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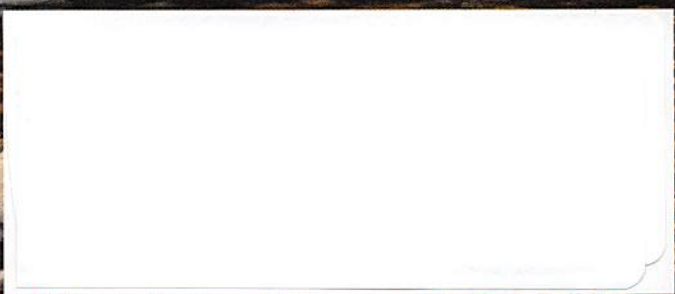
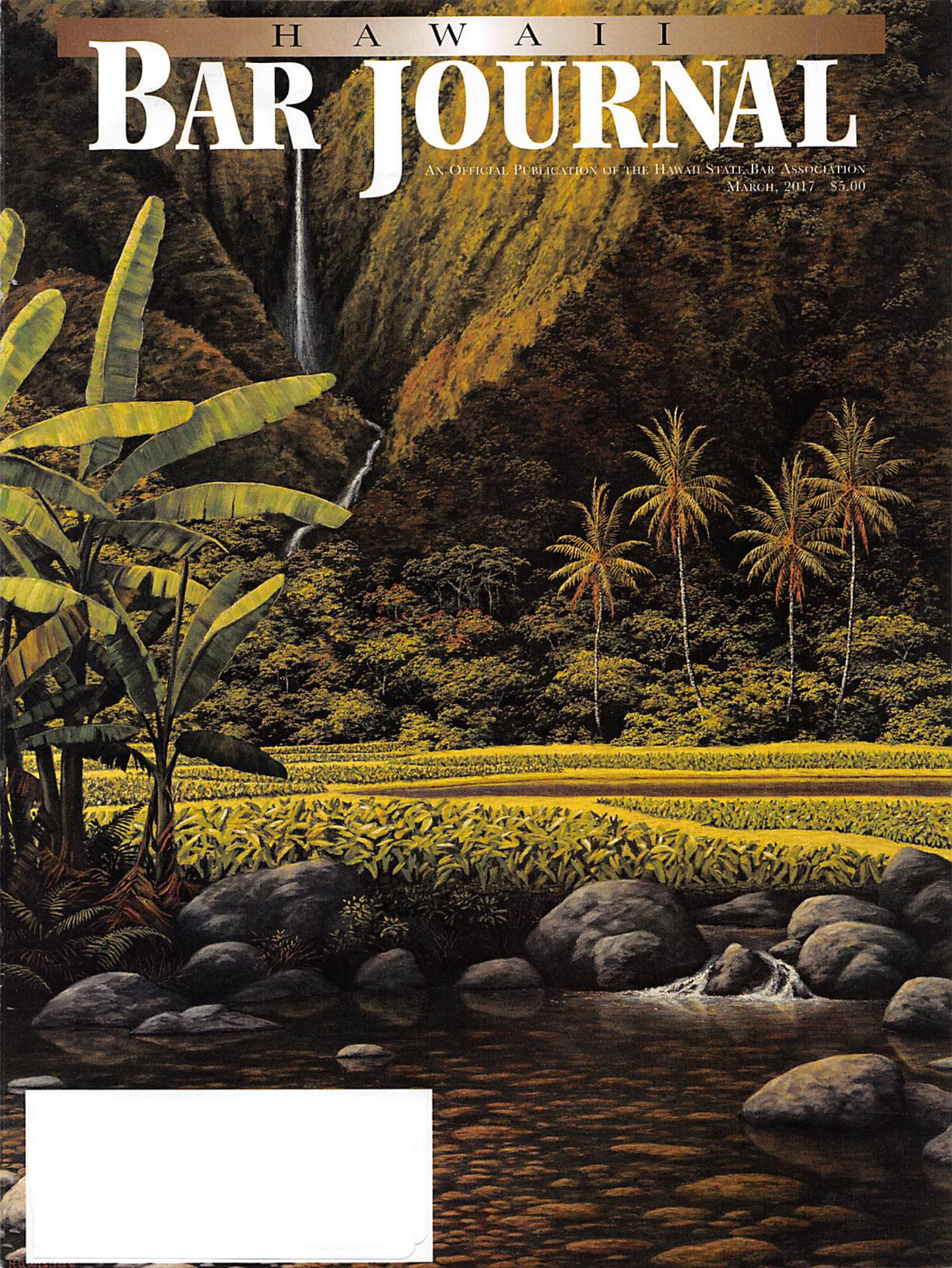


