

them to begin seeking the best legal representation available. By prevailing against the U.S. Navy, the NRDC and its fellow plaintiffs have not only inspired other environmental groups around the country, but they have also issued a stern warning to the entire regulated community that no organization is immune from liability in this new era of heightened environmental awareness.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY,
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Region 2**

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(Cosponsored with EPA Region 2, New York State Bar Association, New Jersey State Bar Association, New York City Bar, and Fordham Law School)

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(36th National Spring Conference on
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**STANDING ON BOARD THE SUPERFERRY:
*SIERRA CLUB V. HAWAII DEPARTMENT
OF TRANSPORTATION***

Lisa A. Bail

Goodsill Anderson Quinn & Stifel LLP

Introduction

In *Sierra Club v. State of Hawaii Department of Transportation*, 167 P.3d 292 (Haw. 2007), the Hawaii Supreme Court ruled not only that Sierra Club and other plaintiffs had standing to pursue their claims under the Hawaii Environmental Policy Act, Chapter 343 of the Hawaii Revised Statutes (Hawaii EIS Law), but also invalidated an exemption determination made by the State of Hawaii Department of Transportation (DOT) for improvements necessary to accommodate Hawaii Superferry at Kahului Harbor. The decision, which received international media coverage, is notable for significantly expanding the category of persons who have standing to pursue claims under the Hawaii EIS Law.

Procedural History

The Hawaii Superferry project generally involves a new inter-island ferry service between the islands of Oahu, Maui, Kauai, and the Big Island. The ferry will use existing harbor facilities at Honolulu Harbor, Kahului Harbor, Nawiliwili Harbor, and Kawaihae Harbor for operation of its high-speed, roll-on/roll-off ferry service between the Hawaiian islands.

The litigation focused on proposed improvements necessary to accommodate Hawaii Superferry at Kahului Harbor on Maui including: a removable barge (floating platform) moored to an existing pier to provide a platform between the vessel and the pier for passenger loading and off loading, a removable ramp between the barge and pier for safe vehicle loading and off loading, minor improvements in the form of utility services (water, power and lighting), minor improvements in the form of security fencing and pavement striping, and minor improvements in the form of tents at inspection points or customer waiting areas.

In November 2004, DOT consulted with the State of Hawaii Office of Environmental Quality Control (OEQC) regarding the scope of improvements and changes needed at the various piers to accommodate the introduction of the Hawaii Superferry and the propriety of issuing exemptions from environmental review under the Hawaii EIS law. OEQC confirmed that “OEQC believes that the proposed improvements fall within the scope of work described in the Department of Transportation’s approved exemption list.” OEQC further confirmed, “we believe that the Department of Transportation has authority to declare the actions described above as exempt from the requirement to prepare an environmental assessment.” Prior to issuing the exemptions, DOT also consulted with various state and county agencies regarding the exemption for Kahului Harbor.

On Feb. 23, 2005, DOT issued its decision determining that the operation of Hawaii Superferry at Kahului Harbor conformed to the intended use and purpose of the harbor and met conditions that permitted exemption from environmental review.

Plaintiffs the Sierra Club, Maui Tomorrow, Inc., and the Kahului Harbor Coalition filed a complaint against DOT and Hawaii Superferry, Inc. (Hawaii Superferry) seeking a determination that an environmental assessment (EA) be prepared for the Hawaii Superferry project and/or that the Hawaii Superferry project must be incorporated into an EA being prepared by DOT for implementation of master planned activities in Kahului Harbor in Maui.

The Circuit Court entered a final judgment in July 2005 in favor of DOT and Hawaii Superferry, after granting separate motions of DOT and Superferry to dismiss or, in the alternative for summary judgment, ruling that Plaintiffs lacked standing and DOT’s actions complied with the Hawaii EIS Law.

Plaintiffs appealed and, by January 2006, all appellate issues had been fully briefed before the Hawaii Supreme Court. At substantial cost and investment, Hawaii Superferry constructed the Alakai, the first of two aluminum hull catamarans, and the largest aluminum ship built to date in the United States.

