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FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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Civil No. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL;
TODD A.K. MARTIN, Plaintiffs-Appellees,
v.
CITY AND COUNTY OF HONOLULU, a municipal corporation;
KUILIMA RESORT COMPANY, a Hawaii corporation,
Defendants-Appellees,
and
DOE DEFENDANTS 1-10, Defendants

KUILIMA RESORT COMPANY, a Hawaii general partnership,
Counterclaim Plaintiff-Appellee,
v.
UNIT HERE! LOCAL 5 HAWAII, a Hawaii labor
partnership; ERIC W. GILL, an individual,
Counterclaim Defendants-Appellees

KUILIMA RESORT COMPANY, a Hawaii general partnership,
Counterclaim Plaintiff-Appellee,
v.
UNITE HERE!, a New York labor organization,
Additional Counterclaim Defendant-Appellee,
and
DOE DEFENDANTS 1-10, Additional Counterclaim Defendants

and

Civil No. 06-1-0867
KEEP THE NORTH SHORE COUNTRY, a Hawaii non-profit
corporation; and SIERRA CLUB, HAWAII CHAPTER, a foreign
non-profit corporation, Plaintiffs-Appellants,
v.
CITY AND COUNTY OF HONOLULU; HENRY ENG, Director of
Department of Planning and Permitting, in his
official capacity; KUILIMA RESORT COMPANY, a Hawaii
general partnership, Defendants-Appellees,
and
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; and DOE
GOVERNMENTAL UNITS 1-10, Defendants

NO. 28602

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

MAY 22, 2009

WATANABE, ACTING C.J., AND FOLEY, J.;
AND NAKAMURA, J., DISSENTING

OPINION OF THE COURT BY FOLEY, J.

Plaintiffs-Appellants Keep the North Shore Country (KNSC), a Hawai'i non-profit corporation, and Sierra Club, Hawai'i Chapter (Sierra Club), a foreign non-profit corporation, (collectively, Plaintiffs) appeal from the Amended Final Judgment filed on June 4, 2007 in the Circuit Court of the First Circuit[1/] (circuit court). The circuit court entered judgment in favor of Defendants-Appellees City and County of Honolulu (CCH); Henry Eng (Eng), Director of Department of Planning and Permitting (DPP), in his official capacity; and Kuilima Resort Company (Kuilima), a Hawai'i general partnership, (collectively, Defendants) and against Plaintiffs on all of Plaintiffs' claims as set forth in their First Amended Complaint.

On appeal, Plaintiffs contend the circuit court erred in granting Kuilima's Third Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment.

I.

In the 1980's, Kuilima's predecessor in interest, Kuilima Development Company (KDC), owned a resort on the North Shore of the Island of O'ahu. The resort consisted of a 487-room hotel and an 18-hole golf course. KDC proposed the Kuilima Resort Expansion (Project), which would involve expansion of the existing hotel and new construction of three hotels for total of 1,450+ new units; renovation of the existing 18-hole golf course; and new construction of 2,060+ condominium units, a 70,000+ sq. ft. commercial complex, an 18-hole golf course and clubhouse, a tennis center, and an equestrian center. The Project also called for infrastructure and public improvements, including a

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[1/] The Honorable Sabrina S. McKenna presided.

new wastewater treatment plant, a production water well, a standby well, a new reservoir, new water distribution lines, improvements to the portion of Kamehameha Highway fronting the resort, two private and two public beach parks, a wildlife preserve that included virtually all of Punahoolapa Marsh, and public rights-of-way to the shoreline.

A. Environmental Impact Statement (EIS)

In connection with the Project, Kuilima published an EIS Notice of Preparation in the Office of Environmental Quality Control (OEQC) Bulletin on November 8, 1983, seeking comments to aid in the preparation of a Draft EIS. The Draft EIS was filed with the OEQC on August 5, 1985 and published in the OEQC Bulletin on August 8, 1985. Comments to the Draft EIS were used in the preparation of the Revised EIS, which was submitted to the DPP's predecessor, the Department of Land Utilization (DLU), on October 7, 1985.