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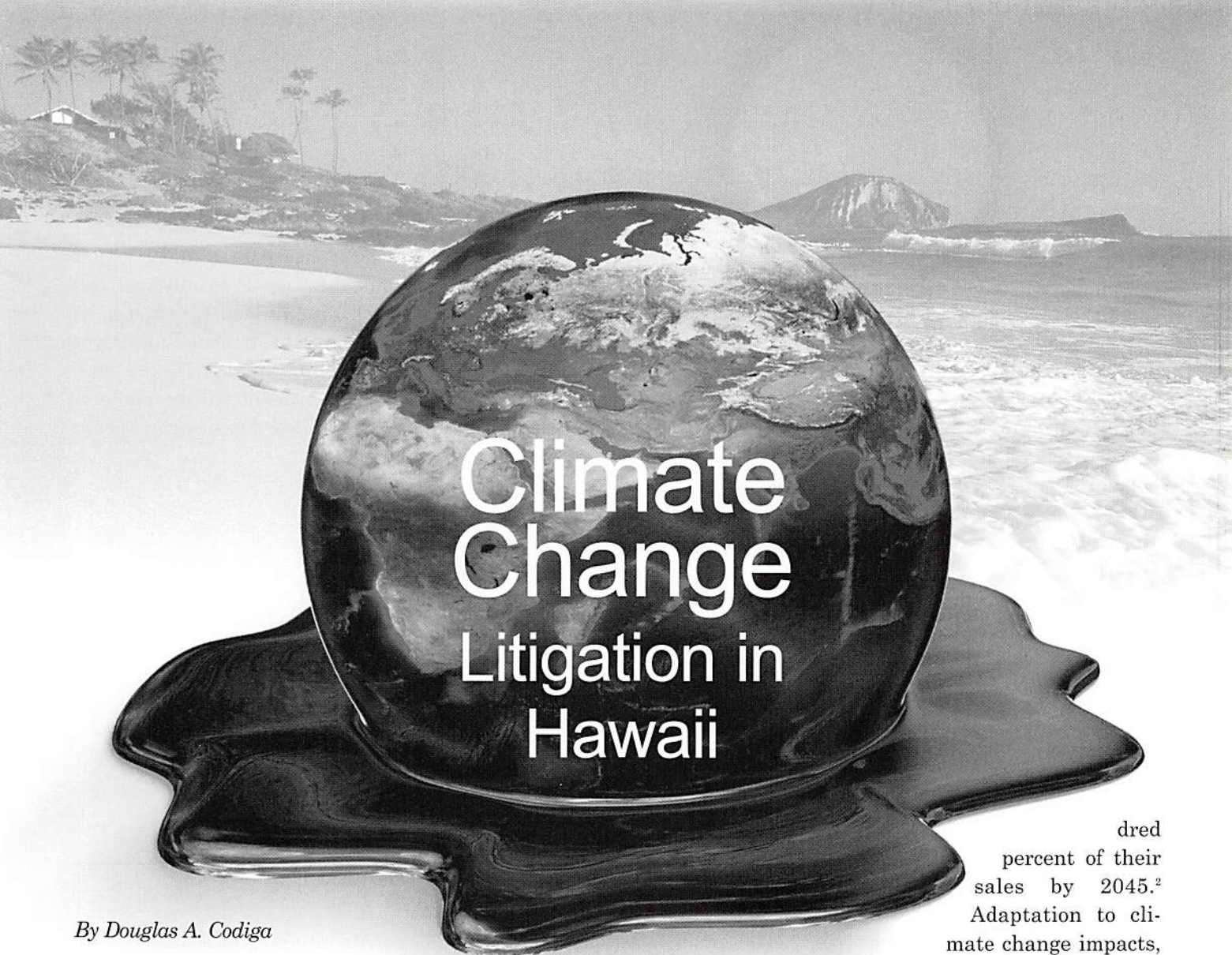
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Climate Change Litigation in Hawaii