Operational plans were developed and implemented, federal loan guarantees were obtained, staff and crew were hired, and Hawaii Superferry publicly announced the intended start of its interisland ferry service in early September 2007.

Just days before the planned start of Hawaii Superferry’s operations, and after more than a year and a half to consider the briefing before it, on Aug. 23, 2007, the Hawaii Supreme Court heard oral argument and issued an order reversing the circuit court judgment, holding that DOT’s determination that the improvements to the Kahului Harbor were exempt from the requirements of the Hawaii EIS law was erroneous as a matter of law, and instructing the circuit court to enter summary judgment in favor of Plaintiffs on their request for an EA.

The Court’s Opinion

Pursuant to its retention of concurrent jurisdiction, the Hawaii Supreme Court on Aug. 31, 2007 issued a 103-page opinion pertaining to Plaintiffs’ standing to pursue their claims and DOT’s exemption determination.

Standing

To determine whether a plaintiff has standing to pursue claims, the Hawaii courts employ a three-part standing test, requiring that the plaintiff satisfy the following questions in the affirmative: (1) has the plaintiff suffered an actual or threatened injury, (2) is the injury fairly traceable to the defendant’s actions, and (3) would a favorable decision likely provide relief for plaintiff’s injury. The court’s review is therefore limited to those questions, pursued by plaintiffs with requisite standing, which are capable of judicial resolution and presented in an adversary context.

Noting that “standing requirements should not be barriers to justice,” and that public interest concerns warrant the lowering of standing barriers in cases pertaining to environmental concerns, the Hawaii Supreme Court overruled the circuit court’s determination that Sierra Club and the other plaintiffs lacked standing. The Supreme Court’s decision was

based on both substantive and procedural standing, and concluded that the Hawaii EIS Law grants a plaintiff standing to sue “either on the basis of a traditional injury in fact or on the basis of a procedural injury.”

In environmental cases, the court noted that injuries to recreational and aesthetic interests can form the basis for a plaintiff’s standing. The ultimate inquiry depends on injury to plaintiffs themselves, not the environment, although plaintiffs must show that some environmentally-related interest was injured. “Procedural injury” is also recognized as a basis for standing in environmental cases brought before the Hawaii courts, a doctrine derived from the United State Supreme Court’s opinion in *Lujan*, which recognized that “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 7, 112 S. Ct. 2130 (1992).

The Hawaii EIS Law, the Hawaii Supreme Court concluded, allows procedural standing for members of the public under the Hawaii EIS Law because it is a procedural statute that accords procedural rights. The fact that the Hawaii EIS law allowed public notice and comment as to actions under the ambit of the Hawaii EIS Law was enough to suggest to the Hawaii Supreme Court that the Hawaii EIS Law accords a procedural right unto members of the public.

The Hawaii Supreme Court concluded that Plaintiffs suffered threatened injuries under a traditional injury-in-fact test or procedural injuries based on a procedural rights test. Under a threatened injuries test, the court found that Plaintiffs’ threatened injuries resulted from DOT’s decision to issue an exemption and allow the Superferry project to operate without an EA. Plaintiffs’ procedural injury was satisfied by the various interests identified by Plaintiffs that were threatened due to the violation of their procedural rights under the Hawaii EIS Law. These interests included concerns from a canoe club coach that Superferry’s docking in Kahului harbor would impinge on the outrigger canoe race course and training area,

and could also result in increased traffic near the harbor. The interests also included those of a marine biologist studying marine life in the waters through which Hawaii Superferry would travel and a surfer who was concerned upon the effects of an expanded Coast Guard security zone limiting access to surf sites. The Hawaii Supreme Court found this threat of increased risks “clearly redressable by the preparation of an EA” allowing for the threatened injuries to be addressed and potentially mitigated or avoided.

Under the new test for establishing a procedural injury, a plaintiff before the Hawaii courts pursuing a claim under the Hawaii EIS law must show that: (1) they have been accorded a procedural right which was violated in some way, (2) the procedural right protects the plaintiff’s concrete interests, and (3) the procedural violation threatens plaintiff’s concrete interests. The personal threat to the plaintiff required by the latter can be shown through either a “geographic nexus” to the site in question or simply the fact that the procedural violation increases the risk of harm to the plaintiff’s concrete interests.