The Revised EIS identified additional traffic as one of the unavoidable environmental effects of the Project's development and included a traffic study prepared by a company retained by Kuilima. The traffic study examined the traffic conditions that would be caused by an increase in visitors to the region, with projections through the year 2000. Access to the Project would be via Kamehameha Highway, a two-lane, two-way, undivided state highway that serves as the only arterial highway on O'ahu's North Shore. The study concluded that "[w]hile the increased traffic generated by the proposed resort expansion is significant when compared to the projected background conditions, it is not beyond the carrying capacity of an upgraded, high quality two-lane arterial."

The Revised EIS mentioned a potential impact on green sea turtles, a "threatened" species under the federal Endangered Species Act, when discussing the desilting of Kawela Bay (which borders on the Project). It noted that the desilting would be located "across the area where the abundant growths of algae that are known to be important diet items of [green sea turtles] are found." The Revised EIS did not mention any anticipated impact

upon the Hawaiian monk seal, an "endangered" species under the Endangered Species Act.

At the time the Revised EIS was prepared, the Project was to be developed in three phases, with phase I starting in 1986, phase II starting between 1988 and 1989, and phase III starting between 1993 and 1996. The DLU accepted the Revised EIS on October 30, 1985.

B. Initial Approvals and Delays in the Project's Development

The Revised EIS listed additional governmental approvals KDC needed to obtain in order to complete development of the Project, including rezoning approval from the DLU, grading and building permits, a shoreline certification, a Special Management Area Use Permit, and subdivision approval.

On March 27, 1986, the Land Use Commission approved the reclassification of 236 acres of the property from Agriculture District to Urban District for resort and golf course uses.

On May 23, 1986, the DLU accepted KDC's application for a Special Management Area Use Permit and Shoreline Setback Variance. KDC sought to expand its resort by developing a master-planned resort community that would include hotels, dwellings, commercial areas, golf courses, parks, roadways; to replace two drainage culverts with open channels; and to conduct a desilting operation at Kawela Bay.

On June 25, 1986, a bill for an ordinance to rezone certain portions of the property to be developed under the Project was introduced before the CCH City Council (City Council). The bill incorporated the Unilateral Agreement and Declaration for Conditional Zoning (Unilateral Agreement), in which KDC agreed that the zoning change would be subject to conditions requiring, among other things, construction of a wastewater treatment plant, construction of low-to-moderate-income housing, improvements and modifications to roadways, the implementation of a shuttle service, and the establishment of a child care center, parks, public easements to and along the shoreline, and public parking. Like the Revised EIS, the

Unilateral Agreement anticipated development to proceed in three phases, the last phase to be completed before 2000. The Unilateral Agreement noted that development may deviate from the phased development schedule "due to the occurrence of changed economic conditions, lawsuits, strikes or other unforeseen circumstances."

The City Council passed the rezoning bill on August 14, 1986 and approved KDC's application for the Special Management Area Use Permit and Shoreline Setback Variance by resolution adopted on October 1, 1986 (the March 27, 1986; August 14, 1986; and October 1, 1986 approvals are collectively referred to as the Project Entitlements).

Over the next twenty years, only certain aspects of the Project were completed. KDC constructed a wastewater treatment plant and water main between January 1989 and March 1990, the Opana Wells between February 1989 and March 1991, and the Palmer Golf Course between March 1989 and March 1991. Construction of improvements to Punahoolapa Marsh began in approximately March 1990. From 1990 through 1991, KDC obtained subdivision approvals for various parcels to be used for parks, roads, hotels, a golf course, and a golf clubhouse.

In March 1999, Kuilima purchased the property underlying the Project from KDC and KDC assigned its interest in the Project to Kuilima.

In May 1999, the DPP drafted the Koʻolau Loa Sustainable Communities Plan "to help guide public policy, investment, and decision-making through the 2020 planning horizon" in order to maintain and enhance "the region's ability to sustain its unique character, current population, growing, families, lifestyle, and economic livelihood." The plan recognized and supported the Project. The City Council adopted the plan on December 16, 1999.

Kuilima renovated the existing Fazio Golf Course between 2000 and 2002. In 2003, Kuilima obtained approval to renovate and expand existing portions of the Turtle Bay Resort. Between 2003 and 2005, Kuilima invested about $100 million in

completing these renovations, which included the addition of nine resort condominium units.

