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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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In the Matter of the Application of

MAUI ELECTRIC COMPANY, LIMITED

For Approval of Power Purchase Agreement for Renewable  
Dispatchable Generation with Paeahu Solar LLC.

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SCOT-21-0000041

APPEAL FROM THE PUBLIC UTILITIES COMMISSION  
(Agency Docket No. 2018-0433)

MARCH 2, 2022

DISSENTING OPINION BY WILSON, J.

I.

The deferral doctrine. In this case, the Majority allows the Public Utilities Commission ("PUC") to defer its obligation to protect public trust resources to other state agencies. Once Pono Power, a beneficiary of the state's public trust, raised "evidence of possible damage" to specific public trust resources, the PUC bore a duty to independently investigate those allegations as trustee. Ching v. Case, 145

Hawai'i 148, 177, 449 P.3d 1146, 1175 (2019). Instead, the PUC deferred a determination of whether "reasonable allegation[s] of harm" were raised as to specific public trust resources by cataloguing the list of permits that Paeahu would have to obtain from other agencies. Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014). I cannot conclude, as does the Majority, that the PUC considered whether Pono Power raised a reasonable allegation of harm. Pono Power rightly contends it is entitled to such a determination. Accordingly, I respectfully dissent and would remand for the PUC to determine whether a reasonable allegation of harm was made.

## **II.**

The PUC, as a trustee of public resources, has a "duty to investigate upon being made aware of evidence of possible damage" to trust resources. Ching, 145 Hawai'i at 177, 449 P.3d at 1175. This duty to investigate includes determining whether evidence raised by a beneficiary constitutes a "reasonable allegation of harm" to trust resources. Kauai Springs, 133 Hawai'i at 173, 324 P.3d at 983. If there is a "reasonable allegation of harm" to a trust resource, then the PUC must assess that threat and make findings regarding that trust resource; specifically, to approve a power purchase agreement ("PPA"), the PUC "must affirmatively find that there is no harm to the trust resource or that potential harm is justified."

The PUC must also meet certain statutory requirements before approving a PPA. The PUC must consider fossil fuel-related harms, including "the need to reduce the State's reliance on fossil fuels" pursuant to HRS § 269-6(b).<sup>1</sup> Additionally, the PUC must balance "technical, economic, environmental and cultural" factors under HRS § 269-145.5(b)<sup>2</sup> in

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<sup>1</sup> HRS § 269-6(b) requires the PUC to weigh several fossil fuel-related factors:

(b) The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions. . . .

(Emphases added).

<sup>2</sup> HRS § 269-145.5(b) states:

(b) In advancing the public interest, the commission shall balance technical, economic, environmental, and cultural considerations associated with modernization of the electric grid, based on principles that include but are not limited to:

- (1) Enabling a diverse portfolio of renewable energy resources;
- (2) Expanding options for customers to manage their energy use;
- (3) Maximizing interconnection of distributed generation to the State's electric grids on a cost-effective basis at non-discriminatory terms and at just and reasonable rates, while maintaining the reliability of the State's electric grids, and allowing such access and rates through applicable

(continued...)

deciding whether approving a PPA is in the public interest. HRS § 269-145.5(b). That is, alongside the PUC's public trust obligations, the PUC's statutory duties require a determination of whether approving a PPA would violate the public's interest in the environment. Id.

The Majority incorrectly contends that the PUC discharged its public trust responsibilities by following HRS §§ 269-6 and 269-145.5 because the PUC's "public trust and statutory mandates [were] co-extensive" in this instance. The PUC failed to balance the environmental considerations raised by Pono Power in determining whether approving the PPA is in the public interest, as required by HRS § 269-145.5(b). Moreover, the PUC failed to make a determination as to whether Pono Power's allegations of harm were "reasonable," as required by the public trust doctrine. Kauai Springs, 133 Hawai'i at 173, 324 P.3d at 983; Ching, 145 Hawai'i at 177, 449 P.3d at 1175.

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( . . . continued)

rules, orders, and tariffs as reviewed and approved by the commission;

(4) Determining fair compensation for electric grid services and other benefits provided to customers and for electric grid services and other benefits provided by distributed generation customers and other non-utility service providers; and

(5) Maintaining or enhancing grid reliability and safety through modernization of the State's electric grids.

Rather than considering the environmental concerns raised by Pono Power, the PUC concluded without investigation or support that the alleged harms were unsubstantiated and deferred its obligations to other agencies.