By Douglas A. Codiga

As climate change impacts increase in the future, affected parties – including businesses, landowners, and concerned citizens – will increasingly seek redress before Hawaii courts and governmental agencies. These climate change-related legal actions will be based on different but related legal theories, and seek a correspondingly broad range of relief. Yet these diverse legal actions will remain united by one factor: the pursuit of justice in the face of growing climate change impacts in the Islands, including sea-level rise, changes to rainfall patterns, extreme weather events, ocean acidification, and pollution of the atmosphere with greenhouse gas emissions.

Climate change litigation in Hawaii is likely to continue to focus on the two chief substantive areas of mitigation and adaptation. The legal basis for mitigation, or the reduction of the greenhouse gas (“GHG”) emissions which cause climate change, is found in both environmental and energy law. Air pollution control laws, for example, establish emission limits and regulate pollution of the atmosphere with GHG emissions.¹ Mitigation of GHG emissions may also be accomplished by laws mandating increased reliance on renewable energy, such as Hawaii’s Renewable Portfolio Standards law which requires electric utilities to establish a renewable portfolio standard of one-hun-

dred percent of their sales by 2045.² Adaptation to climate change impacts,

such as rising sea levels, is a similar focus, for example with laws regulating real property development and public infrastructure in low-lying coastal areas.

Effective dispute resolution in this area will require counsel to not only understand and apply environmental, energy and other areas of the law, but also to grasp the scientific and technical aspects of diverse climate change impacts. Equally important, the dynamic interplay between current laws and future climate change impacts must be continually assessed as they evolve through the litigation process in Hawaii and other jurisdictions.

Accordingly, this article provides a brief overview or “snapshot” of selected areas of Hawaii

climate change litigation. A comprehensive discussion of the detailed aspects of the various laws and policies at issue is beyond the scope of this article. Instead, selected legal theories and actions are surveyed to provide an introduction to critical issues likely to shape the growth of Hawaii climate change litigation in the future.

Climate Change Impacts in Hawaii

Climate change is changing Hawaii. The impacts of climate change have been observed and documented by scientists for decades on both land and sea. On land, the rate of warming air temperature in Hawaii has quadrupled in the last forty years to over 0.3 degrees Fahrenheit per decade.³ This warming could cause heat-related illnesses and vector-borne diseases (e.g., dengue fever) in humans, expanded ranges for pathogens and invasive species, and thermal stress for plants and animals. A decrease in the prevailing northeasterly trade winds, which drive precipitation on windward coasts, has also been recorded in Hawaii over the last forty years.⁴

Over the last thirty years rainfall has declined overall in Hawaii, with widely varying precipitation patterns on each island. More drought and heavy rains, which damage infrastructure and cause flash flooding, runoff, and sedimentation, are projected in the future. Stream base flows have decreased the last seventy years due to declining precipitation, which could also reduce aquifer recharge and freshwater supplies, adversely impacting agriculture as well as aquatic and riparian ecosystems.⁵

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At sea, climate change is increasing sea levels, sea surface temperatures, and ocean acidity. Sea level has risen over the last century on each island from 0.5 to 1.3 inches per decade, causing beaches and shorelines to recede. Globally, rates of sea rise are projected to continue to accelerate, resulting in sea-level rise of one to three feet, or more, by the end of the century. Sea-level rise will exacerbate coastal inundation and erosion, degrade coastal ecosystems, and increase beach loss and damage to infrastructure in low-lying areas. Similarly, sea surface temperatures, which influence ocean circulation and nutrient distribution, have warmed between 0.13 and 0.41 degrees Fahrenheit per decade in the Pacific for the last forty years, with warming of 2.3 to 4.9 degrees predicted by the end of the century. Ocean acidification, which has increased by thirty percent globally due to marine uptake of carbon dioxide pollution, could harm marine life by inhibiting shell and skeleton growth in corals, shellfish, and plankton.⁶

