project. In January 2006, concerned individuals requested that the DPP require the preparation of an SEIS in connection with the developer's request for subdivision approval. Given the twenty-year passage of time since the acceptance of the 1985 EIS, it was

not implausible that conditions in the community surrounding the project had changed to such an extent that the anticipated environmental impacts from the project were significantly different from those considered in the 1985 EIS. However, the DPP erroneously believed that because the design of the project itself had not changed, it had no legal authority to order an SEIS. Thus, in declining to order an SEIS, the DPP never considered whether changed conditions surrounding the project had significantly affected the proposed project's anticipated environmental impacts.

The DPP is responsible in the first instance for exercising its informed judgment in deciding whether an SEIS is warranted. Because the DPP failed to consider relevant factors in declining to order an SEIS, its decision-making was flawed. The usual remedy in this situation is to return the question of whether an SEIS is required to the DPP for its determination under the appropriate criteria. In my view, the Circuit Court of the First Circuit (circuit court) erred in granting the Third Motion for Summary Judgment filed by Defendant-Appellee Kuilima Resort Company (Kuilima) based on the current record. I would vacate the circuit court's Amended Final Judgment (Judgment) and remand the case for further proceedings.

I.

The governing statute in this case is Hawaii Revised Statutes (HRS) Chapter 343, commonly referred to as the Hawai'i Environmental Policy Act (HEPA). The legislative findings on which HEPA is based and its purpose are as follows:

> The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and

> public participation during the review process benefits all parties involved and society as a whole.
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> It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

HRS § 343-1 (1993) (emphases added).

In Sierra Club v. Department of Transportation, 115 Hawai'i 299, 167 P.3d 292 (2007) (hereinafter "Superferry I"), the Hawai'i Supreme Court quoted from a publication of the Office of Environmental Quality Control (OEQC) which described HEPA as follows:

> the law requires that government give systematic consideration to the environmental, social and economic consequences of proposed development projects prior to allowing construction to begin. The law also assures the public the right to participate in planning projects that may affect their community.

Id. at 306, 167 P.3d at 299 (quoting OEQC, State of Hawai'i, A Guidebook for the Hawaii State Environmental Review Process 6 (2004)).

As defined in HRS § 343-2 (1993),

> "[e]nvironmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.[1/]

HRS § 343-5(g) (1993), in turn, provided that "[a] statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required."[2/]

[1/] In 2000, the definition of "environmental impact statement" or "statement" in HRS § 343-2 (1993) was amended by changing the phrase "effects of a proposed action on the economic and social welfare of the community and State" to read "effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State." 2000 Haw. Sess. Laws Act 50, § 2 at 93.

[2/] In 2004, HRS § 343-5(g) (1993) was amended with only minor grammatical changes being made. 2004 Haw. Sess. Laws Act 55, §3 at 284.

The evident purpose of HRS § 343-5(g) is to provide a degree of finality in the environmental review process. It addresses the concern, particularly of private parties, that repeated requests for EISes and requiring the preparation of multiple EISes could create uncertainty and undue delay in completing a proposed project. Thus, HRS § 343-5(g) provides that if an EIS is accepted for a particular action, no other EIS for that proposed action shall be required.

Consistent with the purpose of HRS § 343-5(g), the Environmental Council has adopted rules which limit the circumstances under which an SEIS can be ordered to where "an essentially different action" is under consideration. This imposes a relatively high threshold. Only changes in the anticipated environmental impacts of the proposed action that are significant enough to render it "an essentially different action" for purposes of HEPA are sufficient to trigger the need for an SEIS.

The rules adopted by the Environmental Council for when an SEIS is required, Hawai'i Administrative Rules (HAR) §§ 11-200-26 and 11-200-27, are as follows:

> § 11-200-26. General Provisions.
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> A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and 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. 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[3/] shall be prepared and reviewed as provided by

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3/ HAR § 11-200-2 defines the term "supplemental statement" as follows:

> "Supplemental statement" means an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things.

