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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

NAVAHINE F., a Minor, by and through her natural guardian; et al., Plaintiffs, v. DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI‘I, et al., Defendants.	CIVIL NO. 1CCV-22-0000631 (JPC) (Environmental Court) ORDER DENYING DEFENDANTS' MOTION TO DISMISS (Dkt. 78) Judge: The Honorable Jeffrey P. Crabtree Trial Date: September 26, 2023

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

On August 22, 2022, Defendants Department of Transportation, State of Hawai‘i ("HDOT"); Jade Butay, in his official capacity as Director of the Department of Transportation; Governor Ige; and State of Hawai‘i filed their Motion to Dismiss (Dkt. 78). The motion was heard by the Honorable Jeffrey P. Crabtree on January 26, 2023, at 10:30 a.m. Leinā‘ala L. Ley and Isaac Moriwake from Earthjustice and Andrea Rodgers and Joanna Zeigler from Our Children's Trust appeared on behalf of Plaintiffs. Lauren K. Chun, Charlene S. Shimada, and Bryan M. Killian appeared on behalf of Defendants.[1] The court took the motion under advisement and, having considered the memoranda filed by the parties, the arguments of counsel, and the record and files in this action, DENIES Defendants' motion for the following reasons.

I. STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

This is a Rule 12(b)(6) motion for failure to state a claim. Such motions are viewed with disfavor and rarely granted. *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed to be true and must be viewed in the light most favorable to the Plaintiff for purposes of the motion. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai‘i 251, 266 (2007); *Bank of Am. v. Reyes-Toledo*, 143 Hawai‘i 249, 257 (2018). However, the court is not required to accept conclusory allegations.

Hawai‘i is a notice pleading jurisdiction. The federal "plausibility" pleading standard (*Twombly/Iqbal*) was expressly rejected by our Hawai‘i Supreme Court in *Bank of America v.*

[1] Rule 25(d) of the Hawai‘i Rules of Civil Procedure provides that parties named in an official capacity will be automatically substituted by their successor once they leave office. Accordingly, due to the change in administration between August 22, 2022, and the date of this Order, Governor Green has replaced Governor Ige as a defendant. Ed Sniffen, nominee for Director of Transportation, will automatically replace Jade Butay as a defendant, subject to his confirmation by the Senate.

Reyes-Toledo, 143 Hawai‘i at 263. If the complaint is too general or too vague, a defendant may request a more definite statement per Rule 12(e). *Id.* at 259-60.

In deciding a 12(b)(6) motion, the court should dismiss only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Kealoha v. Machado*, 131 Hawai‘i 62, 74 (2013). This includes under any alternative theory. *Bank of Am.*, 143 Hawai‘i at 257; *In re Estate of Rogers*, 103 Hawai‘i 275, 280-81 (2003); *Malabe v. AOAO Exec. Ctr.*, 147 Hawai‘i 330, 338 (2020).

II. PLAINTIFFS' FIRST CLAIM

Plaintiffs' claim Defendants breached their public trust duties under Article XI, section 1 of the Hawai‘i Constitution. Section 1 provides:

> **Section 1.** For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Generally, Plaintiffs claim that Defendants establish, maintain, and operate the state's transportation system in a way that contributes to greenhouse gas emissions and continued reliance on fossil fuels. This allegedly results in harms to "public trust resources . . . including the climate system and all other natural resources affected by climate change." Compl. ¶ 180. Paragraphs 158-78 of the Complaint include a lengthy list of alleged failures. If proved—as the court is required to assume for this motion—Defendants are failing to preserve public trust resources by not doing enough, fast enough, to help reduce climate change by reducing GHG emissions. Paragraphs 181-83 allege that the harm of greenhouse gases ("GHG") requires "swift decarbonization" of the state's transportation system, but that Defendants have not developed any plans addressing these harms or alternatives. Paragraph 182 alleges that Defendants continue to establish, maintain, and

operate traditional infrastructure that preserves and promotes fossil fuels. Paragraph 183 asserts that Defendants have not planned, funded, or implemented necessary alternatives for reducing GHG emissions, including vehicle miles traveled, electrifying facilities, increasing alternative fuels, and expanding alternative options such as bikeways, public transit, and pedestrian pathways.