Citizen Suit Litigation Under Hawaii's Climate Change Law

To address these types of climate change impacts, in 2007 the Hawaii Legislature passed major climate change legislation known as Act 234. Act 234 describes the harm from various climate change impacts. These include displacement of businesses and residences and inundation of freshwater aquifers from sea-level rise, damage to marine ecosystems and the natural environment, extended drought and loss of soil moisture, an increase in the spreading of infectious diseases, and an increase in the severity of storms and extreme weather events.⁷ Act 234 also affirms that climate change will harm some of Hawaii's largest industries, including tourism, agriculture, recreation, commercial fishing, and forestry.⁸

Declaring that "climate change poses a serious threat to the economic well-being, public health, natural resources, and the environment of Hawaii," Act

234 requires a statewide reduction of GHG emissions to 1990 levels by the year 2020. This emissions limit, and other key provisions of the Act, are codified in Part VI, "Greenhouse Gas Emissions" ("Part VI") of Hawaii's air pollution control law, Chapter 342B, Hawaii Revised Statutes, "Air Pollution Control" ("Chapter 342B"). Section 342B-71 states: "A statewide greenhouse gas emissions limit to be achieved by 2020 is hereby established that is equal to

Ocean acidification, which has increased by thirty percent globally due to marine uptake of carbon dioxide pollution, could harm marine life by inhibiting shell and skeleton growth in corals, shellfish, and plankton.

or below the level of statewide greenhouse gas emissions in 1990, as determined by section 3 of Act 234, Sessions Laws of Hawaii 2007; provided that for purposes of this Act greenhouse gas emissions from airplanes shall not be included."⁹

This broad mandate is enforced through administrative rules implementing Chapter 342B. On June 30, 2014, Chapter 11-60.1, Hawaii Administrative Rules, was amended to include Subchapter 11, "Greenhouse Gas Emissions" ("Subchapter 11"). These rules specify a sixteen percent GHG emission cap for large existing stationary sources with potential carbon dioxide equivalent emis-

sions at or above 100,000 tons per year.¹⁰ Each affected source must submit a GHG emission reduction plan to establish measures to meet the approved emission cap, which shall be incorporated into the facility's covered source air pollution control permit under Chapter 342B.¹¹

The climate change-related amendments to Chapter 342B are subject to its existing enforcement provisions, including the citizen suit provision set forth in section 342B-56, "Citizen suits." This provision may provide a basis for at least three types of climate change litigation. First, under section 342B-56(a)(1), "any person may commence a civil action on that person's own behalf" against "any person" who is alleged to be in violation of Chapter 342B, including in violation of "any emission standard or limitation."¹² Thus, the Chapter 342B citizen suit provision may provide a basis for claims against the large stationary



sources, such as power plants or other large emitters of GHGs, which are alleged to be in violation of the emissions standards or limits incorporated into their covered source air pollution control permits. In addition to emissions standards or limits, section 342B-56(a)(3) similarly authorizes actions for violation of other conditions of air pollution control permits.¹³ Finally, the citizen suit provision authorizes civil actions against the State of Hawaii Department of Health (“Department”) based on its alleged failure to perform “any act or duty under this chapter [i.e., Chapter 342B] which is not discretionary.”¹⁴ Thus, an alleged failure by the Department to properly enforce the provisions of Part VI of Chapter 342B or Subchapter 11 of the implementing administrative rules could potentially give rise to claims.

It should be noted that the relief available to citizen suit litigants under Chapter 342B includes civil and administrative penalties for the violation of administrative rules¹⁵ and fines of not more than \$25,000 for each separate offense,¹⁶ where each day of each violation constitutes a separate offense.¹⁷ In addition, the State may seek to impose criminal penalties on any person who knowingly violates GHG emission-related provisions and requirements, which may include fines not to exceed \$25,000 for each day of each violation, imprisonment not to exceed five years, or both.¹⁸