As of November 2005, construction on the major components of the Project, including the hotel rooms and the condominium units, had not begun.

C. The 2005 Subdivision Application

On November 8, 2005, Kuilima submitted a Site Development Division Master Application Form (Subdivision Application) to the DPP, seeking subdivision approval for approximately 744 acres of its 808-acre property.

In response to the Subdivision Application, the DPP received two letters in January 2006, asking that the DPP require the preparation of a Supplemental EIS (SEIS) before approving the Subdivision Application.[1] In a January 5, 2006 letter, Eric Gill, the treasurer of UNITE HERE! Local 5, asserted that an SEIS was required because twenty years had passed since the Revised EIS and changes had occurred in the "traffic, water availability, hotel and housing needs, endangered species habitat needs, and the like." North Shore resident Ben Shafer submitted a January 6, 2006 letter, stating that "[m]uch had changed since the approval of the [Revised] EIS . . . some twenty years ago" and an SEIS needed to be prepared to allow for community input and to address new concerns regarding "[t]ransportation, sewage, housing, water, cultural [issues], [and] the Master Plan for the Koʻolauloa region."

The DPP responded to the Shafer and Gill letters that because no specific time limit had been imposed on the Project at the time of the Project's initial approval, the DPP felt it could not require an SEIS to address changes in the conditions surrounding the Project caused by the passage of time. Although DPP planner James Peirson (Peirson) drafted the January 19, 2006 reply letter to Shafer, the letter was signed by Eng. The DPP's letter to Shafer stated:

> No time frame for development was either implied or imposed by the City Council as part of its approval. Accordingly, the developer is entitled to proceed with the project as approved. By not imposing any time limits at the time, the City Council indicated that the project could be developed at its own pace. Further, as a matter of law, the [CCH]

> cannot retroactively impose time limits or unilaterally rescind an entitlement like an approved discretionary permit.

(Emphasis added.)

The DPP's reply letter to Gill, dated January 31, 2006, was prepared by DPP planner Mario Siu-Li (Siu-Li) and signed by Eng. The letter explained that an SEIS was not required because as long as Kuilima was following the appropriate subdivision rules and regulations, the CCH was obligated to continue to process the Subdivision Application. The DPP provided Gill a copy of its reply letter to Shafer.

Peirson explained in his deposition that when determining whether to require an SEIS, DPP looked to see if there had been any substantive changes to a project. In his deposition, Siu-Li similarly stated that the reason why the DPP did not require an SEIS for the Project was because "the [S]ubdivision [A]pplication was not changing the existing condition of the properties."

On March 8, 2006, the State of Hawai'i Environmental Council heard testimony from members of the North Shore community regarding the SEIS issue. On March 22, 2006, the Environmental Council wrote to the DPP requesting clarification as to why the Project did not require an SEIS considering "the changes in timing since 1985, especially with respect to cumulative impacts and mitigative measures articulated in the original accepted [Revised EIS]." In an April 4, 2006 letter, the Department of Corporation Counsel for CCH responded that the DPP would not comment on the Environmental Council's concerns because the issue of requiring an SEIS had become the subject of litigation.

The Environmental Council sent a follow-up letter to the DPP dated June 14, 2006, expressing the council's concern that the DPP was placing the burden on others to prove an SEIS was required instead of making its own independent determination:

> The Council is concerned that . . . DPP has not made an independent determination of whether an SEIS is required. Rather, it appears as though DPP believes that it should not require an SEIS unless some third party *proves* to DPP that it is required. This does not appear to be correct.

The Environmental Council also stated that based on the information available to it regarding changing environmental conditions in the Project over the last twenty years and changes in the Project's timing and scope, it believed the DPP should require Kuilima to prepare an SEIS for the Project.

As part of its subdivision review process, the DPP circulated Kuilima's Subdivision Application to various interested departments and agencies of CCH and the State of Hawai'i for review, comment, and approval. The State of Hawai'i Department of Transportation (DOT) was among the departments and agencies that reviewed the Subdivision Application. The DOT accepted Kuilima's Roadway Improvements Implementation and Phasing Plan after Kuilima agreed to revise its Traffic Impact Analysis Report to address the DOT's concerns. On September 29, 2006, without requiring an SEIS, the DPP tentatively approved the Subdivision Application.