As a threshold issue, Defendants argue the public trust doctrine does not apply to the climate, because climate is not air, water, land, minerals, energy resource or some other "localized" natural resource. The court need not decide whether "the climate" is a trust resource or "property," because Plaintiffs argue that deteriorating climate change *impacts* our natural resources. Defendants concede this, saying "to be sure, climate change impacts Hawaii's public trust resources." Mot. at 13. But then Defendants argue that Plaintiffs' claim "strains the public trust doctrine too far" because HDOT/the State only controls a "small portion" of the globe's GHG emissions and "cannot control climate change's local impacts." *Id.* The court understands this argument, but first, it is factual, which is generally fatal on a 12(b)(6) motion. Second, and more importantly, reduced to its essence, Defendants' argument is that it is not required to do anything because the problem is just too big and the State's efforts will have no impact. Putting aside that negative thinking will not solve the problem, the law requires that as trustee, the State/HDOT *must* take steps to maintain their assets to keep them from falling into disrepair. It is "elementary trust law" that trust property not be permitted to "fall into ruin on [the trustee's] watch." *Ching v. Case*, 145 Hawai'i 148, 170 (2019). "To hold that the State does not have an independent trust obligation to reasonably monitor the trust property would be counter to our precedents and would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id.* (citing *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 (2006)). To hold that the State has no trust obligation to reasonably monitor and maintain our natural resources

by reducing our GHG emissions and establishing and planning alternatives to a fossil-fuel heavy transportation system—all because GHG emissions are just "too big a problem" -- "would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." *Id*.

Once past the threshold objection that the public trust doctrine does not require the State to do anything about climate change, the State argues that 1) Plaintiffs cannot point to a specific "statutory function" that HDOT failed to perform, and 2) statutory authorities "cabin" [contain or limit] Defendant's public trust obligations." Mot. at 12. In the strict procedural context of a 12(b)(6) motion, the court disagrees, in part because this motion can only be granted if it is beyond doubt that Plaintiffs can prove no set of facts in support of their claim. More importantly, the court disagrees that statutory limits or requirements limit the public trust doctrine in a way that requires dismissal of this case. Again, *Ching* is clear:

> Moreover, this court has made clear that while overlap may occur, the State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty. *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) ("As the public trust arises out of a constitutional mandate, the duty and authority of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature."); *see also In re TMT*, 143 Hawai'i 379, 416, 431 P.3d 752, 789 (2018) (Pollack, J., concurring) ("Thus, although some congruence exists, BLNR's and the University of Hawai'i at Hilo's public trust obligations are distinct from their obligations under [Hawai'i Administrative Rules] § 13-5-30(c).").

145 Hawai'i at 178. The motion to dismiss never cites *Ching*.[2]

[2] The court respectfully recommends that when a recent case from our Supreme Court addresses a constitutional claim at length, and a party moves to dismiss such a claim, movant should discusss that case in their motion rather than wait until their Reply brief. The Reply brief cites *Ching* seventeen times—when Plaintiffs have no opportunity to respond. Movant may offer "but we did not have to raise *Ching* until the memo in opp did." The court disagrees. *Ching* is

III. PLAINTIFFS' SECOND CLAIM

Plaintiffs claim Defendants breached their duties under Article XI, section 9 of the Hawai'i Constitution. It states:

> **Section 9.** Each person has the right to a clean and healthful environment, as defined by the laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

Our Supreme Court has described important particulars for section 9 that apply to this case:

> We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 ***by providing that express consideration be given to reduction of greenhouse gas emissions*** in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.
>
> We note that this right is not a freestanding interest in general aesthetic and environmental values. *See Sandy Beach Def. Fund*, 70 Haw. at 376–77, 773 P.2d at 260–61. The challengers in *Sandy Beach Defense Fund* did not identify any source granting them a substantive legal right to enforcement of environmental laws. Rather, the asserted "property interests" were unilateral expectations of aesthetic value, including claims that a person who lived in close proximity to a proposed development would lose her view of the ocean and decrease the value of her property. *Id.* at 367, 773 P.2d at 255. In contrast, Sierra Club's right to a clean and healthful environment is provided for in article XI, section 9 of the Hawai'i Constitution and defined by HRS Chapter 269. It is not a unilateral expectation on the part of Sierra Club, but rather a right guaranteed by the Constitution and statutes of this state.

