NO. 28845

IN THE INTERMEDIATE COURT OF APPEALS
THE STATE OF HAWAI`I

1000 FRIENDS OF KAUAI, a Hawaii non-profit incorporation; RICHARD HOEPPNER, an individual, Petitioners/Appellants vs. THE DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII; BARRY FUKUNAGA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII and HAWAII SUPERFERRY, INC. Respondents/Appellees	CIVIL NO. 06-1-0049 (Injunctive Relief) (Declaratory Judgment) APPELLANTS' OPENING BRIEF; CERTIFICATE OF SERVICE APPEAL FROM THE JUDGMENT FILED HEREIN ON OCTOBER 12, 2007. FIFTH CIRCUIT COURT HON. RANDAL G.B. VALENCIANO Fifth Circuit Judge

APPELLANTS' OPENING BRIEF;

CERTIFICATE OF SERVICE

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APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE AND MATERIAL FACTS

This case is intertwined with the case of Sierra Club, et. al. v. Department of Transportation et. al.,115 Hawai'i 299, 167 P.3d 292 (August 31, 2007).

"The Hawaii Superferry project (HSP) generally involves an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i and Hawai'i using harbor facilities on each island." Sierra Club v. DOT, 115 Haw. at 303.

HSP filed an application on July 22, 2004 with the Public Utilities Commission of the State of Hawaii ("PUC") for a Certificate of Public Convenience and Necessity to operate as a water carrier of passengers and property between the islands of Oahu and Kauai, Maui and Hawaii. Motion for a Temporary, Preliminary and/or Permanent Injunction p 39. ROA at 63.

On January 26, 2005 a unanimous Kauai County Council adopted a resolution requesting that an environmental impact statement be prepared on the Hawaii Superferry. Ex. A to Motion for a Temporary, Preliminary and/or Permanent Injunction. ROA Vol. 1 at 23.

In February 2005, the Department of Transportation, ostensibly fulfilling the requirements of HRS §343 *et. seq*. (Hawaii Environmental Protection Act or "HEPA"), made a determination that the use of State or County lands associated with the Hawaii Superferry project and, more particularly, the improvements to State harbors on Kaua'i, Maui, O'ahu and Hawai'I, would have no significant environmental impact and thus were exempt from the requirement of performing an environmental assessment (EA). Upon finding no significant impact to the environment associated with the harbor improvements for the Hawaii Superferry project, the DOT exempted all four harbors from the requirements of an EA. This omnibus exemption took the form of four (4) "Exemption Determinations" - one for each harbor.

"The [exemption] letters were written on the same day, February 23, 2005 and they all have the same author, Barry Fukunaga of the State Department of Transportation, and the content of the letters is nearly identical. There's only one paragraph of about seven paragraphs that is different. And the only difference is it's describing the details of the layout at each harbor." Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 45.

Exhibit. A to Memorandum of Law Re: Jurisdiction, on September 11, 2007. ROA Vol. 2 at 28. See also ex. C to Defendant Hawaii Superferry Inc.'s Memorandum in Opposition to Motion for a Temporary, Preliminary and/or Permanent Injunction. ROA Vol. At 138.

On September 7, 2005 the State of Hawaii entered into a "Harbors Operating Agreement" between the State of Hawai'i and Hawai'i Superferry, Inc. (hereinafter "HSF"). Page two of that Agreement acknowledges that "HSF and other users of the State's commercial harbors are subject to the State's Administrative Rules..."

The Hawaii Superferry project is "subject to the availability of adequate port facilities" under the jurisdiction of the DOT at State harbors in Honolulu, Oahu, Nawiliwili, Kauai, Kahului, Maui and Kawaihae, Hawaii. In a "letter of intent" dated December 9, 2004, the DOT acknowledged (1) they will pay for certain "equipment", including $40,000,000.00 for barges, and boarding ramps and gangways and (2) that the State will allow HSF to install temporary accommodations for passenger facilities at ***Nawiliwili, Kahului and Kawaihae harbors***, provided HSF pays all costs, as well as incidental support services including ticket sales, customer processing, passenger vehicle and waiting, grouping and assembly of passengers, vehicles and cargo, inspection of passengers, baggage, vehicles and cargo, embarkation, disembarkation, cargo and vehicle loading and unloading. Defendant Hawaii Superferry's CEO described these necessary facilities as "a prerequisite to Superferry's commencement of its operations." See Declaration of Mr. Garibaldi as Exhibit X to Respondents' Opposition to Motion for a Temporary, Preliminary and Permanent Injunction. ROA at 138.

On March 21, 2005 the Sierra Club filed a complaint in the Second Circuit Court challenging "certain exemptions issued by DOT as of February 23, 2005 for Harbor Improvements which are a condition precedent to the implementation of the [Hawaii Superferry] project." First Amended Complaint, p. 2 in Sierra Club et. al. v. Department of Transportation et al. (2nd Circuit Court, Civil no. 05-1-0114 (3) (hereinafter "Sierra Club (Maui))", decided by the Hawaii Supreme Court in Sierra Club v. DOT, infra. The complaint alleged, "these claimed exemptions are illegal, void or voidable as a matter of law and fact." The complaint also alleged "because a complete and adequate Environmental Assessment ("EA") was and is required pursuant to Chapter 343 . . . any approvals granted for this project are void and the "Hawai'i Superferry" must be enjoined or stayed from implementing any

segment of this project." The complaint alleged further,"the triggering event for an EA in this case is the extensive use of state lands, namely, State harbors on all of the major islands in the State of Hawai'i." First Amended Complaint for Declaratory Injunctive and Other Relief, Paragraphs 3, 4 & 7 in Sierra Club v. DOT (Second Circuit Court, Civil no. 05-1-0114 (3)), decided by Hawaii Supreme Court in Sierra Club v. DOT., Supra.

The First Amended Complaint in Sierra Club (Maui) sought "a Temporary Restraining Order, preliminary injunctions, and permanent injunction and / or stay that would restrain DOT and Superferry from proceeding with the short-term Harbor improvement and / or the Hawaii Superferry project from implementing the projects in any way, from seeking or granting any further approvals for the project or from selecting any particular alternatives... unless and until an acceptable EA is prepared." Sierra Club (Maui).

On May 12, 2005 DOT filed a Motion to Dismiss in Sierra Club (Maui). HSF filed a similar motion. On July 12, 2005 the Second Circuit Court (Judge Cardoza presiding) issued an Order granting both motions. Id. The Sierra Club appealed the dismissal and its requests for injunctive relief to the Hawaii Supreme Court.