D. Proceedings in the Circuit Court

Two civil lawsuits were filed in connection with the DPP's decision not to require an SEIS for the Project.

On February 15, 2006, UNITE HERE! Local 5, Gill, and Todd A.K. Martin filed a complaint against CCH and Kuilima in Civil No. 06-1-0265, seeking declaratory and injunctive relief relating to the lack of an SEIS for the Project.

Plaintiffs filed their complaint on May 19, 2006 and their First Amended Complaint for Declaratory and Injunctive Relief on June 7, 2006, in Civil No. 06-1-0867. Plaintiffs alleged that a substantive change in the timing of the Project had increased the intensity of the Project's environmental impacts and, thus, Kuilima was required to prepare an SEIS for the remaining portions of the Project. Plaintiffs asked the circuit court to (1) order Kuilima to prepare an SEIS updating the Revised EIS before Kuilima proceeded with the dormant portions of the Project; and (2) issue an injunction against any further ground work or construction by Kuilima relating to the Project until the SEIS had been prepared.

The two lawsuits were consolidated on July 17, 2006. On August 1, 2006, the parties to Civil No. 06-1-0265 stipulated to the dismissal with prejudice of all claims and parties. Thereafter, only the parties and claims in Civil No. 06-1-0867 remained.

On October 11, 2006, Kuilima filed four motions:

1. Motion for Judgment on the Pleadings. Kuilima argued that there is no private right of action under the Hawaii Environmental Policy Act (HEPA) to require an SEIS.

2. First Motion for Summary Judgment. Kuilima argued that Plaintiffs' complaint was barred by the statute of limitations.

3. Second Motion for Summary Judgment. Kuilima argued that its Subdivision Application was exempt from the environmental review process and involved a non-discretionary, ministerial action by the DPP that could not trigger an SEIS.

4. Third Motion for Summary Judgment. Kuilima argued that Plaintiffs could not meet their burden of proving that an SEIS was required under the applicable regulations. Kuilima contended that the applicable regulations should be interpreted to mean that an agency can only require an SEIS if there is a substantive change in a project itself which causes significant environmental impacts not addressed in the original EIS. Accordingly, absent evidence that the Project itself had substantively changed, an SEIS could not be triggered based on a showing that new circumstances surrounding the project would result in significant environmental impacts.

Eng and CCH joined in Kuilima's motions, except for Kuilima's Second Motion for Summary Judgment.

On October 26, 2006, Plaintiffs filed a Motion for Summary Judgment, arguing that the DPP had violated the law by failing to require Kuilima to prepare an SEIS.

On December 5, 2006, the circuit court granted Kuilima's Third Motion for Summary Judgment regarding Plaintiffs' inability to meet their burden of proof, denied Plaintiffs' Motion for Summary Judgment, and ruled that Kuilima's other

motions were rendered moot. The circuit court agreed with Kuilima that the applicable regulations should be interpreted to mean that an agency can require an SEIS only when there is a substantive change in the project itself, and the court found that Plaintiffs had not shown a substantive change in the Project. The circuit court found in relevant part as follows:

> 4. Although there has been some delay in the Project from the community's perspective, there have been ongoing activities and actions with respect to the Project throughout the past 20 years. In addition, the Project was adopted as part of the Ko'olauloa Sustainable Communities Plan in May of 1999; the public had an opportunity to participate with respect to the adoption of that Plan.
>
> . . . .
>
> 6. At the end of 2005 and beginning of 2006, certain North Shore neighborhood boards, Ms. Dee Dee Letts on her own behalf, and other individuals asked the DPP whether the timing of the Project would require [an SEIS]. The Plaintiffs did not write any of those letters. The DPP responded, indicating that it had determined that [an SEIS] was not required for the Project. Although it does not appear that specific reasons were given, the DPP determined that the timing of the action has not changed so as to require [an SEIS].
>
> 7. The [Revised] EIS contained only general statements in terms of phasing of the Project, but those statements did not impose a time limit on the Project based on that proposed phasing time frame. The [Revised] EIS does not obligate Kuilima to follow that phasing time frame.
>
> 8. The law provides that when you have a project that is to be constructed in phases, the original EIS covers everything, and the project is the action under consideration. In this case, the Project is the "action." There has been no change to the action that would essentially make it a new action under consideration.