> this chapter. As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter.
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> § 11-200-27. Determination of Applicability.
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> The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required. This determination will be submitted to the office for publication in the periodic bulletin. Proposing agencies or applicants shall prepare for public review supplemental statements whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated. 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.

(Emphases added.)

By limiting the required preparation of an SEIS to situations where "an essentially different action" is under consideration, the rules strike a reasonable balance between the overarching purpose of HEPA to ensure that "environmental concerns are given appropriate consideration in decision making" and the purpose of HRS § 343-5(g) to provide a degree of finality and avoid undue delay in the environmental review process. The question critical to this appeal is how to determine, under the applicable rules, when "an essentially different action" is under consideration. On this question, the rules are not a model of clarity.

II.

Defendants-Appellees Kuilima, the City and County of Honolulu (the City), and Henry Eng (Eng), in his official capacity as Director of the DPP,[4/] argue that the administrative rules provide that an agency has no authority to order an SEIS unless substantive changes have been made to the design of the

[4/] Defendants-Appellees the City and Eng filed a joint answering brief. Arguments or claims made by the City and Eng will be attributed to the City in this dissenting opinion.

project itself. They further argue that even if this threshold condition is met, the agency can only order an SEIS if the environmental impacts flowing from the substantive changes in the project are significant and were not disclosed in the previously accepted EIS. There is language in the Environmental Council's rules, particularly in HAR § 11-200-26, that lend support to Kuilima's and the City's argument.

On the other hand, the last sentence of HAR § 11-200-27 supports the position of Plaintiffs-Appellants Keep the North Shore Country and the Sierra Club, Hawai'i Chapter (collectively, the "Plaintiffs") that an agency's authority to order an SEIS is not limited to situations where substantive changes to the project's design have been made. This sentence provides, in relevant part, that "[a] supplemental statement shall be warranted . . . when the intensity of environmental impacts will be increased . . . or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." HAR § 11-200-27. This portion of HAR § 11-200-27 supports the view that different or increased environmental impacts unrelated to design changes in the proposed project itself can create "an essentially different action" and trigger the need for an SEIS.

At minimum, the rules are ambiguous. "In construing an administrative rule, general rules of statutory construction are applicable." Paul v. Dep't. of Transp., 115 Hawai'i 416, 426, 168 P.3d 546, 556 (2007) (citation and brackets omitted). "Where the words of a law are ambiguous: . . . The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning." HRS § 1-15(2) (1993) (format changed); see Paul, 115 Hawai'i at 426, 168 P.3d at 556 (indicating that administrative rules, like statutes, must be "construe[d] . . . in a manner consistent with its purpose").

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read

> statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> . . . When [an administrative] rule does not conflict with statutory and constitutional requirements, courts will ascertain and effectuate the intent of the agency which promulgated the rule. Courts strive to give meaning to all parts of an administrative rule and to avoid construing any part as superfluous. Courts will not construe rules in a manner which produces an absurd result.

Paul, 115 Hawai'i at 426-27, 168 P.3d at 556-57 (citations, quotation marks, and ellipses omitted; format changed).

The rules at issue were promulgated by the Environmental Council pursuant its statutory authority to "adopt . . . necessary rules for the purposes of [HEPA]." HRS § 343-6 (1993). When viewed in the light of the reason for and spirit of HEPA, I cannot agree with the restrictive reading of the rules proposed by Kuilima and the City.

The overriding purpose of HEPA is to ensure that an agency is provided with relevant information about the environmental impacts of a proposed project so that the agency can make informed decisions about the project. See HRS § 343-1. Given this purpose, there is no logical reason to distinguish between significant changes to the anticipated environmental impacts of a development project that arise from changes to the design of the project itself, changes to conditions surrounding the project, or the discovery of new information. 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.