On August 23, 2007 the Supreme Court issued an Order reversing the July 12, 2005 Circuit Court judgment, and instructed the Circuit Court to enter Summary Judgment in favor of the Sierra Club as to its request for an EA. The Court held that the "[t]he Hawai'i Department of Transportation's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai'i Revised Statutes (HRS) chapter 343 (Supp.2004) was erroneous as a matter of law." Sierra Club v. DOT, 115 Haw at 298, 167 P.3d at 305. The Court further held that the "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary on the environment[1]. Therefore, … DOT's determination that the improvements [ ] are exempt from the requirements of HEPA [the Hawaii Environmental Protection Act] was erroneous as a matter of law. **The exemption being invalid**, the requirement of 343-5 [that an environmental assessment would be required before continuing with the proposed action] is applicable." Id., 115 Haw. at 382

[1] The unanimous Hawaii Supreme Court remanded the case to the Second Circuit after it first ordered that state harbor improvements were not exempt from an environmental assessment on August 23, 2007 - but it retained concurrent jurisdiction over the case through August 31, 2007 when it issued its full written opinion.

(emphasis added).

The Supreme Court noted that it was "clear that the Superferry project itself -- were its environmental effects considered - - does not meet the standard of an exempt action, i.e., a ' minor project" that will "probably have minimal or no significant effects on the environment." Id. at 85.

On August 24, 2007, the day after the Hawaii Supreme Court ruled DOT's exemption determination letter(s) were invalid, thereby voiding the Operating Agreement between Hawaii Superferry, Inc. and DOT, and necessitating an EA in order for HSF to use State harbors, DOT and HSF immediately accelerated the previously scheduled start date and pointed the Alakai superferry vessel toward Nawiliwili Harbor, on Kauai – apparently based on the *invalid* conclusion that the use of State harbors for the Superferry Project was exempt from an environmental assessment.

On August 26, 2007 the Alakai bore down upon Nawiliwili Harbor; turtles and an endangered monk seal were seen in the harbor when the Alakai arrived[2]. The DOT, however, permitted the Alakai to dock at the State owned harbor – without first completing the environmental assessment ordered by the Supreme Court only days earlier.

On Monday, August 27, 2007, in Sierra Club (Maui) the Honorable Joseph Cardoza of the Second Circuit Court, issued a Temporary Restraining Order, as requested by the Hawaii Supreme Court in Sierra Club v. DOT, infra, enjoining the HSF from commencing operations until a preliminary injunction could be heard. Exh. D to Petitioners' Motion for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. ROA at 24.

The August 27, 2007 Restraining Order stated that the acceptance of a required final statement in accordance with HRS § 343-5(b) is a "condition precedent" to: (1) the commencement or implementation of a proposed project, (2) the use of state lands or funds in implementing the proposed action, and (3) the issuance of approvals or entitlements for the project. Id. Exhibit D to ROA at 24.

That very same day the Alakai superferry vessel again attempted to enter Nawiliwili Harbor and dock on State land but it was turned back by citizen protests.

On August 31, 2007 the Supreme Court issued its opinion in Sierra Club v. DOT. In

[2] Declaration of Carl Berg,from Supplemental Declarations in Support of Motion for a Restraining Order. ROA at 122

that opinion, the Supreme Court addressed the complaint that an EA and an injunction were required for both the harbor improvements and the Superferry project. The Court wrote, "[w]e now turn to [Sierra Club's] principal argument, and in our view, the crux of this case, that the circuit court erred in ruling that the DOT had complied with HEPA, because under the regulatory and statutory framework DOT was required, in making exemption determinations, **to review all phases of a project as a whole, without segmentation**, and to review the **secondary and cumulative impacts of the project**." Sierra Club v. DOT, 115 Haw. at 336, 167 P.3d at 329 (emphasis added).

On September 4, 2007 Appellants on Kauai filed a Petition for Declaratory Relief. The Petition included a direct cause of action under HEPA, a claim under Article 11 Section 9 of the Hawaii State Constitution, an equitable claim in nuisance alleging that the Superferry had been wrongly permitted and a request for a declaration that the DOT permits for Nawiliwili Harbor were invalid pursuant to HRS §632-1. The next day Appellants filed a Petition for Declaratory and Injunctive Relief seeking to stop the Superferry from using Nawiliwili Harbor until it had complied with HRS §343-5 by conducting an EA. ROA Vol. 1 at 1.

> Petitioners have demonstrated above that completion of the environmental process, including the completion of a required Environmental Assessment, is a condition precedent to approval of the request and commencement of the proposed action, including the use of state lands, state harbors and state waters. HAR § 11-200-23(c). Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005); KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997). A required statement is a "condition precedent":
>
> (a) to the issuance of approvals or entitlements for the project, HRS § 343-5(c); HAR § 11-200-23(d); Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005); KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997);
>
> (b) to the commencement or implementation of a proposed project, HRS § 343-5(c); HAR § 11-200-23(d); and
>
> (c) to the use of state lands or funds in implementing the proposed action. HRS §343-5(b); HAR § 11-200-23(c).
>
> By continuing to allow the Superferry to operate, Defendants

> DOT and Hawaii Superferry are violating the plain and unambiguous terms of Chapter 343 and its implementing regulations (HAR § 11-200 et. al.), if state lands at the Nawiliwili, Kahului, and Kawaihae harbors and the barges paid for with state funds at the Nawiliwili, Kahului, and Kawaihae harbors are used by Hawaii Superferry. Plaintiff PPK seeks to enjoin this violation of state law and is likely to succeed in its attempts to do so.

Motion for a Temporary, Preliminary and Permanent Injunction. p. 26. ROA at 50.

Appellants also filed a February 27, 2007 letter from Michael Faye, the Chair of the State of Hawaii Environmental Council, to State Senator Gary Hooser (Kauai, Niihau) informing the Senator that the "Environmental Council does not concur with the Department of Transportation's determination that the Superferry infrastructure falls within exemption classes 3 & 6 because the determination does not take into account cumulative and secondary impacts as set forth in HAR Section 11-200-8 (b)."

Petitioners' constitutional claim and the HEPA claim supported their Motion for a Temporary, Preliminary and/or Permanent Injunction. At the hearing, counsel explained the claim further – alleging that Appellants had a constitutional right to the same statewide environmental protections on Kauai that were being enforced on Maui:

> "[ ] Article 11, Section 9 of the Hawaii State Constitution guarantees that each person has the right to a clean and healthful environment as defined by the laws relating to environmental quality. It goes on to say that any person may enforce this right against any party, public or private, through the appropriate legal proceedings subject to reasonable limitations and regulation. We are seeking to enforce this constitutional right against both the state and the Superferry." Id. p. 31, l. 12-22.
>
> The statute by its own terms defines that it is brought for the benefit of all of human kind. We're talking about a fundamental public right under the Hawaii Constitution, specifically guaranteed, and it also specifically guarantees our right to come to court and enforce that. We're requesting injunctive relief. We believe – separate and apart from the 343 argument as applied to the State, we believe that when the Superferry operates, it operates, given the Supreme Court's opinion, in violation of 343. That is a law relating to environmental quality that is protected by the Constitution."

Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 32, l. 5-16.