The circuit court concluded that:

> 2. The DPP's decision that [an SEIS] is not required for the Project meets the rule of reason standard and was not arbitrary or capricious. The timing of the Project has not substantively, or essentially, changed. In the alternative, even if the timing had substantively changed, which the Court finds that it has not, such change is not likely to have a significant effect.
>
> 3. Plaintiffs' concerns that form the basis of their claims in this litigation were basically expressed for the first time in the filings before this Court. However, even if the Court were to review those concerns, the Court would not find that there is a substantive change likely to result in a significant effect not originally considered or previously dealt with that would require a supplemental EIS.

The circuit court filed the Amended Final Judgment on June 4, 2007, and Plaintiffs timely appealed.

II.

The circuit court's grant or denial of summary judgment is reviewed de novo. Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Querubin, 107 Hawai'i at 56, 109 P.3d at 697 (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)).

III.

A. HEPA

HEPA, the governing law, was enacted in 1974, codified as Hawaii Revised Statutes (HRS) Chapter 343, and patterned after the National Environmental Policy Act of 1969 (NEPA). Sierra Club v. Dep't of Transp. (Superferry), 115 Hawai'i 299, 306, 167 P.3d 292, 299 (2007). HEPA requires that an EIS be prepared for a development project that meets certain criteria. Id.

HEPA provides that once an EIS has been accepted, "no other statement for the proposed action shall be required." HRS § 343-5(g) (Supp. 2005). HEPA does not specifically address the authority of an agency to require an SEIS.

B. HEPA and Applicable Rules

This appeal turns on the interpretation of HEPA and the rules promulgated by the Environmental Council regarding the circumstances under which an agency is required to order an SEIS. Pursuant to its rule-making authority set forth in HRS § 343-6 (1993), the Environmental Council promulgated Hawaii Administrative Rules (HAR) Title 11, Chapter 200.

HAR § 11-200-2 defines the term "supplemental statement" as meaning "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." The term "action" is defined in HAR § 11-200-2 to mean "any program or project to be initiated by an agency or applicant." HAR §§ 11-200-26 and 11-200-27 establish when an SEIS is required.

Plaintiffs contend these rules mean that an SEIS must be prepared in three separate situations: (1) "[w]hen there is a substantive change in a project's size, scope, location, use, timing, mitigation, and other things which may have a significant effect"; or (2) "[w]hen there is a substantive change in the intensity of environmental impacts caused by the project not disclosed in the EIS"; or (3) "[w]here new circumstances or evidence have brought to light different or likely increased environmental impacts not previously disclosed or dealt with in the EIS."

Kuilima and the DPP, on the other hand, contend that the rules only permit an agency to order an SEIS if substantive changes to the project itself have been made. In Kuilima's words:

> In short, [the applicable regulations] require an initial determination of a substantive change in the Project before the environmental impacts are considered in determining whether an SEIS is required. Neither increased environmental impacts nor new circumstances or evidence alone, without a substantive change in the Project, is sufficient to require an SEIS.

(Emphasis in original; footnote omitted.)

Kuilima and the DPP argue that because there was no substantive change in the Project itself, the DPP correctly determined that it could not require Kuilima to prepare an SEIS. Plaintiffs argue that because the DPP misconstrued the regulations, the DPP failed to take a hard look at whether an SEIS was required by new circumstances and evidence and thus DPP's decision cannot stand.

Kuilima and the DPP point to the language of HAR § 11-200-26, which provides:

> § 11-200-26. **General provisions.** 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 shall be prepared and reviewed as provided by 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.

(Emphases added.)

Under the plain terms of HAR § 11-200-26, the DPP is required to conduct a two-step inquiry to determine whether an SEIS is required:

(1) Whether the action (the Project) has changed substantively in size, scope, intensity, use, location or timing? And if so,

(2) Will the change in any of these characteristics likely have a significant effect and result in individual or cumulative impacts not originally disclosed in the EIS?