Atmospheric Trust Litigation

Like the Chapter 342B citizen suit provision, atmospheric trust litigation may provide a venue for concerned citizens to seek climate justice through Hawaii courts and administrative agencies. The term atmospheric trust litigation (“ATL”) refers to a relatively new and untested legal theory merging climate change litigation and the public trust doctrine. In essence, the ATL legal theory maintains that state and federal governments hold the atmosphere in public trust and must protect the resource for present and future generations.¹⁹ The common law public trust doctrine, which traces its origins to Roman law and English common law, has been developed and applied by numerous courts, including the U.S. Supreme Court in its seminal decisions in *Illinois Central Railroad Company v. Illinois*²⁰ and *Geer v. Connecticut*.²¹ ATL actions proceed on the assumption that a court should find the atmosphere is a public trust resource, the government has breached its fiduciary duty to protect the atmosphere under the public trust doctrine, and climate protective declaratory and injunctive relief should be granted.²²

Thus far, most ATL actions have met with limited success in federal and state courts. In 2011, ATL lawsuits and petitions for administrative rulemaking were filed by youth plaintiffs in all fifty states as part of a campaign coordinated by a nonprofit organiza-

tion.²³ In *Alec L. v. Jackson, et al.* in 2012, for example, the D.C. Circuit Court dismissed plaintiff's ATL claims for lack of subject matter jurisdiction on grounds that the public trust doctrine is a matter of state law and is displaced by the federal Clean Air Act following the U.S. Supreme Court's decision in *American Electric Power v. Connecticut* ("AEP").²⁴

In a groundbreaking recent ATL action brought before the Oregon federal District Court, however, the court denied defendants' motion to dismiss for lack of subject matter jurisdiction.²⁵ Although the court in *Juliana* did not determine whether the atmosphere is or is not a public trust resource,²⁶ it did conclude that application of the public trust

doctrine is not limited to state governments but also applies to federal governments,²⁷ that the ATL claims are not displaced by the federal Clean Air Act and other federal laws pursuant to *AEP*, and that ATL claims may be enforced in federal court.²⁸ The closely-watched *Juliana* ATL action is expected to be set for trial in mid-2017.²⁹

The prospects for similar ATL actions in Hawaii remain unclear and at this writing no ATL actions have been filed in state or federal courts. In 2011, a Honolulu youth filed an administrative petition for rulemaking ("petition") with the Department seeking to reduce the atmospheric concentration of fossil fuel carbon dioxide emissions based on the public trust doctrine.³⁰ Declaring that Hawaii "holds the

air and the atmosphere in trust for present and future generations," the petition asserts that even if there is full compliance with Act 234's mandates there would not be a sufficient reduction in carbon dioxide emissions.³¹ The Department subsequently denied the petition in June 2011 based on Act 234 and state renewable energy mandates, asserting that "we in Hawaii are taking climate change seriously and we intend to reduce Hawaii's GHG emissions significantly."³²

INTERVENTION IN PUBLIC UTILITIES COMMISSION REGULATORY PROCEEDINGS ON RENEWABLE ENERGY

Like courts of law handling ATL actions, administrative agen-




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cies conducting quasi-judicial regulatory proceedings present another venue for businesses, landowners and concerned citizens to adjudicate climate change-related law and policy claims. For example, Hawaii's electric utilities generate electricity primarily by burning imported fossil fuels, which produce carbon dioxide and other GHG emissions contributing to climate change. Statutory mandates and official policy, however, promote a transition from the use of imported fossil fuels to renewable sources of energy to generate electricity, which should mitigate or reduce the GHG emissions causing climate change.

This transition to increased renewable energy is a major focus of electric utility regulation before

the State of Hawaii Public Utilities Commission ("Commission"). The Commission is adjudicating this topic in a number of key regulatory proceedings or dockets.³³ In Docket No. 2014-0183, for example, the Commission is reviewing "Power Supply Improvement Plans" ("PSIP") filed in the proceeding by the Hawaiian Electric Companies.³⁴ The purpose of the PSIP, as described by the utilities, is to provide a "detailed plan charting the specific actions for the years 2017 through 2021 to accelerate the achievement of Hawaii's 100 percent Renewable Portfolio Standard (RPS) by 2045."³⁵ A sampling of similarly important regulatory proceedings includes Docket Nos. 2013-0141 (decoupling), 2014-0192 (distributed energy

resources), 2015-0142 (demand response), 2015-0389 (community-based renewable energy), and 2016-0087 (smart grid and grid modernization).