Appellants also argued,

> "We're not challenging the 2005 decision because we don't' have to. The Sierra Club challenged it and the Supreme Court invalidated it. [The] Supreme Court said, although we don't take Mr. Garabaldi's (sic) comments to that effect as a dist[in]ct admission that the Superferry will cause significant effects on the environment, they make clear that the Superferry project itself, were its environmental effects considered, does not meet the standard of an exempt action. That's a statewide determination. It affects everyone in the State."

Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 27, l. 14 - 28. l. 3.

The DOT and HSF opposed Petitioners requests for injunctive relief, essentially arguing that the Sierra Club v. DOT decision only voided the DOT's exemption determination for Kahului Harbor on Maui. On September 11, 2007, HSF filed its Motion to Dismiss Appellants' Petition for Declaratory and Injunctive Relief.

Lawyers for the HSF argued, "[t]here's a 120 day statute of limitations that passed two years ago. There is no 343 claim. Similarly, your Honor, there's no right to enforce a Supreme Court decision." Hearing on Petition for Temporary Restraining Order, Transcript of September 6, 2007. p. 8, l. 12-14.

At the hearing on the Motion for a Temporary Restraining Order the court opined:

> THE COURT: The Court has spent a lot of time looking at the pleadings, including looking at Rule 65 – Hawaii Rules of Civil Procedure 65, and Chapter 343. So before we decide how to proceed, the first question that the Court has for Mr. Hempey on behalf of your client is the section on 343-7 pertaining to the 120 day limitation, because the Court believes that the limitation is a jurisdictional question and controls what we discuss or don't discuss in this case. One of the things in addressing that that I would ask that you note is in the Footnote 15 of the Sierra Club versus the Department of Transportation, Footnote Number 15, where there's a reference to the Maui case being filed in a timely manner. The question then that I have is, how do the applicants in this case satisfy the 120 day requirement?
>
> MR. HEMPEY: [...] We're bringing two claims. We're bringing a claim in law under 343, […] I think the substance is that we're not challenging the agency's determination. We're just trying to enforce the Supreme Court's ruling….

> I go back to 343-7, the very terms of the statute. It talks about 120 days after an agency decision and in this case that decision has been invalidated. But it also says if a proposed action is taken without a formal determination that a statement – that a statement is not required, and in this case when the Superferry came to Kauai and the Department of Transportation let it use its harbors without a valid determination that a statement is not required, that triggered 120 days also."

Id., Transcript of September 6, 2007, p. 16, l. 12-21.

Appellants insisted that this case had a separate 120 day trigger from the Sierra Club v. DOT case. Counsel argued, "[w]ell, what we're talking about is use of state land, your Honor, and/or state funds. We're not talking about the exemption, because, again, our position is that those exemptions were invalidated by the Supreme Court, so they don't exist." Transcript of September 6, 2007. p. 12, l. 10-14.

Appellants repeatedly argued that the circumstances of this case - in which a Supreme Court ruling invalidated DOT's exemption determination and its Operating Agreement with HSF but where DOT and HSF commenced the project anyway - implicated the alternate 120 day trigger set forth in HRS §343-7.

> MR. MEYERS. "If you look at 343-7 it says, any judicial proceeding shall be initiated within 120 days of the agency's decision to carry out or [ap]prove the action or if a proposed action is undertaken without a formal determination by the agency that a statement is not required[,] [a] judicial proceeding shall be instituted within 120 days after the proposed action is started.
>
> Our position is that it's as if there was never a formal determination made because the Supreme Court dismissed that formal determination. And I know they keep referencing only the Kahului Harbor exemption [de]termination, but there was also an exemption [de]termination made on the same day with regards to the Nawiliwili Harbor and the proposed harbor improvements are almost identical in Kahului and Nawiliwili."

Hearing on Motion for a Temporary Restraining Order, Transcript of September 6, 2007, p. 10, l. 11-25.

> "Again, 343 mentioned that judicial proceedings shall be instituted within 120 days after the proposed action is starting, and we're saying the proposed action is the use, the use of the harbor, the use of the harbor improvements."

Id., Transcript of September 6, 2007, p. 12, l. 17-21.

The Court invited supplemental Briefings on the issue. Petitioners filed a Memorandum of Law Re: Jurisdiction, on September 11, 2007. ROA Vol. 2 at 28. Appellants wrote:

> "Here, the HRS § 343-7 120 days did not commence at the time the DOT made its initial determined [sic] an EA was not required. Just as the Court wrote in Kahana Sunset, "[t]he language states that the period runs when the agency decides to "carry out or approve the action. No action was approved at the time the Commission first announced that no environmental assessment was required for the project."

ROA at 28. This issue dominated the proceedings. The Court asked whether Appellants were "arguing that there are multiple triggers and that the 120 days regenerates itself somehow, depending on which trigger is activated?"

Hearing on Motion for a Temporary Restraining Order, Transcript of September 6, 2007, at 17, l. 2-4.

> "MR. HEMPEY: The statute has, in its very terms, two different triggers. An agency determination or proposed action being taken without an agency determination. In the Maui case those plaintiffs went on the first of those two prongs, only. If you look at the language in the Supreme Court case, it just says, on page 88 at the bottom, it says appellants have produced no argument to demonstrate that the Superferry project itself is an action. They didn't raise -- they didn't raise the issue that the Superferry itself was a use in the Maui case, so the Court didn't' rule on it. They just said that the appellants didn't raise it.
>
> Here, we're raising the second prong of 343-7, which, again, says, if a proposed action is undertaken without a formal determination that a statement is not required, the judicial proceedings shall be instituted.

Id. p. 17, l. 5-22.

On September 7, 2007 the Court denied the Motion for a Temporary, Preliminary and/or Permanent Injunction. See Order Denying Petitioners Motion for a Temporary, Preliminary and/or Permanent Injunction ROA Vol. 1 at 49.

The State of Hawaii filed its Motion to Dismiss Appellant's Petition on September

13, 2007. ROA Vol.3 at 39. Superferry also filed a Motion to Dismiss. ROA Vol.2 at 89. Both motions claimed that Appellants' entire case was time-barred by HRS §343-7, apparently taking the position that the Supreme Court in Sierra Club v. DOT only invalidated the February 23, 2005 exemption letter for Kahului Harbor and that it was too late for Hawaii citizens to challenge all other illegal Superferry use of the other three affected State harbors, regardless of whether the environment, Hawaii citizens or the environment would suffer.

Appellants argued at the hearing that the invalid and voided 2005 DOT exemption determination letter was not the applicable trigger for commencement of the 120 day limitations period contained in HRS §343-7, but that the use of State land at Nawiliwili Harbor on August 26, 2007 – a DOT and HSF action that was undertaken after the formal exemption determination had been invalidated - commenced their right to bring a HEPA claim and stop the wrongfully permitted Superferry from using State harbors on Kauai. Alternatively, Appellants argued that a new 120 day limitations period commenced just after the Supreme Court's opinion in Sierra Club v. DOT, infra, when DOT "decided" to perform an environmental assessment.