In re Maui Elec. Co., 141 Haw. 249, 264–65 (2017) (emphasis added) ("*MECO*").

Plaintiffs claim that Defendants' actions and inactions result in high levels of GHG emissions and continued reliance on fossil fuels. The Complaint claims this is at odds with

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clearly relevant to issues in the motion. Simple fairness also requires counsel to raise it as part of their initial filing. Under the rules, movants already have the advantage of the "last word" with the Reply.

Hawai‘i’s Zero Emissions Target, HRS section 225P-5 and other laws requiring reduction of GHG and carbon from the transportation system. The laws cited include:

HRS §§ 196-9(c)(6), (10):	Energy Efficiency and Environmental Standards for State Facilities, Motor Vehicles, and Transportation Fuel;
HRS §§ 225P-5 and -7:	Hawai‘i Climate Change Mitigation and Adaptation Initiative; Zero Emissions Target; Climate Change Mitigation, “decarbonizing the transportation sector”;
HRS §§ 226-4, -17,-18:	Hawai‘i State Planning Act;
HRS § 264-142:	Ground Transportation Facilities;
HRS § 264 -143:	Ground Transportation; Project Goals; Reporting;

S*ee* Compl. ¶ 187.

Defendants argue that 1) some of these laws do not apply to HDOT, 2) Plaintiffs do not allege any of them were violated, and 3) these laws are merely “aspirational” and Plaintiffs “cannot show HDOT violated” the laws. Mot. at 7. Defendants at times seem to argue that some of the laws cited are not laws relating to environmental quality, but it is not clear to the court.

Laws Relating to Environmental Quality. Taking the last point first: especially after *MECO,* the court concludes that similar to HRS chapter 269 and the PUC in *MECO*, the above-cited laws dealing with planning for and actually reducing GHG emissions, decarbonizing the transportation sector, reducing and eliminating fossil fuels in ground transportation, and promoting alternative fuels and overall energy efficiency, are laws relating to environmental quality. More specifically:

HRS §§ 225P-5, -7:	Hawai‘i Climate Change Mitigation and Adaptation Initiative; Zero Emissions Target; Climate Change Mitigation. The title alone makes it clear it is a law relating to environmental quality. *See also In re Haw. Elec. Light Co*., No. SCOT-22-0000418, slip op. at 14 (Haw. Sup. Ct. Mar. 13, 2023) (“*HELCO*”).

HRS §§ 226-17, -18:	Hawai‘i State Planning Act. The purpose of this law is to manage our energy resources to protect health and safety and welfare, and preserve our limited natural resources for future generations.
HRS § 196-9(c)(6), (10):	Energy Efficiency and Environmental Standards for State Facilities, Motor Vehicles, and Transportation Fuel. This statute speaks to electric vehicles in the State's fleet to reduce fossil fuels and GHG emissions.
HRS §§ 264-142, -143:	Ground Transportation Facilities. Develop bikeways and pedestrian walkways to help reduce fossil fuel use and GHGs.

Further, see paragraphs 78-84 of the Complaint for multiple allegations regarding these laws and how they relate to environmental quality.