Stakeholder parties have played an important role in these proceedings by filing motions to intervene and contributing to the record as parties or participants. Over the last decade the Commission has admitted significant numbers of state and county agencies, renewable energy trade associations, commercial developers, and advocacy organizations in these types of proceedings.³⁶ The Commission's Rules of Practice and Procedure, which govern intervention, establish a multi-factor test and provide for intervention as a full party or as a participant with



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Although energy production rather than GHG emissions reductions is usually the central focus of these Commission proceedings, climate change may play an important role. For example, in a recent proceeding an electric utility sought to extend an existing power purchase agreement with a coal-fired power plant. The Commission denied the utility's request, in part because the extension would increase GHG emissions from the burning of coal to produce electricity.³⁸ Thus, like Chapter 342B citizen suits and ATL actions, these quasi-judicial administrative proceedings provide another venue for adjudicating the mitigation of GHG emissions.

SEA-LEVEL RISE ADAPTATION TORT LIABILITY FOR LOCAL GOVERNMENTS AND DEVELOPERS

Unlike mitigation claims, which seek GHG emissions reductions, adaptation tort claims focus on the potential liability of local government agencies and developers for failing to appropriately address climate change impacts, including rising sea levels. Like Act 234's affirmation that climate change impacts support GHG emissions reductions, in the adaptation context the Hawaii Legislature has similarly declared that climate change is "the paramount challenge of this century, posing both an urgent and long-term threat to the State's economy, sustainability, security, and way of life" in passing Act 83, the Hawaii Climate Adaptation Initiative Act.³⁹

As discussed above, in *AEP* the U.S. Supreme Court rejected claims that GHG emitters are liable under tort law for failing to mitigate GHG emissions causing climate change. Adaptation tort law claims, however – which address climate impacts by compensating plaintiffs for their losses due to negligent planning and project development – may be viable against local governments and developers.⁴⁰ In essence, an adaptation tort negligence claim will apply the four negligence tort elements of duty, breach, causation, and damages in an overarching analysis concerning whether the local government or developer defendant acted reasonably in light of the known risks of climate change.⁴¹ To find a local government negligent for its actions in light of climate change, a plaintiff must establish that the local government's conduct "falls below the standard established by law for the protection of others against unreasonable risk of harm."⁴² It should be noted that local governments in Hawaii and other jurisdictions continue to consider a range of law

and policy tools to address sea-level rise,⁴³ and that the threat of landowner claims under the U.S. and Hawai'i Constitutions for unpermitted regulatory "takings" of their properties by these government agencies remains an acknowledged concern.⁴⁴

Among various climate impacts, sea-level rise may serve as a basis for advancing adaptation tort claims in the near term. Sea-level rise impacts include inundation, erosion, salt intrusion, and drainage problems. Such coastal hazards have arguably become more foreseeable and predictable with improved technology and mapping. Act 83, for example, established an Interagency Climate Adaptation Committee which is to develop a Sea Level Rise Vulnerability and Adaptation report which is due December 31, 2017 and is to be updated every five years.⁴⁵ In addition, the National Oceanic and Atmospheric Administration's Sea Level Rise Viewer is a publicly available web mapping tool that provides an image or visualization of community-level impacts in Hawaii and other coastal states. The impacts include a depiction of sea level rise of up to six feet above average high tides at specific shoreline properties or areas.⁴⁶

Adaptation tort claims appear to have gained a foothold in other jurisdictions. In Australia, for example, local government decisions approving development projects or public infrastructure have been met with legal challenges by local residents on the basis that the agency failed to adequately consider sea-level rise, flood, fire protection, or erosion control.⁴⁷ In addition to local residents who may be more generally impacted, owners of directly adjacent properties may also have viable claims if governments issue permits or fail to adequately regulate development and there are subsequent losses due to storm surge and sea-level rise impacts.⁴⁸

Finally, like local governments, developers might also face adaptation tort liability for development projects on Hawaii's shorelines which are increasingly impacted by sea-level rise. The breach of developer's duty to purchasers would hinge on evidence that the developer knew or should have known material facts regarding the suitability of a development. In Oregon, for example, a court found that a developer of oceanfront lots that were being destroyed by coastal erosion had a duty of reasonable care to determine whether the lots sold were fit for their intended use.⁴⁹