Pono Power raised allegations of potential harm sufficient to obligate the PUC to investigate further whether such allegations were "reasonable." See Ching, 145 Hawai'i at 177, 449 P.3d at 1175<sup>3</sup>; see also Kauai Springs, 133 Hawai'i at 173, 324 P.3d at 983. In particular, Pono Power raised concerns regarding the "protections for native flora and fauna" in the project area and "stormwater runoff[.]"

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<sup>3</sup> The Majority distinguishes Ching because "Ching recognized an agency's duty to investigate potential harm in the context of examining that agency's continuing duty to monitor the relevant trust property after it authorized the use of that property" in the form of a lease to the U.S. Military. The Majority notes that in the instant proceeding, the PUC was under no pre-existing lease obligation to monitor the relevant property. Respectfully, though Ching involved a lease between the agency and the U.S. Military, this does not diminish the duty of the PUC to investigate whether the allegations of harm by Pono Power were "reasonable." It is undisputed that if there was a reasonable allegation of harm to trust resources, the PUC could not approve the PPA until it made specific findings regarding the alleged harm. See Kauai Springs, 133 Hawai'i at 173, 324 P.3d at 983. Though the PUC is not under a pre-existing duty as a lessor to monitor the land, the PUC, as trustee, must nonetheless ensure that trust resources are not harmed by its actions.

The Majority further asserts that in Ching, the risk of impending damage was more concrete than "in the PPA review context, [where] the range of "possible" harm is more open-ended." The Majority expresses the important concern that "to require the PUC to pursue every hint of "possible" harm would cause goose chases that we cannot endorse." Respectfully, the instant record does not require a goose chase. The record bears no evidence that the cost of making an independent initial determination regarding alleged harm to public safety and to native vegetation would have been a prohibitively expensive "goose chase."

Regarding flora and fauna, Pono Power asserted that there are various native species in the area that may be harmed by the project. Pono Power noted that there were inconsistent representations made by project proponents regarding the extent of vegetation removal: a memorandum<sup>4</sup> stated that "[m]ost of the native vegetation would remain," while elsewhere, it was stated that "[g]rubbing, grading, and other vegetation removal would be required for areas of the Project." Further, Pono Power explained that "[t]he project's consultation document [] focused on nonnative, invasive flora and fauna but [did] not address native and listed species worthy of protection" including the 'akoka, nee, and heuhiuhi, a native nitrogen fixer. Pono Power also submitted an anonymous note stating that wiliwili trees, Ko'ali'awa plants, and Iwa'iwa are located within the project area. Lastly, Pono Power submitted a report, authored by Professor Lee Altenberg, at the University of Hawai'i at Mānoa ("Altenberg report"), which elaborates upon the prevalence and importance of wiliwili trees in the area.

The Majority contends that the Altenberg report and the anonymous note "do not reasonably establish a link between

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<sup>4</sup> The memorandum was prepared by TetraTech, Inc., on behalf of Paeahu.

the Project and the alleged harm to those trees and plants.”<sup>5</sup> However, CarolAnn Barrows, president of Pono Power,<sup>6</sup> testified that “[d]isplacing native and listed biota over 200 acres and removing that acreage from their habitat may have significant impacts that are not being addressed through these proceedings or any others proposed.” Additionally, Paeahu identified that it would require, among others, a grading, grubbing, and building permit from the Maui County Department of Public Works and Environmental Management. Thus, Pono Power’s concerns are plain: such grading and grubbing activity may adversely impact the ecosystem in which native vegetation exists, and may possibly cause the direct removal of native and listed species worthy of protection.

Pono Power also raised an allegation of harm regarding water runoff sufficient to require the PUC to investigate further. Pono Power explained that the project will create

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<sup>5</sup> The Majority also asserts that the Altenberg report was drafted in 2007 for an unrelated project in a nearby location, and that the report’s findings suggest that “native flora can vary significantly” throughout the region. While it may be the case that the Altenberg report’s finding of wiliwili trees in an adjacent location does not hold true for the project location, the PUC never made a determination as to the presence or absence of wiliwili trees or other native vegetation in the project area. Moreover, Pono Power’s allegations of harm exceed the direct removal of native vegetation, to include the effects of the project’s grading on the ecosystem in which native vegetation exists and depends. Finally, the utilization of pre-existing studies to substantiate community concerns should not be rejected as a factor in determining whether an agency’s duty to investigate has been triggered. Not all community groups will be able to expend the resources necessary to generate a new study detailing their specific concerns.