> MR. MEYERS: I just wanted to talk again about this idea that the exemption determination in the Maui case was only the Kahului Harbor exemption determination. We submitted the four exemption determinations for Honolulu Harbor, Kawaihae, Nawiliwili, and Kahului Harbor with our – Petitioner's memorandum of law re jurisdiction that we submitted a couple weeks back.
>
> And – I'm not sure if the Court had a chance to look at those letters, but by looking at those letters it – it's clear that this – this was one decision. The letters were written on the same day, February 23rd, 2005, they all have the same author Barry Fukunaga of the State Department of Transportation, and the content of the letters is nearly identical. There's only one paragraph of about seven paragraphs that is different. And the only difference is it's describing the -- the details of the layout at each harbor. The idea was doing the same improvements to these harbors.

Hearing on Motions to Dismiss, Transcript of September 21, 2007. p. 44 l. 17.25 – p. 45 l. 1-9.

Counsel further argued:

> MR. MEYERS: I don't think this Court wants a situation where every person in the state who want[s] to be protected by an environmental law has to go file their own lawsuit to claim that protection. Id. p. 28, l. 4-7.
>
> [I]f you look at the Kahana Sunset case, the Supreme Court said, come on, this is a redundant waste of judicial resources to force people to file multiple actions about the same issue. Maui challenged the exemption determination letter. Why would Kauai have to challenge, and Honolulu have to challenge, and Kawaihae have to challenge the same exact thing?" Id.. p. 45 l. 19-25.

But from the outset, the Fifth Circuit Court focused on the120-day time limitation in which to challenge agency actions pursuant to HRS §343-7 as being jurisdictional and dispositive. The Court disregarded Appellants' claim that the trial court had original jurisdiction under HRS §632-1 to issue declaratory relief, stating that declaratory relief was a remedy, not a cause of action. See Hearing on Motions to Dismiss, Transcript of September 21, 2007, p. 36, l. 2-5. Argument at the hearing on the Motions to Dismiss mirrored the argument made at the hearing on the Temporary Restraining Order.

> MR. MEYERS: So again an EA has been required. So when you look at 343-7 (a), like we discussed a few weeks ago, we're looking at the second clause wherein no formal determination has been made regarding an environmental impact statement. There's a difference between environmental assessment and environmental impact statement.
>
> The DOT exempted an environmental assessment with its determination letters back in 2005. There has been no determination regarding an environmental impact statement. And because there has been no formal determination regarding a statement within 343-7 (a), the second clause which says that you have 120 days within the proposed action.

Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 42 l. 19.25 - 43 l.8.

In its Order Granting in Part and Denying in Part Respondent Hawaii Superferry, Inc.'s Motion to Dismiss Petition for Declaratory and Injunctive Relief and State's Motion to Dismiss Petition for Declaratory and Injunctive Relief, the Court found that "the trigger date of the 120-day period under HRS 343-7(a) was February 23, 2005." ROA at 220.

It held Petitioners HEPA claim to be time-barred. ROA at 220.. The Court

additionally refused to permit Appellants to invoke the presumed or procedural harm associated with a HEPA violation in seeking injunctive relief on their constitutional claim or their public nuisance claim.

It held Petitioners HEPA claim to be time-barred. ROA at 220. The Court additionally refused to permit Appellants to invoke the presumed or procedural harm associated with a HEPA violation in seeking injunctive relief on their constitutional claim or their public nuisance claim. See Hearing on Motions to Dismiss, Transcript of September 21, 2007, p. 94 l. 8-25.

Without their HEPA claim, and without the ability to argue presumed harm from a HEPA violation, Appellants dismissed their remaining claims without prejudice and filed a timely appeal.

CONCISE STATEMENT OF THE POINTS OF ERROR

1. THE TRIAL COURT ERRED BY BY RULING THAT APPELLANTS' CLAIMS UNDER THE HAWAII ENVIRONMENTAL PROTECTION ACT WERE TIME BARRED.

The argument of whether the 120 day limitation on the right to bring a judicial action under HRS §343-7 was triggered exclusvely by 2005 DOT exemption determinations, or whether it could have been triggered anew when the DOT and HSF undertook commencement of the Superferry Project using State harbors after the exemption determination, was the focus of the hearing.

At the hearing on Appellees' Motions to Dismiss, the Court ruled from the bench:

> COURT: Claim number one, and I'm referring to page 15 of the Petition, specifically refers to the need for an environmental assessment pursuant to HEPA and H.R.S. 343. To the extent that claim number one relies on H.R.S. 343, it is time barred H.R.S. 343, and is dismissed. So the motion to dismiss for claim number one is granted.
>
> Claim number two, which is on page 17 of the Petition, again refers to the need for an environmental assessment, refers to HEPA, and H.R.S. 343. Claim number two, again, relies on H.R.S. 343. Claim number two is time barred by H.R.S. 343, and in regards to claim number two, the motion to dismiss is granted.

> Claim number three, which is on page 19 of the public nuisance, refers to the need for an environmental assessment, HEPA and H.R.S. 343, that is also time barred by H.R.S. 343, and is dismissed.

Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 94 l. 8-25.

> However, to the extent that the public nuisance claim is not reliant on H.R.S. 343, the motion to dismiss is denied . . .In regards to claim number four, which is the constitutional claim, any reliance on the –pursuing the consti—constitutional claim pursuant to H.R.S. 343, again, is time barred by 343, and is dismissed."

Id., at 95 l. 1-8.

A THE TRIGGER IN THIS CASE WAS THE SUPERFERRY'S NON-EXEMPT USE OF STATE LAND AT NAWILIWILI HARBOR ON AUGUST 26, 2007.

Appellants argued that HRS §343-7 was triggered in this case (as opposed to Sierra Club v. DOT) by the date on which the Superferry sailed into Nawiliwili Harbor – rather than the date on which the DOT made the invalid exemption of the harbor improvements from environmental review under HEPA. Appellants wrote:

> "Here, the HRS §343-7 120 days did not commence at the time the DOT made its initial determined [sic] an EA was not required. Just as the Court wrote in Kahana Sunset, "[t]he language states that the period runs when the agency decides to "carry out or approve the action. No action was approved at the time the Commission first announced that no environmental assessment was required for the project."

Memorandum of Law Re: Jurisdiction, filed on September 11, 2007, Vol. 1 at 34.

The trial Court ruled against Appellants on this and every issue having to do with HEPA in its Order Granting in Part and Denying in Part Respondent Hawaii Superferry, Inc.'s Motion to Dismiss Petition for Declaratory and Injunctive Relief and State's Motion to Dismiss Petition for Declaratory and Injunctive Relief, wherein the Court found that "the trigger date of the 120-day period under HRS 343-7(a) was February 23, 2005." ROA Vol3 at 220.