To address this potential litigation risk, developers should consider all reasonable measures to obtain relevant knowledge about the site and any coastal

hazard risks due to sea-level rise. This may include contracting – before commencing development – for independent geological, hydrological, and engineering studies that are based on the best available climate science for the region or topography.⁵⁰

The foregoing presents a sampling of the potential types of future climate change legal actions focused on mitigation and adaptation. Although an emerging area of the law, it draws from established legal principles and may be viewed as an extension of similar claims in environmental, energy, tort and other areas of the law. Increasing climate change impacts in the Islands are likely to continue to drive the future growth and development of climate change litigation in Hawaii.

¹ See 2007 Haw. Sess. Laws, Act 234 § 1(a); H.B. 226, 24th Leg. (Haw. 2007) (“Act 234”); Haw. Rev. Stat. § 342B-71; see also Douglas A. Codiga, *Act 234: Hawaii’s Climate Change Law*, 12 May Haw. B. J. 4 (2008) (overview of Act 234 and Hawaii climate change law and policy).

² See Haw. Rev. Stat. § 269-92; see also Douglas A. Codiga, *Hawaii Clean Energy Law and Policy*, 13 Sept. Haw. B. J. 4 (2009) (overview of Hawaii renewable energy law and policy including Renewable Portfolio Standard law).

³ University of Hawaii Manoa Sea Grant College Program, *Climate Change Impacts in Hawaii: A summary of climate change and its impacts in Hawaii’s ecosystems and communities* (2014) (“*Climate Change Impacts*”) at iii, available at <http://sea-grant.soest.hawaii.edu/sites/default/files/publications/smfinal-hawaiiclimatechange.pdf>.

⁴ *Id.*

⁵ *Id.* See Richard Wallsgrove and David Penn, *Water Resources and Climate Change Adaptation in Hawaii: Adaptive Tools in the Current Law and Policy Framework* (Sea Grant 2012) (analysis of

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climate change and Hawaii water law), available at http://seagrant.soest.hawaii.edu/sites/default/files/publications/water_adaptation_final.pdf

⁶ *Climate Change Impacts* at iii.

⁷ 2007 Haw. Sess. Laws, Act 234 § 1(a). The Act finds climate change is caused by human activities, including the burning of fossil fuels.

⁸ *Id.*

⁹ Haw. Rev. Stat. § 342B-71. See State of Hawaii Department of Business, Economic Development, and Tourism, *Hawaii Clean Energy Initiative Transportation Energy Analysis Final Report* (Aug. 2015) at 140 (identifying recommendations and “tactics” to reduce aviation fuel consumption).

¹⁰ Haw. Admin. Rules § 11-60.1-204(c).

¹¹ Haw. Admin. Rules § 11-60.1-204(b).

¹² Haw. Rev. Stat. § 342B-56(a)(1).

¹³ Haw. Rev. Stat. § 342B-56(a)(3).

¹⁴ Haw. Rev. Stat. § 342B-56(a)(1).

¹⁵ Haw. Rev. Stat. § 342B-47, 48.

¹⁶ Haw. Rev. Stat. § 342B-47(c).

¹⁷ *Id.*

¹⁸ Haw. Rev. Stat. § 342B-49.

¹⁹ Kylie Wha Kyung Wager, *In Common Law We Trust: How Hawaii’s Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change*, 20 *Hastings W.-N.W. J. Envtl. L. & Pol’y* 55 (2014) (“*In Common Law*”) at 56 (citations omitted).

²⁰ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1858); see also *In Common Law* at 84-88.

²¹ *Geer v. Connecticut*, 161 U.S. 519 (1896); see also *In Common Law* at 84-88.

²² See *In Common Law* at 83-105.

²³ See *In Common Law* at 57, n. 10. The nonprofit organization Our Children’s Trust, which states that its mission includes securing the “legal right to a stable climate and healthy atmosphere,” is a leading organization in promoting ATL actions. See Our Children’s Trust, available at <https://www.ourchildrenstrust.org/>.

²⁴ *Alec L. v. Jackson, et al.*, 863 F. Supp. 2d 11; see also *In Common Law* at 79-82.