A proposed project can become "an essentially different action" in terms of its environmental impacts due to changed circumstances surrounding the project or the discovery of new information, even if the project's design has not changed. Because the focus of HEPA is to achieve informed decision-making based on a clear understanding of a project's environmental impacts, I believe it would be incongruous to preclude an agency

from ordering an SEIS to address significant changes to the anticipated environmental impacts of a proposed project simply because the design of the project itself had not changed. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370-74 (1989).[5/]

An interpretation of the Environmental Council's rules that would only permit an agency to require an SEIS when the design of a project had substantively changed could lead to absurd results. See HRS § 1-15(3) ("Every construction which leads to an absurdity shall be rejected."). Assume, for example, that after the 1985 EIS was approved for Kuilima's proposed project, a devastating hurricane drastically changed conditions in the surrounding community and the community's capacity to accommodate additional visitors and residents. Under Kuilima's and the City's interpretation of the rules, as long as no substantive changes were made to the design of the proposed project, the DPP would be powerless to require an SEIS to address the project's significantly different environmental impacts

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[5/] HEPA was patterned after the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321-4370(f) (2000). See Superferry I, 115 Hawai'i at 306, 167 P.3d at 299. In Marsh, 490 U.S. at 370-74, the United States Supreme Court held that the authority to require an SEIS was implicit under NEPA. The Court's reasoning is instructive:

> The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy [NEPA's] "action-forcing" purpose. NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. It would be incongruous with this approach to environmental protection, and with [NEPA'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.

Id. at 370-71 (citations and footnotes omitted) (emphasis added).

resulting from the changed circumstances. In addition, according to Kuilima and the City, absent a design change to the project, the DPP would likewise be powerless to order the preparation of an SEIS even if the discovery of new information or evidence brings to light significant environmental impacts that had not previously been disclosed.

Moreover, under Kuilima's and the City's interpretation of the applicable rules and circumstances, because no specific deadline was established for the project's completion, the 1985 EIS would remain valid in perpetuity and no SEIS could ever be required, so long as no substantive changes to the design of the project were made.

I recognize that there is a tension between the need to ensure that an agency is apprised of relevant environmental impacts so that it can make informed decisions and the need for finality in an agency's decision-making. The United States Supreme Court noted that under NEPA,

> an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

Marsh, 490 U.S. at 373. Similarly, under HEPA, not every delay in a project will support a claim that circumstances surrounding the project have changed to such an extent that an SEIS is warranted.

In my view, the Environmental Council's rules address this tension by imposing a relatively high threshold for when an SEIS will be required. I construe the rules to mean that an SEIS is required when new circumstances or evidence reveal significant changes in the anticipated environmental impacts of the proposed action that were not addressed in the original EIS that was accepted. In order to trigger the obligation to prepare an SEIS, the unaddressed environmental impacts must be significant enough that "an essentially different action" would be under

consideration. I believe this is a more reasonable interpretation of the rules than one that would impose an absolute bar on an agency's authority to order an SEIS unless substantive changes were made to the project's design.

My interpretation of the applicable rules is supported by provisions of parallel federal and state law. NEPA regulations and the California Environmental Quality Act (CEQA) provide that the obligation to prepare an SEIS can be triggered not only by significant changes to the project itself, but by significant changes to circumstances surrounding the project or new information. Under NEPA regulations, an agency must prepare an SEIS whenever "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (emphasis added) (format changed). Similarly, the California Environmental Quality Act provides:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
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> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
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> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
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> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Cal. Pub. Res. Code § 21166 (2007) (emphases added).

III.

Whether an agency has followed correct procedures or considered appropriate factors in making determinations under HEPA is a question of law subject to de novo review. See Superferry I, 115 Hawai'i at 317, 167 P.3d at 310. An agency is

required to take a "hard look" at relevant environmental factors in determining whether an SEIS is required, and courts apply the "rule of reason" in reviewing such determinations. See Price v. Obayashi Hawaii Corp., 81 Hawai'i 171, 182 & n.12, 914 P.2d 1364, 1375 & n.12 (1996) (applying the rule of reason in reviewing an agency's determination that an EIS was sufficient); Superferry I, 115 Hawai'i at 342, 167 P.3d at 335 (stating that the court must ensure that the agency has taken a hard look at environmental factors when the agency determines that an action is exempted from the requirements of HEPA); Marsh, 490 U.S. 373-74 (concluding that in deciding whether an SEIS is required under NEPA, an agency must take a hard look at the environmental effects of its planned action, even after an initial EIS has been approved). "If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be 'arbitrary and capricious,' given the known environmental consequences." Price, 81 Hawai'i at 182 n.12, 914 P.2d at 1375 n.12 (quoting Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 159 (D. Haw. 1982)); see Marsh, 490 U.S. at 378 (stating that in examining "whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'" (citation omitted)).