B. THE 2005 ILLEGAL DOT ACTION WAS VOID AT ITS INCEPTION.

Appellants raised the issue in their Memorandum of Law Re: Jurisdiction, filed on September 11, 2007, writing:

> "HRS § 343-7 TIME LIMITS [for this case] DID NOT COMMENCE IN 2005 WHEN DOT (ERRONEUOSLY) DETERMINED THAT ITS PROPOSED HARBOR IMPROVEMENTS WERE EXEMPT FROM ENVIRONMENTAL REVIEW." **(WHY IS THIS IN ALL CAPS?)**
>
> "In Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 947 P.2d 378 (1997), the Hawaii Supreme Court held, under analogous circumstances, that the plaintiffs claim under HEPA was timely. The Court also noted that it would be a redundant waste of judicial resources to require multiple actions in different forums just to protect time limits in HEPA cases.[3] This is especially true where the proposed harbor improvements of DOT and the separate exemption determination letters were nearly identical."

Memorandum of Law Re: Jurisdiction, filed on September 11, 2007. ROA Vol.2 at 28. The issue also was raised at the hearing on Respondents' Motions to Dismiss:

> MR. HEMPEY: I think that is essentially why we are here. Again, not to challenge the Department of Transportation's any exemption [de]termination they may have made back in 2005. The Supreme Court's decision was issued August 31st, 2007. We filed our pleading within four days of that determination. Our position is that the Supreme Court's decision invalidated the Department of Transportation's exemption [to] [de]termination. So it's as if it never existed. It was voided. There's nothing to challenge there. It's gone.

[3] The filing of suit in Sierra Club, et. al. v. Department of Transportation, et. al., Civil No. 05-1-0114 (3), should haveprotected all people in the state who would be impacted by HSF. To hold otherwise would necessitate lawsuits in each of the counties, all challenging the same state action, to insure that the state law is not just applied locally only in counties where the initiating lawsuit was filed. Maui groups would sue to protect Maui citizens under the statewide HEPA. Oahu citizens would have to file separate lawsuits on Oahu to protect their rights in the statewide HEPA, etc. This would be a "redundant waste of judicial resources" and is the type of result the Kahana Sunset decision warns against. As the Sierra Club, et. al. slip opinion notes: "Rules like HAR 11-200-7 are meant to keep applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion. The proposed action must be described in its entirety and cannot be broken up into component parts which, if each is taken separately, may have minimal impact on the environment."

> So, an environmental assessment has to be done. That's not being disputed. And what we're saying is this was not a decision made two years ago. The decision that the environmental assessment has to be done was just made six days ago and that's why we're here today.

Hearing on Motion to For a Temporary Restraining Order, Transcript of September 6, 2007, at 41. 4-25 -- 6. 1. 1-15.

In its Order Granting in Part and Denying in Part [the] Motion[s] to Dismiss the Court found that "the trigger date of the 120-day period under HRS 343-7(a) was February 23, 2005." ROA Vol.3 at 220.

2. THE TRIAL COURT COMMITTED LEGAL ERROR BY REFUSING TO GIVE KAUAI CITIZENS THE BENEFIT OF A SUPREME COURT RULING THAT SHOULD HAVE EQUALLY PROTECTED THE ENTIRE STATE.

This issue was raised squarely in Appelants' Petition for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. Petitioners pled:

> A. On August 31, 2007, the Hawaii Supreme Court entered its written decision in Sierra Club, et. al. v. Department of Transportation, No. 27407, reversing the Exemption Determination issued by the Department of Transportation, State of Hawaii (hereinafter "DOT") for the Hawaii Superferry Project (hereinafter "HSP") improvements, directing the entry of Summary Judgment in favor of Petitioners and holding that an Environmental Assessment must be prepared…
>
> C. By plain and unambiguous provisions of Chapter 343, the Hawaii Superferry Project may not be implemented, State lands at State harbors may not be used for the HSP and the barges purchased with $40,000,000.00 in state funds may not be used by the HSP until this environmental process is lawfully completed.
>
> D. Petitioners have a constitutional right, pursuant to Haw. Const., art. XI, §9, cited in Sierra Club v. Department of Transportation, (Hawaii S.Ct. No. 27407). (p. 42, Opinion issued August 31, 2007) to be free from Superferry, Inc.'s operation on Kauai until and unless it has complied with State environmental law.

ROA Vol.1 at 1.

At the hearing on the Motion for a Restraining Order, Appellants' counsel argued that all of the citizens in Hawaii were entitled to constitutional protection based on the Supreme Court invalidating the DOT exemptions. "What I'm saying is the Supreme Court's opinion is a law related to environmental protection in the state. It has that effect. It is precedent. It has the effect of law and the laws related to environment are protected by the Constitution." Id., Transcript of September 6, 2007, p. 86. l. 1-5. "So, again, we believe that generally speaking, the very broad protections of our Constitution do support an equitable claim to enjoin a threatened violation and it's just like First Amendment cases. People go to court all the time and seek restraining orders to invalidate prior restraints on speech. Many constitutional rights have this. People go to court to invalidate or enjoin threatened violations." Id., Transcript of September 6, 2007, p. 40, l. 25 through p. 41, l. 7.

Appellants argued that HEPA could not constitutionally be interpreted such as to require Kauai Petitioners to prove the same HEPA violation, and the same statewide harm to Hawaii citizens that had already been proven in the Second Circuit Court.

> MR. HEMPEY: The Supreme Court said you have to do an environmental assessment. And I know [ ] that the [R]espondents keep referring to Kahului Harbor, but the Supreme Court said you have to do an environmental assessment regarding the Department of Transportation's facilitation of the Hawaii Superferry project. Certainly the Hawaii Superferry project – the secondary impact[s] of the Hawaii Superferry project are statewide. It's a statewide project. I don't believe [R]espondents would be here if they weren't planning to bring the Hawaii Superferry to Nawiliwili Harbor.

Id., Transcript of September 21, 2007, p. 42 l. 5-18.

The trial Court ruled that "the trigger date of the 120-day period under HRS 343-7(a) was February 23, 2005." ROA Vol.3 at 220. It denied the Petition for a Temporary Restraining Order on September 7, 2007. ROA Vol. 1 at 49.

3. THE COURT ERRED AS A MATTER OF LAW WHEN IT DENIED APPELLANTS JURISDICTION UNDER HRS §§632-1 AND 603-21.5.

Appellants asserted in paragraph seven of their Petition for Declaratory and Injunctive Relief, that the trial court below had jurisdiction to hear their Petition based on HRS §§632-1 and 603-21.5. Id., ROA Vol.1 at 1. The Court stated at the Hearing on the

Petition for a Temporary Restraining Order that HRS §343-7's 120 day statute of limitations requirement is "mandatory and jurisdictional." Id., Transcript of September 6, 2007, p. 19, l.13-15. The Court further stated at the Hearing on Respondents' Motions to Dismiss that "the declaratory relief is basically the remedy or the relief that petitioners are looking for and not necessarily a cause of action." Hearing on Motions to Dismiss, Transcript of September 21, 2007, p. 36, l. 2-5.

Appellants argued, however, that the Fifth Circuit Court had jurisdiction over their Petition pursuant to HRS §632-1, because:

> MR. MEYERS: If you look at the statute . . . the last portion of statute discusses that the mere fact, and [sic] actual or threatened controversy is susceptible of relief whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment.