<sup>6</sup> See infra n. 8.

increased impervious surfaces, consisting of solar panels and associated structures, which may cause adverse "impacts to water flowing through gulches near [Pono Power's] community and nearshore water quality." Pono Power stated that "[e]xisting conditions already allow violent runoff through the gulches [near the project area] and the increase in impervious surfaces and reduction of groundcover will exacerbate this situation."<sup>7,8</sup> Furthermore, Pono Power noted that the project's location is "less than two miles east and upstream of marine waters [and that] [i]ntermittent streams run through the northern and southern boundaries of the Project area and into residential areas." Pono Power recognized that Paeahu will be required to obtain a National Pollutant Discharge Elimination System permit, but stated that "it is unclear whether" stormwater runoff will be mitigated to an acceptable level in order to protect public trust resources.

As trustee of these natural resources, the PUC's duty necessitated some initial investigation to determine whether

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<sup>7</sup> To demonstrate the existing conditions, Pono Power submitted a series of photographs taken at the same location near the project site: two photographs taken following one-hour of heavy rain, and one photograph taken on a dry-day.

<sup>8</sup> The Majority seems to discredit Pono Power's allegations regarding water runoff because "Pono Power backs up its...allegation with its president's testimony[.]" Respectfully, there is no basis upon which to devalue testimony in the form of personal observations of this trust beneficiary who is the official representative of Pono Power.



Pono Power's allegations of harm were "reasonable[.]" Pono Power articulated detailed concerns regarding the project's impacts to native vegetation and water runoff. The allegations that Pono Power raised are supported in great measure by personal observations, which is a form of evidence that this court has previously relied upon, in part, to hold that an agencies' duty to investigate was triggered. In Ching, the plaintiffs presented evidence, including testimony in the form of personal observations, that there may be military debris scattered around the subject property in violation of the U.S. military's lease with the Department of Land and Natural Resources ("DLNR").<sup>9,10</sup> Ching, 145 Hawai'i at 154, 160-61, 449 P.3d at 1152, 1158-59. This court found that the plaintiff's allegations were sufficient to trigger the DLNR's duty to investigate the issue further. Id. at 177-78, 449 P.3d at 1175-

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<sup>9</sup> The plaintiff's complaint cited a letter written by a DLNR employee, which stated "that the State was aware of the possibility that the land leased to the United States was littered with unexploded ordnance (UXO) and munitions and explosives of concern." Ching, 145 Hawai'i at 155, 449 P.3d at 1153 (internal quotations omitted).

The plaintiffs called the DLNR's custodian of records to testify, who stated that the "DLNR's lease file contained records of only three inspections of the leased [] land[.]" Id. at 160, 449 P.d at 1158. The plaintiffs also called a former cultural monitor for the leased area, who testified that "during her inspections she observed and noted in her reports a range of debris." Id. Finally, the plaintiff's called the Deputy Director of DLNR, who testified that there were "a series of letters and reports from the United States Army that documented a need to clean up" the leased land. Id.

<sup>10</sup> The individual plaintiffs in Ching both testified that they personally observed military debris on the leased property. Id.

76. In the instant proceeding, the plaintiffs raise concerns, based on a scientific report and personal observations, regarding the project's impacts to native vegetation and water runoff. These concerns triggered the PUC's duty to investigate further.<sup>11</sup>

Rather than independently investigate to determine whether Pono Power's allegations of harm were "reasonable[,] " the PUC merely "catalog[ued]" the list of permits that Paeahu would have to obtain. As the Majority notes, the PUC listed "(1) the permits that Paeahu would have to obtain to construct and operate its solar plant; (2) the impact studies related to those permits; (3) which agency would review them; and (4) under what statutes, regulations, or ordinances." However, the Majority asserts without explanation that the list is not a mere catalogue. The PUC offered minimal analysis as to how the required, future permits would adequately protect native vegetation or mitigate water runoff. What is more, in its approval order, the PUC specifically "reaffirm[ed] that it lacks jurisdiction over other agency permitting processes and that each government agency or entity that has responsibility over a