In response to Kuilima's request for subdivision approval in November 2005, the DPP received letters in January 2006 from Eric Gill, a union officer, and Ben Shafer, a North Shore resident. The letters requested the preparation of an SEIS based on concerns that the anticipated environmental impacts of the proposed project had significantly changed in the twenty years that had elapsed since the 1985 EIS had been accepted. On appeal, Plaintiffs argue that two new circumstances have arisen since the 1985 EIS was accepted that require the preparation of an SEIS: 1) increased traffic resulting in "traffic gridlock" on the North Shore on Kamehameha Highway, the sole access road to the proposed

development, during Saturday afternoons, holidays, periods of high surf, and special events; and 2) the use of beaches in the proposed development by Hawaiian monk seals, an endangered species, and green sea turtles, a threatened species.

There is no evidence in the record that the DPP took a "hard look" at, or even considered, the alleged new circumstances surrounding the proposed project in deciding not to require an SEIS. Rather, the record reflects that based on its interpretation of the law, the DPP felt that its hands were tied and that it could not consider the alleged new circumstances because no substantive changes had been made to the design of the project itself. Thus, the DPP made its decision not to require an SEIS without considering whether new circumstances or evidence had brought to light significant changes in the project's environmental impacts that were not previously addressed in the 1985 EIS.[6/]

Because of its erroneous view of the law, the DPP failed to consider appropriate factors and follow correct procedures in deciding not to require an SEIS. Thus, its decision was arbitrary and capricious. Based on the existing record, I cannot say that notwithstanding the DPP's failure to consider relevant factors, the question of whether an SEIS is required is so clear-cut that a court can decide the question as a matter of law. I believe there

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[6/] In its letter to Ben Shafer, the DPP explained that because no time limit had been placed on the development of the project, "Kuilima is entitled to proceed with the project as approved." In its letter to Eric Gill, the DPP enclosed a copy of its letter to Ben Shafer and stated that "as long as [Kuilima] is following procedures and satisfying the requirements of the subdivision rules, regulations, and ordinances, the City must continue to process the [Subdivision] [A]pplication and act on the proposal accordingly."

James Peirson, the DPP planner who prepared the letter to Shafer, stated in his deposition that when determining whether to require an SEIS, the DPP "looked at what [Kuilima] was proposing to do and what the original approvals were from 1986 to determine if there was a substantive change to the project." Mr. Peirson explained that the "passage of time itself could not constitute a substantive change to the project" that could require an SEIS under HRS Chapter 343. Mario Siu-Li, the DPP planner who drafted the letter to Gill, explained in his deposition that an SEIS for the proposed project was not required because "the [S]ubdivision [A]pplication was not changing the existing condition of the properties."

are genuine issues of material fact which preclude the grant of summary judgment for Kuilima and the City or for the Plaintiffs.

Ordinarily, a lapse of time between the acceptance of an EIS and the beginning of construction on components of a project would not constitute changed circumstances requiring an SEIS. In this case, however, the time lapse was extraordinary. The EIS was accepted in 1985. There have been significant delays in the project such that construction on the major portion of the development, including all 1,450 new hotel rooms and 2,054 of the 2,063 new condominium units, had still not begun more than twenty years later. The fact that no specific time limits were established for the completion of the project does not mean that the project's anticipated environmental impacts have not significantly changed as a result of the delays in the project's completion. Indeed, the traffic study attached to the 1985 EIS only projected traffic conditions up through the year 2000. Therefore, the traffic study for the 1985 EIS did not cover the traffic conditions that existed in November 2005 when the DPP began considering Kuilima's Subdivision Application.