No actual harm or controversy. Defendants next argue that Plaintiffs cite laws which "contain broad, aspirational objectives that Plaintiffs have not and cannot show HDOT violated." Mot. at 7. Defendants argue that since the Zero Emissions Target law (HRS ch. 225P) goal is to reduce GHG and carbon by 2045, "it is not possible to argue that HDOT has violated a 20-years-from-now deadline." Mot. at 8. Similarly, movant argues HRS § 196-9(c)(6) is aspirational, instructing agencies to "promote" energy efficiencies, and implement goals "to the extent possible." Mot. at 8. In the same vein, Defendants argue HRS § 264-143 merely instructs HDOT to "endeavor" to meet "goals," such as reducing carbon emissions, vehicle miles travelled, and reducing urban temperatures with tree canopies. Mot. at 8-9. HRS chapter 226 is also merely "aspirational" per Defendants, by only "encouraging" or "promoting" alternative rules and fuel efficiency measures. Mot. at 9. What are Defendants really arguing here? That a "target" or "goal" passed by the Legislature has no legal force or effect? That the Legislature did not intend to drive action by state agencies to plan for and respond meaningfully to the threats of climate change? The court gives the Legislature a lot more credit than that. The court concludes the Legislature is requiring timely planning and action, not meaningless or purely aspirational goals.

HRS § 225P-1, titled Purpose, states:

> The purpose of this chapter is to address the effects of climate change to protect the State's economy, environment, health, and way of life. This chapter establishes the framework for the State to:
>
> (1) Adapt to the inevitable impacts of global warming and climate change, including rising sea levels, temperatures, and other risk factors; and
>
> (2) Mitigate its greenhouse gas emissions by sequestering more atmospheric carbon and greenhouse gases than the State produces as quickly as practicable, but no later than 2045.

HRS § 225P-5, titled Zero Emissions Clean Economy Target, states:

> (a) Considering both atmospheric carbon and greenhouse gas emissions as well as offsets from the local sequestration of atmospheric carbon and greenhouse gases through long-term sinks and reservoirs, a statewide target is hereby established to sequester more atmospheric carbon and greenhouse gases than emitted within the State as quickly as practicable, but no later than 2045; provided that the statewide target includes a greenhouse gas emissions limit, to be achieved no later than 2030, of at least fifty per cent below the level of the statewide greenhouse gas emissions in 2005.
>
> (b) The Hawaii climate change mitigation and adaptation commission shall endeavor to achieve the goals of this section. After January 1, 2020, agency plans, decisions, and strategies shall give consideration to the impact of those plans, decisions, and strategies on the State's ability to achieve the goals in this section, weighed appropriately against their primary purpose.

HRS § 225P-7, titled Climate Change Mitigation, states:

> (a) It shall be the goal of the State to reduce emissions that cause climate change and build energy efficiencies across all sectors, including decarbonizing the transportation sector.
>
> (b) State agencies shall manage their fleets to achieve the clean ground transportation goals defined in section 196-9(c)(10) and decarbonization goals established pursuant to chapter 225P.

The Complaint is replete with additional allegations that Defendants' actions do not comply with the Legislature's statutory directives. *See* Compl. ¶¶ 125-78.

Current and Concrete Harms are Alleged. Plaintiffs allege—and the court is required to accept as true for purposes of this motion—that Defendants' actions and inactions to date *already* cause *actual* harms. *See* Compl. ¶ 140. The Complaint alleges in multiple paragraphs that based on the lack of action to date, harms are already being baked in. Transportation emissions are increasing and will continue to increase at the rate we are going. *See* Compl. ¶¶ 125-35. In other words, the alleged harms are not hypothetical or only in the future. They are current, ongoing, and getting worse. This renders Defendants' "future goals are not actionable" argument illusory in the specific context of a 12(b)(6) motion where the court is obligated to accept the factual allegations that Defendants failure to plan and implement actual changes fast enough is causing harms now and will cause harms in the future. The harms caused by a lack of action on GHGs and fossil fuels were highlighted at the end of the Supreme Court's opinion in *HELCO,* slip op. at 18-19:

> We have said that an agency "must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations," *Paeahu*, 150 Hawai'i at 538, 506 P.3d at 202, and that "[a]rticle XI, section 9's 'clean and healthful environment' right as defined by HRS chapter 269 subsumes a right to a life-sustaining climate system," *id*. at 538 n.15, 506 P.3d at 202 n.15. The right to a life-sustaining climate system is not just affirmative; it is constantly evolving.
>
> The people of Hawai'i have declared "a climate emergency." S.C.R. 44, S.D. 1, H.D. 1, 31st Leg., Reg. Sess. (2021). Hawai'i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and more extreme droughts and storms. *Id.* For the human race as a whole, the threat is no less existential.
>
> With each year, the impacts of climate change amplify and the chances to mitigate dwindle. "The Closing Window: Climate crisis calls for rapid transformation of societies," Emissions Gap Report 2022, https://www.unep.org/resources /emissions-gapreport-2022 [https://perma.cc/6JAR-RFZE]. "A stepwise approach is no longer an option." *Id.* at page xv.
>
> The reality is that yesterday's good enough has become today's unacceptable. The PUC was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty.