Id., Transcript of September 21, 2007, p.39, l 19-25 through p.40, l. 1.

4. THE COURT ERRED AS A MATTER OF LAW WHEN IT DENIED APPELLANTS THE RIGHT TO RELY ON THE LEGAL PRESUMPTION OF HARM BASED ON VIOLATIONS OF HEPA IN THER REQUEST FOR INJUNCTIVE RELIEF AND IN THEIR CONSTITUTIONAL AND NUISANCE CLAIMS.

In addition to dismissing Appellants' direct claims based on HRS Chapter 343, the court below ruled that the presumptions of harm that are associated with HEPA violations were not available to Appellants in the prosecution of their constitutional claim and in their requests for injunctive relief. "In regards to claim number four, which is the constitutional claim, any reliance on the – pursuing the [ ] constitutional claim pursuant to HRS 343, again, is time barred by 343, and is dismissed." Hearing on Motions to Dismiss, Transcript of September 21, 2007, at 95 l. 1-8.

At the hearing on the Motion for a Temporary Restraining Order counsel argued, "Procedural noncompliance with the Hawaii Environmental Protection Act is irreparable harm. There was no public input. This is very well discussed in the Sierra Club v. DOT case. Id., Transcript of September 6, 2007, p. 44, l. 16-22.

Appellants sought strong presumptions of irreparable harm in the face of known HEPA violations in their Supplemental Memorandum in Support of Petitioners' First Motion in Limine, filed on September 19, 2007. ROA Vol.3 at 81. Appellants wrote:

> "Procedural violations of ESA § 7(a)(2) mandate injunctive relief because **the balance of the hardships has already been struck by Congress** in favor of endangered species. TVA v. Hill, 437 U.S. 153, 174, 194 (1978). **Accordingly, courts "may not use equity's scales to strike a different balance."** Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). See also Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.")
> With respect to injunctive relief under NEPA, the Supreme Court has noted that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

Petitioners Supplemental Memorandum in Support of Petitioners' First Motion in Limine. p. 3. ROA Vol.3 at 81.

5. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY DENYING APPELLANTS' PETITION FOR A TEMPORARY RESTRAINING ORDER.

Appellants argued at the first hearing that they were entitled to a Temporary restraining Order based on their showing of HEPA violation(s) and irreparable harm.

> MR. HEMPEY: Now, the Superferry is going to get up, I believe, and tell you that you should balance the harm. First of all, that's not what Rule 65 says. It says that we have to show irreparable harm based on what we've filed. We've done that. They're going to claim, nonetheless, that it's a balancing test here today. Whether or not that is true, there's still irreparable harm and the equities still favor the plaintiffs.

Hearing on Motion for a Temporary Restraining Order, Transcript of September 6, 2007, P. 38, l. 17-21.

Counsel continued:

> MR. HEMPEY: We submitted yesterday declarations. The declaration of Kauai County Council JoAnn Yukimura, at paragraph eight talks about irreparable harm if the Superferry is allowed to run. She says the Hawaii Superferry is the only form of

> interisland travel that would allow drive on drive off travel that has potential to cause far reaching effects – far reaching impacts to Kauai in terms of invasive species, drugs, stolen goods, overloading of the parks and special places, depletion of cultural resources, fish, limu, maile, to name a few. The project is similar to an interstate highway connecting the major islands. There's never been a question that a highway would have significant impacts on an ES.
>
> Councilperson Yukimura talks about irreparable harm. And I want to talk for a minute about – one moment about that before I go on with the harm. The harm that we show has to be irreparable. We all breathe the same air. We all play in the same water. We all enjoy water. We all enjoy the same marine life. We all sit in the same traffic jams. This kind of harm cannot be repaired.
>
> A whale that has been sliced in half by a high speed ferry is irreparably harmed. You can't buy him back.

Id., Transcript of September 6, 2007, p. 36, l. 22 through p. 37, l. 20.

Counsel also asked the Court to consider the procedural harm of the HEPA violation in determining whether to grant a Temporary restraining Order. "The first thing I note is that the Sierra Club [v. DOT] decision alone says procedural harm is harm. Now, again, they talk about that in the context of standing, but there's no question, given the Sierra Club [v. DOT opinion] that there's been procedural harm in this case. Id., Transcript of September 6, 2007, p. 36, l. 13-17.

The Court denied the petition for a Temporary restraining Order on September 7, 2007. ROA Vol.2 at 49.

STANDARD OF REVIEW

1. WHETHER THE TRIAL COURT ERRED BY RULING THAT APPELLANTS' CLAIMS UNDER THE HAWAII ENVIRONMENTAL PROTECTION ACT WERE TIME-BARRED.

> "A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review." Child Support Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000)) (internal quotation marks and brackets omitted). "Questions of constitutional law and statutory interpretation are reviewed under the same standard." 344 State v. Rogan, 91 Hawai'i 405, 411, 984

P.2d 1231, 1237 (1999); State v. Arceo, 84 Hawai‘i 1, 10, 928 P.2d 843, 852 (1996).

We review questions of constitutional law de novo under the "right/wrong" standard. State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998).State v. Tabigne, 88 Hawai'i 296, 302, 966 P.2d 608, 614 (1998) (citations omitted).

2. WHETHER THE TRIAL COURT DENIED APPELLANTS THE CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT BY REFUSING TO GIVE KAUAI CITIZENS THE BENEFIT OF A SUPREME COURT RULING THAT SHOULD HAVE EQUALLY PROTECTED THE ENTIRE STATE.

“We review questions of constitutional law ‘by exercising our own independent constitutional judgment based on the facts of the case.’ State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999) (internal quotation marks omitted).

“We review questions of constitutional law de novo under the ‘right/wrong’ standard. State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998).State v. Tabigne, 88 Hawai'i 296, 302, 966 P.2d 608, 614 (1998) (citations omitted).

3. WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANTS’ JURISDICTION UNDER HRS §§632-1 AND 603-21.5.

“A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review.” Child Support Enforcement Agency v. Roe, 96 Hawai‘i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai‘i 207, 209, 10 P.3d 728, 730 (2000)) (internal quotation marks and brackets omitted). “Questions of constitutional law and statutory interpretation are reviewed under the same standard.” State v. Rogan, 91 Hawai‘i 405, 411, 984 P.2d 1231, 1237 (1999); State v. Arceo, 84 Hawai‘i 1, 10, 928 P.2d 843, 852 (1996).

4. WHETHER THE TRIAL COURT ERRED BY HOLDING THAT APPELLANTS WERE NOT ENTITLED TO ANY PRESUMPTIONS OF HARM BASED ON VIOLATIONS OF THE HAWAII ENVIRONMENTAL PROTECTION ACT.

“A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review.” Child Support Enforcement

Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000)) (internal quotation marks and brackets omitted). "Questions of constitutional law and statutory interpretation are reviewed under the same standard." State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999); State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996).