If the DPP answers the first question in the negative, no further inquiry is necessary as "no other statement [for the Project] will be required." Id. If the DPP answers the first question in the affirmative (i.e., finding there is a substantive change in one of the aforementioned characteristics), then the DPP is required to determine whether the change will likely have a "significant effect" and result in "individual or cumulative impacts not originally disclosed" in the original EIS. Id.

The requirement that there be a change in the action is further made clear by HAR § 11-200-2: "'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." (Emphases added.)

HAR § 11-200-27, which provides further specifics for determining if an SEIS is required, also requires the threshold determination of a substantive change:

> § 11-200-27. **Determination of applicability.** 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.) The last sentence -- on which Plaintiffs rely -- identifies new or different environmental impacts that would warrant an SEIS, but does not change the requirement as set forth in HAR §§ 11-200-2 and 11-200-26 and the next-to-last sentence of § 11-200-27 that there must be a substantive change in the action (the Project) before an SEIS is to be considered.

No other reading of the rules is possible. HRS § 343-5(g) provides that once an EIS has been accepted, no other statement for the proposed action shall be required. Because the rules must be consistent with HRS § 343-5(g), the rules cannot be construed to require an additional SEIS unless there has been a substantive change in the action. Capua v. Weyerhaeuser Co., 117 Hawai'i 439, 446, 184 P.3d 191, 198 (2008).

C. Plaintiffs' Misplaced Reliance on NEPA and the California Environmental Quality Act (CEQA)

Plaintiffs argue that NEPA and CEQA support their contention that an SEIS is required when there is a change in the intensity of environmental impacts or there are new circumstances or evidence. The plain language of the federal regulations and California's regulations is different from that of Hawai'i's SEIS rules. Moreover, NEPA is limited to federal actions or federally funded actions.

The NEPA regulation, 40 C.F.R. § 1502.9, provides in relevant part that agencies:

> (1) Shall prepare supplementals to either draft or final environmental impact statements if:

> (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.

(Emphases added.)

California's regulation, CEQA § 21166, provides:

> § 21166. **Subsequent or supplemental impact report; conditions.** 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:
>
> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> (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.
>
> (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).

Unlike Hawai'i's SEIS rules that require an SEIS when there is a substantive change in the project or action, NEPA and CEQA § 21166 require an SEIS when there are substantial changes or significant new circumstances or information relevant to the project and action.

D. Plaintiffs' Failure to Show a Substantive Change in the Project

Plaintiffs' only allegation in the circuit court of a "change" in the Project was an alleged change in "timing." Plaintiffs argue that increased traffic, other planned developments near the Project, and the existence of endangered or threatened species constitute "new circumstances or evidence." However, these are not substantive changes in the Project.

When asked what information they had about changes in the Project, each of Plaintiffs' deposition witnesses admitted they had no personal knowledge or evidence of changes in the Project, with the exception of their claim regarding timing.

When asked what change sufficient to require an SEIS had occurred, Schuyler "Lucky" Cole, KNSC's treasurer, responded with the economics of and employment in the area, the striker brigade, Kapolei as a second city, the development of Ko Olina, traffic in the area, and the appearance of monk seals in the area. However, Mr. Cole could produce no actual evidence of these changes, let alone a change to the Project. Similarly, Sierra Club Director Jeff Mikulina admitted that he did not know of any changes in the Project's scope, intensity, or use, stating "[y]eah, I don't remember being too aware of the change in the size itself of the [P]roject. . . . I know some things are moving around. I don't know how the scope has changed in the [P]roject. . . . Again, I don't know enough about the most recent iteration of the [P]roject to see how [the intensity of the Project has] changed." Douglas Cole, a Director of KNSC, stated that he believed that currently there were "far more" cars and people coming to the North Shore than in 1984-85 and "based on personal experience and just observation," it took "a lot longer" to drive along the North Shore.

Plaintiffs confirmed in their answers to interrogatories that they had no specific evidence of a change in the Project. The Revised EIS detailed only an "approximate phasing of the development for the resort." Neither the Revised EIS nor the governmental entities imposed a timing condition.