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<sup>11</sup> Paeahu asserts that Ching is distinguishable from the instant proceeding because there, DLNR's "efforts to monitor the [leased] lands were clearly inadequate" as there was a "lengthy period of inactive reporting[.]" while here, "the PUC directed Paeahu [] to identify and provide copies of available reports and studies even before the PPA was approved." However, Paeahu fails to account for the fact that the PUC offered no independent analysis of the studies it directed Paeahu to submit.

facet of decision-making for this project will apply their own criteria to decision-making." The PUC failed to recognize both the extent of its statutory responsibilities and that an agency's public trust obligations may be distinct and beyond its statutory duties. Kauai Springs, 133 Hawai'i at 172, 324 P.3d at 982. The PUC is required to evaluate "environmental" considerations in determining whether PPA approval is in the "public interest." HRS § 269-145.5(b). And, in addition to statutory duties to consider harms outside of its usual expertise—to wit impacts to native vegetation and water runoff—the public trust doctrine requires consideration of harm to public trust resources. Kauai Springs, 133 Hawai'i at 172, 324 P.3d at 982.

Beyond cataloguing the list of permits that Paeahu would have to obtain, the PUC directed Paeahu to file various studies<sup>12</sup> it had undertaken related to the Project. However, the PUC did not itself analyze these studies nor did the PUC adequately explain how these studies' address Pono Power's concerns regarding native vegetation and water runoff. Rather, the PUC "believed the studies...usefulness was related to an

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<sup>12</sup> These studies related to the Project's impacts on cultural and natural resources and were created by Paeahu to assist in applying for permits from various other agencies.

assessment of whether Paeahu was taking steps to comply with other regulatory agencies' permitting requirements[.]”

Finally, the PUC made minimal and conclusory findings regarding its public trust duties and Pono Power's allegations. The PUC failed to make any findings about its public trust responsibilities in its order approving the PPA. Further, the PUC's order denying Pono Power's motion for reconsideration of the approval (“Recon Order”) merely stated that Pono Power's “assertions about the impact to [public trust] resources are speculative or unsupported.”<sup>13</sup> However, the Recon Order offered no explanation as to why it found Pono Power's allegations to be unsubstantiated. Rather than offering analysis, the PUC appeared to assume that it had no duty to investigate in order to determine whether Pono Power's allegations of harm were reasonable.

It is undisputed that if the alleged environmental harms were “reasonable,” the PUC could not approve the project until it made specific findings regarding the harm to public trust resources. Kauai Springs, 133 Hawai'i at 173, 324 P.3d at 983 (“If there is a reasonable allegation of harm to one of the uses protected by the public trust, then the [permit] applicant

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<sup>13</sup> The PUC's Recon Order also stated that the PUC had fulfilled its public trust duties by satisfying its obligations under HRS §§ 269-6(b) and 269-145.5(b).

must demonstrate that there is no harm in fact or that any potential harm does not preclude a finding that the requested use is nevertheless reasonable and beneficial.") The PUC failed to conduct any investigation in order to determine the truth or reasonableness of Pono Power's allegations. The PUC simply (1) catalogued the list of permits that Paeahu would have to obtain, (2) directed Paeahu to submit studies, which the PUC did not independently analyze, and (3) found in conclusory fashion that Pono Power's allegations were "speculative or unsupported." In sum, the PUC deferred the threshold question of whether Pono Power's allegations were reasonable—an important public trust obligation—to other state agencies.

### **III.**

State agencies must act as reasonably prudent fiduciaries of public trust resources. See e.g., Ching, 145 Hawai'i at 170, 449 P.3d at 1168 ("Article XI, section 1 of the Hawai'i Constitution places upon the State a fiduciary duty analogous to the common law duty of a trustee with respect to lands held in public trust.") Given that a fiduciary's duties require the exercise of reasonable care, the cost of inquiry should be considered in determining whether a trustee's duty to investigate is triggered by an allegation of harm. See Estate of Dwight, 67 Haw. 139, 146, 681 P.2d 563, 568 (1984) ("A trustee is [] under a duty to the beneficiary to use reasonable

care and skill[.]” (emphasis added)); see also Restatement (Second) of Trusts § 176 (“The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.” (emphasis added)). If the cost of inquiry into an allegation of harm is prohibitively high, a trustee’s duty to investigate is less likely to be triggered; however, if the cost of inquiry into an allegation is low, a trustee’s duty to investigate is more likely triggered. In other words, cost is an important factor in determining how a reasonably prudent fiduciary should act. See e.g., Schreiter v. Wasatch Manor, 871 P.2d 570, 574 (Utah. App. 1994) (“[C]ost may be an important factor in determining whether a reasonable person would, under all the circumstances [take a protective measure.]”).