"We review questions of constitutional law 'by exercising our own independent constitutional judgment based on the facts of the case.'" State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999) (internal quotation marks omitted).

5. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER.

"The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Molinar v. Schweizer, 95 Haw. 331, 335 (Haw. 2001).

"A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review." Child Support Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000)) (internal quotation marks and brackets omitted). "Questions of constitutional law and statutory interpretation are reviewed under the same standard." State v. Rogan, 91 Hawai'i 405, 411, 984 P.2d 1231, 1237 (1999); State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996).

ARGUMENT

Essentially, Appellants argue that the Court should protect the public and enforce HEPA, even against violators who can show that they cleverly approved a statewide project in severable subparts or who may lose a lot of money if the environmental laws are applied to them.

1. THE TRIAL COURT ERRED BY BY RULING THAT APPELLANTS' CLAIMS UNDER THE HAWAII ENVIRONMENTAL PROTECTION ACT WERE TIME-BARRED.

HRS 343-7 (a) provides,

> Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, **if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required**, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started.

Hawaii Environmental Protection Act, HRS § 343 et seq.

On October 11, 2007, the Court, Granting in Part and Denying in Part Respondents' Motion to Dismiss, ruled, "the trigger date of the 120-day period under HRS 343-7(a) was February 23, 2005." ROA Vol.3 at 220. That was the date that the DOT exempted the harbor improvements. Appellants contend that this decision was legal error.

Appellants first contend that it was error for the court below to use an invalid agency decision as the basis on which to dismiss Appellants' HEPA claim. Appellants next argue that the Court failed to consider that there were alternative triggers for the 120 day limitation period. One trigger occurred just days after the Supreme Court decision in Sierra Club v. DOT when DOT decided to conduct an environmental assessment, and another trigger occurred when HSF docked the Alakai on State land at Nawiliwili Harbor on August 26, 2007 without a formal determination by the agency that an environmental impact statement was not required.

The court's erroneous view that HRS §343-7 barred their Petition for Declaratory and Injunctive Relief also resulted in the erroneous denial of Appellants Petition for a Temporary Restraining Order. Appellants believe that the presumptions of harm associated with the HEPA violation should have required the court to grant injunctive relief.

A. THE HRS §343-7 TRIGGERS IN THIS CASE WERE THE SUPERFERRY'S USE OF STATE LAND AT NAWILIWILI HARBOR ON AUGUST 26, 2007 AND THE 2007 DOT DECISION TO PERFORM AN ENVIRONMENTAL ASSESSMENT.

Appellants' contend that their HEPA claim was not time-barred as a matter of law – based upon a plain reading of the words in the statute. In holding otherwise, the trial court committed case-dispositive legal error. The operative language of HRS §343-7(a) states that

"if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started".

In the case at bar, Appellants claimed that, when the Superferry docked at Nawiliwili Harbor on August 26, 2007, it did so "without a formal determination by the agency that a statement is or is not required[4] in place." The "proposed action" was the use of the State's harbors. The 2005 determination that an environmental assessment (EA) was not required was void. In fact, just days before the hearing, DOT reversed its 2005 decision and required an environmental assessment. The Supreme Court's invalidation of the exemption letters, the Superferry's use of Nawiliwili Harbor and the DOT's decision to require an EA all took place in 2007 well within 120 days of Appellant's lawsuit.

At the Hearing on the Motion for a Temporary Restraining Order, counsel argued that "the Superferry['s] use of the [DOT's] land at the harbor at Nawiliwili at the pier constitutes the proposed action" which triggers HRS §343-7, when HRS §343-7 is at issue. Id., Transcript of September 6, 2007, p. 11, l. 23-25. Second, at the Hearing on the Motions to Dismiss:

> MR. MEYERS: So then we talk about, well, what is the proposed action? Of course, [R]espondents are saying the Supreme Court said that Superferry is not the proposed action. Well, not so fast. I don't think that's really what the Supreme Court said. What the Supreme Court said was nobody raised the issue in that case of whether the Superferry was indeed an action.
>
> I think if you look at the Supreme Court, the slip opinion, I believe it's page 89, footnote 47, it talks about nobody ever presented argument on the issue of whether the Superferry is a proposed action. The Supreme Court states on page 85 of its slip opinion that the Superferry project itself, were its environmental affects considered, does not meet the standard of an exempt action, i.e., a minor project that will probably have minimal – minimal or no

[4] Appellants argued that, in the alternative to the Superferry's actual use of the harbor as a trigger of HRS §343-7, there may have been yet another trigger – the DOT's decision, just days after the Sierra Club v. DOT opinion, to conduct an EA. [W]hat we're saying is this was not a decision made two years ago. The decision that the environmental assessment has to be done was just made six days ago and that's why we're here today." Hearing on Motion to Dismiss, Transcript of September 6, 2007, at 4 l. 4-25 -- 6. l. 1-15.

> significant effects on the environment. So there in the Supreme Court's opinion, they're using, you know, the term action to describe the Superferry project itself.

Id., p. 43, l. 8-25 through p. 44, l. 1-2. Thus, Appellants contend that when the Alakai docked in Nawiliwili Harbor on August 26, 2007, that constituted an "action" for purposes of HRS Chapter 343, and because DOT's "formal determination" had been invalidated, it was on that date that HSF and DOT "carried out" the proposed action which triggered an EA pursuant to HEPA.

Appellants assert that Kahana Sunset, supra, where the Hawaii Supreme Court held under analogous circumstances, that the plaintiffs claim under HEPA was timely, is controlling. In Kahana Sunset, the Court noted:

> The County of Maui argues that the time period began to run on August 12, 1994, when the Commission first made the express determination that no environmental assessment was required for the project. Nothing in the plain language of HRS § 343-7(a) supports this contention. The language states that the period runs when the agency decides to "carry out or approve the action." No action was approved at the time the Commission first announced that no environmental assessment was required for the project."

Id., 86 Haw. at 66 (emphasis added).

Here, as stated above, the period began to run at the time the DOT and HSF decided to "carry out" the action. Just as the Court wrote in Kahana Sunset, "[t]he language states that the period runs when the agency decides to 'carry out or approve the action,'" which in this case occurred either on August 26, 2007 when the Alakai docked at Nawiliwili pier, or a week earlier when DOT publicly announced it would require an EA for the Superferry project.

B. THE 2005 DOT ACTION WAS VOID AT ITS INCEPTION.

Appellants contend that the statute of limitations does not apply where an act or instrument is void at its inception. Colman v. Colman, 25 Wash.2d 606, 611, 171 P.2d 691 (1946); see also Marley v. Dep't of Labor & Indus., 125 Wash.2d 533, 538, 886 P.2d 189 (1994). Appellants contend that the Court erred when it dismissed their HEPA claims because they were not brought within 120 days of an invalid exemption.

In Sierra Club v. DOT, the Hawaii Supreme Court held that DOT's analysis failed to consider "whether its facilitation of the *Hawaii Superferry Project* will probably have minimal or no significant impacts, both primary and secondary, on the environment." 115 Haw. at 400. The Supreme Court held that this determination was erroneous as a matter of law and thus the exemption is invalid[5]. Id.