The Hawaii Supreme Court carefully and deliberately distinguished its decision in *Sierra Club v. Hawaii Tourism Authority*, 59 P.3d 877 (Haw. 2002), a plurality opinion in which it found the Sierra Club lacked standing to challenge the expenditure of \$114 million in state funds on a tourism marketing plan without first conducting an EA. In denying standing in that earlier case, the Hawaii Supreme Court in that case focused on the lack of a connection between the alleged environmental injuries and the state’s failure to prepare an EA, finding that there was no basis to conclude that the marketing program would result in increased tourism and that there was no basis to conclude that increased traffic and use of recreation areas was due to the state’s marketing of tourism. The court noted that the plaintiffs in the Superferry challenge had established a “geographic nexus” to the particular area of Kahului Harbor in which the ferry would dock, unlike the Sierra Club in the *Hawaii Tourism Authority* which failed to establish a geographic nexus to a particular area.

Exemption Determination

There was no dispute in the underlying litigation, or during the appeal, that the harbor improvements necessary for Superferry's operation were a triggering "action" under the Hawaii EIS law. The question before the Supreme Court was whether DOT's exemption determination was erroneous. In examining this issue, the Supreme Court referred to the regulatory requirement that an agency must consider the exclusions to the exemption, referring to the requirement under the Hawaii Administrative Rules that exemptions "are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment." The Supreme Court also found that in making an exemption determination, DOT was required to review "all phases of a project as a whole," including secondary and cumulative impacts.

The fact that Hawaii Superferry had developed operating plans and developed policies to minimize its effect on the environment, even though it was exempt from the Hawaii EIS Law, did not allay concerns regarding the propriety of DOT's exemption. To the contrary, the fact that such plans had been developed indicated to the Hawaii Supreme Court a "probability" that absent such voluntary policies Superferry's operations would have "more than minimal environmental effects." Therefore, the court reasoned, because mitigation measures were implemented, the Superferry was not a "minor project" that would "probably have minimal or no significant effects on the environment" and thus could not be exempt from review under the Hawaii EIS law.

The court wanted DOT to look beyond the facial compliance of the Kahului harbor improvements with its exemption class, holding that it should also have determined that the activity probably would not have a significant effect, considering not just the effect of the action on the direct site to which the exemption applies, but also secondary impacts that are "incident to and a consequence of the primary impact." Without a record that the DOT had considered secondary

impacts, the Supreme Court concluded that DOT's exemption determination was erroneous as a matter of law.

Epilogue

Following the Hawaii Supreme Court's opinion, plaintiffs moved for, and obtained injunctive relief prohibiting commencement of Hawaii Superferry's operations. This injunction was ultimately lifted in November 2007 following a special session of the Hawaii Legislature which allowed large capacity ferry vessels to operate during the environmental review period. This law was passed based upon the recognition of the public's interest in having operational ferry vessels and the use of harbor improvements.

SAVE TARA AND CONCERNED MCCLOUD CITIZENS: WHEN DO CONDITIONAL AGREEMENTS REQUIRE CEQA REVIEW?

Todd W. Smith

Pillsbury, Winthrop, Shaw, Pittman, LLP

Pursuant to the California Environmental Quality Act (CEQA) (California Public Resources Code §§ 21000 *et seq.*), "discretionary projects proposed to be carried out or approved by public agencies" (Pub. Res. § 21080(a)) must be evaluated to "determine whether a project may have a significant environmental impact, and thus whether an EIR [environmental impact report] is required" (*Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal. 3d 376, 394). Sometimes, however, "the critical issue . . . is not whether an EIR has to be prepared . . .; rather, the critical issue is *when* an EIR has to be prepared." *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal. App. 3d 772, 778 (emphasis added).

Two recent decisions by California courts of appeal—*Concerned McCloud Citizens v. McCloud Community Service District* 147 Cal. App. 4th 181 (2007) (rehearing denied Feb. 22, 2007, review denied Apr. 25, 2007) (*Concerned McCloud*