Kuilima argues that the alleged new circumstances or evidence cited by Plaintiffs are insufficient to demonstrate a significant change in the project's anticipated environmental impacts. It argues that the 1985 EIS considered the issue of the project's impact on traffic congestion, that updated traffic studies have dealt with the project's impact on traffic, and that Plaintiffs have failed to show that delays in the project have resulted in significant new, different, or increased traffic impacts. Kuilima further argues that the presence of Hawaiian monk seals and green sea turtles were well-known when the 1985 EIS was prepared, and that Plaintiffs have not presented new circumstances or evidence regarding the project's impact on these animals.

The parties' conflicting claims demonstrate that there are genuine issues of material fact regarding whether new

circumstances or evidence have revealed significant changes to the project's anticipated environmental impacts. Thus, the circuit court was wrong to affirm the DPP's decision to not require an SEIS on summary judgment.

Under HEPA and the applicable rules, the DPP has the responsibility in the first instance to take a hard look at the relevant factors and exercise its judgment in determining whether an SEIS is warranted. The courts review the agency's ultimate decision under the rule of reason to ensure that the agency's decision was not arbitrary or capricious. As a general rule, in a case like this where the agency's decision-making was flawed because it failed to consider relevant factors, the appropriate remedy is to remand the matter to the agency for reconsideration. See Ohio Valley Environmental Coalition v. United States Army Corps of Engineers, 479 F.Supp.2d 607, 663 (S.D.W.Va. 2007) (concluding that "[o]ther than in 'rare circumstances,' the reviewing court should remand the matter to the agency for reconsideration" when the agency fails to take a hard look at relevant environmental impacts in deciding that an EIS was not required (citations omitted)); O'Reilly v. United States Army Corps of Engineers, 477 F.3d 225, 239-40 (5th Cir. 2007).

An exception to the general rule would be where the evidence is so clear-cut that the agency could only rationally exercise its judgment in one way. The record in this case does not support this exception.[7/] At oral argument, Kuilima acknowledged that if the Environmental Council's rules are interpreted to require the DPP to consider the environmental

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[7/] Courts have also held that a remand to the agency was not necessary where after a lawsuit was initiated, the agency cured its error by taking the required hard look at the alleged new circumstances and information and explained its reasoning for not requiring an SEIS. See Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1025-27 (9th Cir. 1980); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558-61 (9th Cir. 2000). In these cases, the court was able to review the propriety of the agency's decision without requiring a remand. Warm Springs, 621 F.2d at 1025-27; Friends of the Clearwater, 222 F.3d at 558-61. Here, however, the DPP did not cure its error by taking a hard look at the environmental concerns raised by the Plaintiffs after the lawsuit was filed.

impact of changed circumstances unrelated to changes in the project's design (and the above exception to the general rule does not apply), then the question of whether an SEIS is required should be returned to the DPP for its decision.

IV.

Kuilima argues that even if the circuit court erred in granting Kuilima's Third Motion for Summary Judgment, the circuit court's Judgment should be affirmed because there are alternate grounds (not ruled upon by the circuit court) on which to uphold the DPP's decision not to require an SEIS. Kuilima argues that: 1) the Environmental Council exceeded its authority in promulgating the rules empowering an agency to require the preparation of an SEIS; 2) HEPA does not provide a private cause of action for challenging the DPP's decision not to require an SEIS, and even if it did, Plaintiffs' lawsuit was untimely; and 3) Kuilima's application for subdivision approval cannot trigger the DPP's obligation to consider whether an SEIS is required because the Subdivision Application is not a qualifying "action" under HEPA, is exempt from the environmental review process, and involves only ministerial consent.

I am not persuaded that the circuit court's Judgment should be affirmed on these alternate grounds. I disagree with Kuilima's first two arguments. As to Kuilima's third argument, I believe that further development of the record is necessary before the merits of the third argument can be decided.

A.