IV. LACK OF STANDING

This argument is made in most environmental cases, and is rarely viable. There is a reason many environmental cases are styled as declaratory judgment actions under HRS § 632-1. Our declaratory judgment statute is broad. The statute requires antagonistic claims that indicate imminent litigation, and the party seeking declaratory relief has a concrete interest that is denied by the other party, and a declaratory judgment will serve to terminate the controversy. *Tax Found. v. State*, 144 Hawai‘i 175, 189 (2019). The injury-in-fact test used by Article III federal courts does not apply. *Id*. Plaintiffs are minors. Article XI, section 1 is "For the benefit of present and future generations." Plaintiffs allege nothing less than that they stand to inherit a world with severe climate change and the resulting damage to our natural resources. This includes rising temperatures, sea level rise, coastal erosion, flooding, ocean warming and acidification with severe impacts on marine life, and more frequent and extreme droughts and storms. Destruction of the environment is a concrete interest. Since Defendants essentially argue Hawai‘i law does not *require* them to take action *now*, it appears a declaratory judgment action will help resolve the parties' different views of what the Legislature and the Constitution require.

V. POLITICAL QUESTION

Defendants started off their oral argument saying climate change is important, Hawai‘i is addressing it, it is a high priority, new bills are being introduced and passed, and the political process is working well. Therefore, Defendants argue, the issues raised by the two claims in this case amount to a political question, and the courts cannot or should not get involved. First, again, this is partly a factual argument on a Rule 12(b)(6) motion where the court is required to accept the factual allegations of the Complaint. More importantly, this argument fails to recognize the two claims in this case are both based on the Hawai‘i Constitution. The courts unequivocally have

an important and long-recognized role in interpreting and defending constitutional guarantees. *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 143 (2000); *Ching*, 145 Hawai'i at 176 (the political question doctrine does not bar a claim based on public trust duties). The State argues that three of the *Baker* factors are met. *See Baker v. Carr*, 369 U.S. 186 (1962), and *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 194 (2012). To the court, the issue of a political question is not yet and likely will not be formed unless and until a specific motion for injunctive relief is filed. Then we will see if the requested relief improperly trespasses into political questions. In the meantime, the court concludes the *Baker* factors are not automatically triggered by the declaratory relief requested. Depending on where the constitutional arguments and claimed relief end up, Defendants are free to bring up the political question argument again. Currently, where the Defendants argue they have no duty to act now, invoking the political question doctrine is premature.

VI. AGENCY REVIEW/APPEAL

Defendants argue an agency review and appeal under HRS § 91-1 is required before bringing this case in court. *See* Mot. at 7 n.2, 11, 14. Again, Hawai'i law does not require this step in the context of a breach of trust claim and declaratory relief. *See Ching*, 145 Haw at 174.

VII. INJUNCTIVE RELIEF

This seems to be Defendants' greatest concern—that the court will appoint a Special Master to control HDOT. Again, the court respectfully notes this is a 12(b)(6) motion and the court is required to accept the allegations of the complaint as true. The court is making no decision on the merits of injunctive relief. We are even farther away from the court considering whether it would appoint a Special Master. The court declines to spend its limited time on what is currently a non-essential and premature issue in the context of this 12(b)(6) motion.

Accordingly, for the reasons outlined above, and based on the court's overall consideration of the arguments and legal authorities presented to the court, it is hereby ORDERED that the Defendants' Motion to Dismiss is DENIED.

DATED: Honolulu, Hawai'i: April 19, 2023

/s/ Jeffrey P. Crabtree

JEFFREY P. CRABTREE
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM

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