The record in this case demonstrates there was no substantial change in the Project. This was the conclusion of the DPP, the agency responsible for determining whether the SEIS was required.[2/]

E. Kuilima's Subdivision Application Not an "Action" Under HEPA

Contrary to Plaintiffs' contention, the Subdivision Application did not constitute an "action" under HEPA. HRS § 343-2 (Supp. 2008) defines "action" as "any program or project to be initiated by an agency or applicant." See also HAR

[2/] The Environmental Council agreed that "the responsibility for requiring an SEIS falls squarely on the approving agency, which is DPP."

§ 11-200-2. The Revised EIS covered the entire Project, including the Subdivision Application.

Consideration of HAR § 11-200-7 is a preliminary step in defining an "action" under HEPA. Superferry, 115 Hawai'i at 306 n.6, 167 P.3d at 299 n.6. HAR § 11-200-7 provides:

> **§ 11-200-7. Multiple or phased applicant or agency actions.** A group of actions proposed by an agency or an applicant shall be treated as a single action when:
>
> (1) The component actions are phases or increments of a larger total undertaking;
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> (2) An individual project is a necessary precedent for a larger project;
>
> (3) An individual project represents a commitment to a larger project; or
>
> (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

The Project was not in the first stages of development, and the Subdivision Application was not the start of the Project. A Revised EIS had already been completed, and Project Entitlements had been granted. Kuilima had applied for and received numerous subdivision approvals as part of the Project development, including subdivision approvals for (1) the Project's wastewater treatment plant and Opana Wells; (2) public park P-1; (3) hotel lots H-1 and H-2 and roads A and B; and (4) the golf clubhouse.

The purpose of HAR § 11-200-7 is to prevent the pursuit of "projects in a piecemeal fashion." Superferry, 115 Hawai'i at 338, 167 P.3d at 331. "Piecemealing" or "segmentation" occurs when a party tries to "mask the full nature of [the] project or divides up what is clearly a larger action into smaller pieces." Plaintiffs' argument that the Subdivision Application is the "action" is piecemealing. Kenneth A. Manaster & Daniel P. Selmi, 2 State Environmental Law § 13.10 (2006).

Plaintiffs argue that the Subdivision Application proposes "uses within a shoreline area" and thus, under HRS § 343-5(a) (1993 & Supp. 2005) and Att. Gen. Op. 75-14, should be considered an "action." Plaintiffs, however, are wrong. HRS § 205A-41 (2001 Repl.) defines the "shoreline area" as "all of

the land area between the shoreline and the shoreline setback line."[3/] The shoreline setback line is defined as "that line established in this part . . . running inland from the shoreline at a horizontal plane." HRS § 205A-41.

Plaintiffs point to nothing in the record evidencing that the Subdivision Application proposes "any use within a shoreline area as defined in section 205A-41," as required in HRS § 343-5(a)(3). Plaintiffs fail to establish that all three elements were present in the Subdivision Application thereby making the Subdivision Application an "action" that requires an SEIS.

IV.

Therefore, the Amended Final Judgment filed on June 4, 2007 in the Circuit Court of the First Circuit is affirmed.

Rory R. Wicks of Coast Law Group LLP (admitted pro hac vice) (William S. Hunt, Laura P. Couch, and Blake K. Oshiro of Alston Hunt Floyd & Ing, and Marco A. Gonzalez of Coast Law Group LLP (admitted pro hac vice) with him on the briefs) for Plaintiffs-Appellants.

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Daniel R. Foley

[3/] HRS § 205A-41 provides:

> **§205A-41 Definitions.**
> . . . .
>
> "Shoreline area" shall include all of the land area between the shoreline and the shoreline setback line and may include the area between mean sea level and the shoreline; provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then the term "shoreline area" shall include the entire structure.

Don S. Kitaoka, Deputy Corporation Counsel, City and County of Honolulu (Lori K.K. Sunakoda, Deputy Corporation Counsel, City and County of Honolulu with him on the brief) for Defendants-Appellees City and County of Honolulu and Henry Eng.

Pamela W. Bunn, Lindsey Kasperowicz, and Ronald N.W. Kim of Paul Johnson Park & Niles on the brief for amicus curiae Conservation Council for Hawai'i.