As construed in this dissent, the Environmental Council's rules regarding SEISes are consistent with and authorized by HEPA. Thus, the Environmental Council did not exceed its authority in promulgating the SEIS rules.

B.

A private cause of action to challenge an agency's decision not to require an SEIS is implied in HEPA. See Hunt v.

First Ins. Co. of Hawaii, Ltd., 82 Hawai'i 363, 371, 922 P.2d 976, 984 (App. 1996) (setting forth the factors to consider in determining whether an implied private cause of action exists). In addition, I would apply the same procedures used to determine the limitations period for challenging an agency's decision not to require an EIS to an agency's decision not to require an SEIS. See HRS § 343-7(b) (1993). HAR § 11-200-27 requires an agency to submit its decision regarding whether an SEIS is required to the Office of Environmental Quality Control (OEQC) for publication. In this case, there is no evidence that the DPP submitted its decision not to require an SEIS to the OEQC or that a public notice of that decision was published by OEQC. Thus, the limitations period on Plaintiffs' suit did not run.

C.

Further development of the record is necessary to resolve Kuilima's claim that its Subdivision Application cannot trigger the DPP's obligation to consider whether an SEIS is required. I believe this issue turns on whether or not the DPP has sufficient discretion in rendering its decision on the Subdivision Application that its decision-making would meaningfully and usefully be informed by an SEIS.

As noted, the purpose of HEPA is to provide the agency with relevant information about the environmental impacts of a proposed project so that it can make informed decisions about the project. HRS § 343-1 ("It is the purpose of [HEPA] 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."). An SEIS would serve no useful purpose if the project had already progressed beyond the point where the agency's decision-making could meaningfully affect the project or if the agency lacked the ability to exercise meaningful discretion in deciding the matter for which the SEIS was sought.

In addressing the question of whether a project had progressed too far to require an SEIS under NEPA, the United States Supreme Court stated:

> [A]lthough it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment, up to that point, NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally significant.
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> . . . Application of the rule of reason thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains major Federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh, 490 U.S. at 371-72, 374 (quotation marks, citations, footnotes and brackets omitted) (emphases added).

Kuilima and Plaintiffs disagree on 1) the extent to which the DPP may exercise discretion in deciding whether to approve Kuilima's Subdivision Application; 2) whether the DPP's decision on the Subdivision Application is properly characterized as a discretionary consent or a ministerial consent; and 3) whether the project has already progressed beyond the point where an SEIS can meaningfully and usefully inform the DPP's decision-making.[8/] There appear to be factual questions that need to be answered in order to resolve these disputes. I believe that further development of the record is necessary to determine whether the DPP has sufficient discretion in rendering its

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[8/] HRS § 343-2 (1993) defines the term "approval" to mean "a discretionary consent required from an agency prior to actual implementation of an action" and the term "discretionary consent" to mean "a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent." HAR § 11-200-2 defines the term "ministerial consent" to mean "a consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion."

decision on the Subdivision Application to be meaningfully and usefully informed by an SEIS.

In my view, the dispute between Kuilima and the Plaintiffs over whether the Subdivision Application constitutes a qualifying "action" under HEPA and whether the Subdivision Application is exempted from the environmental review process misses the mark. HEPA is designed to require consideration of the cumulative environmental impacts of an entire project. See Superferry I, 115 Hawai'i at 329-35, 167 P.3d at 336-42. That is why "piecemealing" or breaking a project into component parts to escape full environmental review is not permitted. See id. at 331, 167 P.3d at 338. Kuilima does not dispute that an EIS was required for its development project and that the project was not exempt under HEPA. The project has already triggered the need for an EIS under HEPA, and the subdivision approval is an integral component of the project. It is not necessary for Plaintiffs to show that the Subdivision Application would also independently trigger the need for environmental review under HEPA in order to pursue their claim for an SEIS.

V.

For the foregoing reasons, I believe the circuit court's Judgment should be vacated and the case should be remanded for further proceedings. Accordingly, I respectfully dissent.

Craig H. Nakamura