The PUC’s cost of initial inquiry into Pono Power’s allegations regarding native vegetation and water runoff was low, which supports the conclusion that the PUC’s duty to investigate further was triggered. The PUC could have simply sent an investigator to the project site to determine whether Pono Power’s allegations regarding native vegetation in the project area were true. Further, the record bears no evidence that an initial determination regarding the project’s impacts to water runoff—would have been prohibitively expensive. See e.g., Ka Pa‘akai O Ka‘ Aina v. Land Use Comm’n, 94 Hawai‘i 31, 46, 7 P.3d 1068, 1083 (2000) (explaining that it is the responsibility

of the State and its constituent agencies to act only after "independently considering the effect of their actions[.]" (internal citations omitted)). Instead, the PUC conducted no investigation whatsoever.

#### **IV.**

Finally, the Majority's holding that Pono Power failed to raise a reasonable allegation of harm to public trust resources will have detrimental consequences. These consequences will be concentrated upon marginalized communities too frequently faced with the onus of development.<sup>14</sup> The Majority notes that a reasonable allegation of harm is sufficient to require an agency to make specific findings about the affected public trust resource. The Majority further concedes that a "reasonable threat does not mean that there must be conclusive evidence of harm. But it means something more than vague and tenuous concerns about a project's surrounding environment; there must be tangible evidence that reasonably connects the threatened harm to the proposed project." Yet, the Majority's application of the reasonableness standard ignores a

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<sup>14</sup> Industrial and toxic facilities across the United States are more often located in non-white and low-income communities, and these communities face increased adverse health effects because of it. See e.g., Paul Mohai and Robin Saha, Which came first, people or pollution? Assessing the disparate siting and post-siting demographic change hypotheses of environmental injustice, 10 ENV'T RESEARCH LETTERS 11 (2015) (available at <https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/meta>); see also Mary B. Collins et al., Linking 'toxic outliers' to environmental justice communities, 11 ENV'T RESEARCH LETTERS 1 (2016) (available at <https://iopscience.iop.org/article/10.1088/1748-9326/11/1/015004>).

record containing more than mere vague and tenuous concerns. Instead, specific damage to protected plant species and a threat to public safety from proposed grading are asserted. What is more, the concerns are raised by a community that is granted standing as a party to the proceeding before the PUC.

The Majority places too heavy a burden on community groups—the beneficiaries of the state's public trust resources—and too little a burden on state agencies—the trustees of these resources. Requiring allegations more detailed than those raised by Pono Power is likely to mean that only certain communities, willing and able to expend significant resources documenting their concerns, will be capable of triggering an agencies' duty to investigate under the public trust doctrine. Communities unable to marshal the financial resources required to satisfy the ambiguously high bar set forth by the Majority will continue to bear the brunt of degrading environmental conditions and suffer the loss of the protected public trust resources they are entitled to.

In this proceeding, the PUC was made aware of evidence of possible damage to native vegetation and water runoff, and the PUC had a duty to engage in an initial investigation to determine whether such allegations were reasonable. See Ching, 145 Hawai'i at 177, 449 P.3d at 1175 (recognizing "a duty to investigate upon being made aware of evidence of possible



damage" to trust property as "a necessary component of [a trustee's] general duty"). To hold as the Majority does "permit[s] the State to ignore the risk of impending damage to the land, leaving trust beneficiaries powerless to prevent irreparable harm before it occurs." Id.

To conclude that the concerns raised by the community do not merit any investigation by the PUC redounds to the detriment of public trust resources, which frequently depend upon the collective action of concerned citizens and communities for protection and preservation.

#### **CONCLUSION**

The deferral doctrine employed by the PUC violated its statutory and constitutional duty to inquire as to the "reasonableness" of Pono Power's allegations of environmental damage. Remand to the PUC with instruction to conduct such an inquiry, albeit a potentially minimal one, is required. Accordingly, I respectfully dissent to the finding of the Majority that Pono Power failed to raise a reasonable allegation of harm; I concur in all other respects with the Majority decision, including the recognition of the right to a life-sustaining climate system.

/s/ Michael D. Wilson