²⁵ *Juliana, et al. v. United States, et al.*, Case No. 6:15-cv-01517-TC (Signed 11/10/2016) (“*Juliana*”) at 3.

²⁶ *Id.* at 40 n. 10.

²⁷ *Id.* at 48.

²⁸ *Id.* at 51.

²⁹ Our Children’s Trust, *Details of Proceedings*, available at <https://www.ourchildrenstrust.org/federal-proceedings>.

³⁰ *Petition of Joshua Scott & Kids vs. Global Warming to the Hawaii Department of Health* (May 4, 2011) available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5762055c2e69cfaaa6d2aff/1466041694397/HAWAII+CITI-ZEN+PETITION+OL.pdf>.

³¹ *Id.* at 1.

³² Letter from G. Gill (Dept. of Health) to A. Looz, *et al.* (June 8, 2011), available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5762053044024394189d1508/1466041650141/HawaiiPetitionDenial.pdf>.

³³ See Douglas A. Codiga, *Hot Topics in Hawaii Solar Energy Law* 17 *May Haw. B. J.* 4 (2013) (overview of Hawaii solar photovoltaic law and policy including regulatory proceedings)

³⁴ See, e.g., “Hawaiian Electric Companies PSIP Update Report” filed Dec. 23, 2016 (Docket No. 2014-0183), available at <http://dms.puc.hawaii.gov/dms/>.

³⁵ *Id.*, Executive Summary at ES-1.

³⁶ See, e.g., Order No. 33320 Admitting Intervenors and Participants, Identifying Observations and Concerns, Specifying Initial Statement of Issues, and Establishing Schedule of Proceedings filed Nov. 4, 2015 (Docket No. 2014-0183) at 175 (admitting three State and county agencies as parties and eighteen other applicants as participants).

³⁷ See Haw. Admin. Rules §§ 6-61-55, “Intervention,” 6-61-55, “Participation without intervention.”

³⁸ See Decision and Order No. 34283 filed Jan. 4, 2017 (Docket No. 2016-0007) at 30; see also Haw. Rev. Stat. § 269-6 (authorizing Commission consideration of GHG emissions in utility cost determinations).

³⁹ 2014 Haw. Sess. Laws, Act 83 §1(a); H.B. 1714, 27th Leg. (Haw. 2014) (“Act 83”); see generally Haw. Rev. Stat. § 225P-3.

⁴⁰ Maxine Burkett, *Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice*, 42 *ELR* 11144 (Dec. 2012) (“*Litigating Climate*”) at 11145, n. 14.

⁴¹ *Id.* at 11147.

⁴² See Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 *Geo. Mason L. Rev.* 775, 785 (2013) (“*Duty and Breach*”); Restatement (Second) of Torts § 282 (1965).

⁴³ See, e.g., Douglas Codiga and Kylie Wager, *Sea-Level Rise and Coastal Land Use in Hawaii: A Policy Tool Kit for State and Local Governments* (Sea Grant 2011), available at http://seagrant.soest.hawaii.edu/sites/default/files/publications/icap-sealevelrisetoolkit_web-1_2.pdf.

⁴⁴ See, e.g., Douglas Codiga, Dennis Hwang, and Chris Delaunay, *Climate Change and Regulatory Takings in Coastal Hawaii* (Sea Grant 2011), available at http://www.islandclimate.net/wp-content/uploads/2012/05/Codiga-Hwang-Delaunay_2011_Regulatory-Takings.pdf.

⁴⁵ Haw. Rev. Stat. § 225P-3(b).

⁴⁶ National Oceanic and Atmospheric Administration Office for Coastal Management Sea Level Rise Viewer, available at <https://coast.noaa.gov/digitalcoast/tools/slr>.

⁴⁷ See, e.g., Baker & McKenzie, *Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties* (2001) at 36, available at <http://www.environment.gov.au/climate-change/adaptation/publications/local-council-risk-liability>.

⁴⁸ *Litigating Climate* at 11153.

⁴⁹ *Beri, Inc. v. Salishan Properties, Inc.*, 580 P.2d 173 (Or. 1978); see also *Litigating Climate* at 11155.

⁵⁰ *Id.* at 11154-58.

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