Appellants contend that when the Court invalidated the DOT-issued exemption in Sierra Club v. DOT, because the DOT did not follow the legislative mandates of HEPA, the permitting of the Superferry in 2005 became void *ab initio*.[6] As such, the invalid DOT 2005 decision should not have been used to summarily defeat Appellants claim– it had no legal effect.

In Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581 (9th Cir. 1993), the Ninth Circuit Court held that actions taken by a state agency in violation of stay imposed by state law were void ab initio. The court stated:

> "Because the [agency action] resulted in its exercising control over property of the estate, the automatic stay renders [the agency action] void ab initio. The state was required by the provisions and policies of the Bankruptcy Code to seek the permission of the bankruptcy court before taking any action […] the DCCA's dissolution of Hillis was of no effect…"

Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581 (1993). See also N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934, 940 (1986) holding:

> "We hold that the NLRB, acting on the belief that its unfair labor practice proceeding was excepted from the operation of the automatic stay, permissibly proceeded with the hearing without obtaining relief from the stay in the bankruptcy court. **However, the NLRB proceeded at its own risk. If it was later determined that the proceeding was not excepted from the automatic stay, the entire NLRB proceeding would be void ab initio** as an act taken in violation of the stay."

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[5] Certainly, a large number of Kauai citizens felt that the Alakai's entrance into Nawiliwili Harbor, in the face of the Supreme Court's opinion was illegal, environmentally irresponsible and possibly contemptuous. The Superferry was greeted by massive protests in the street and in the water. The trial judge even noted "if the Court was ruling on what's happening in the streets, you'd have different rulings." Hearing on Motion to Continue, Transcript of September 13, 2007 at 13, l 14.

[6] Defined: ab initio, *adverb*, from the beginning (used chiefly in formal or legal contexts): the agreement should be declared void ab initio;

Id., 804 F.2d at 940 (emphasis added). These cases are analogous to the case at bar.

In this case, the Supreme Court held that the DOT did not follow the legislative mandates of HEPA in exempting its proposed harbor improvements. When DOT and HSF spent millions of dollars while the validity of the exemption determination was on appeal, they proceeded with the harbor improvements at their own risk.

In Li v. State of Oregon, 338 Or. 376, 110 P.3d 91 (2005), the court ruled that marriage licenses that Multnomah County had issued to same-sex couples had been issued without authority and thus "were void at the time that they were issued." Id. at 397, 110 P.3d 91. In Bankus v. City of Brookings, 252 Or. 257, 449 P.2d 646 (1969), the court considered a city ordinance that prohibited excavation without a permit. Plaintiff paid the deposit the city asked him to pay, obtained a permit, and began work. Id. 252 Or. at 258-59. The city ordered the excavation halted because plaintiff had not paid the deposit required by ordinance. Id. at 259. Plaintiff sought to enjoin the city "from reneging on the permit issued." Id. The court ruled that the permit was issued without following the provisions of the ordinance and permitted the city to rescind the permit. Id. at 259-60. The invalidly issued permit did not grant plaintiff authority to continue with the project. The permit had been void *from the beginning*.

In Eastport Alliance v. Lofaro,13 A.D.3d 527, 787 N.Y.S.2d 346, 2004, the court held that a Town planning board lacked jurisdiction to approve builders' site plan where the board failed to refer the matters to the county planning commission, and the county administrative code required such referral. The permits were voided and the court held that the failure to refer the matter to the planning commission for proper review was *jurisdictional*:[7]

> "Where a local land use agency acts without jurisdiction in approving or denying a site plan, special permit, or other land use application, a challenge to such an administrative action, as ultra vires, is not subject to the [ ] limitations period applicable to review of the site plan, special permit, or other land use determination…

[7] Petitioners in this case also assert that the DOT's issuance of use permits in 2005 was done without jurisdiction when it failed to consider "whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary." Lacking jurisdiction to have made the decision it made is another reason the permits are void ab initio.

> Because the Planning Board's approval was **null and void** (see Matter of Old Dock Assocs. v. Sullivan, supra), we remit the matter to the Planning Board for a referral to the SCPC, and a new hearing and determination after the SCPC makes its recommendation."

Eastport Alliance v. Lofaro,13 A.D.3d 527, 787 N.Y.S.2d 346, 2004.

The point of this line of cases is that when an agency action or permit is invalidated by a court because the agency did not comply with legislative mandates, the regulation or permit cannot be said to have ever had any legal effect. The agency action or permit is thus void "from the beginning."

Applied to the case at bar, an invalidated DOT determination should not have formed the basis of a statute of limitations that would deny citizens of an entire county of the protections of HEPA. This is especially true, given that the Appellants have demonstrated that different triggers govern their case.

2. THE TRIAL COURT COMMITTED LEGAL ERROR BY REFUSING TO GIVE KAUAI CITIZENS THE BENEFIT OF A SUPREME COURT RULING THAT SHOULD HAVE EQUALLY PROTECTED THE ENTIRE STATE.

Appellants contend both HRS §343-7 and Article XI, Section 9 of the Hawaii Constitution, under these circumstances, entitled Kauai citizens to enjoin the Superferry from docking at Nawiliwili Harbor in violation of environmental law. The very essence of the holding in Sierra Club v. DOT was that the harbor improvements and the operation of the Superferry would have statewide environmental impacts that needed to be studied prior to operation. The DOT, however, apparently interpreted that opinion as only invalidating one of the four exemption letters (Kahului Harbor) – even though the letters were virtually identical[8], signed by the same person and issued on the same day – and gave HSF a green light to sail to the other islands without any environmental review first[9].

[8] The First Amended Complaint filed in the Sierra Club case asserted, ""because a complete and adequate Environmental Assessment ("EA") was and is required pursuant to Chapter 343, ... any approvals granted for this project are void and the "Hawai'i Superferry" must be enjoined or stayed from implementing any segment of this project..."

However, "rules like HAR 11-200-7 are meant to keep applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion. The proposed action must be described in its entirety and cannot be broken up into component parts which, if each is taken separately, may have minimal impact on the environment." Sierra Club v. DOT, 115 Haw. at 338, 167 P.3d 331.

When the trial court nonetheless dismissed the HEPA case, Appellants assert that it unwittingly permitted DOT and HSF from "escaping full environmental review by pursuing projects in a piecemeal fashion" Id.

In Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 947 P.3d 378 (1997), the Hawaii Supreme Court held that it would be a redundant waste of judicial resources to require multiple actions in different forums just to protect time limits in HEPA cases.[10] This is especially true in this case where DOTs proposed harbor improvements and the four "separate" exemption determination letters were virtually identical.

The Kahana Sunset Court goes on to say that because the necessity for an environmental assessment was already a point of contention in a related contested case hearing that was taking place during the first 120 days after the agency decision, "to require KSOA to file a circuit court action at the same time that the Commission was conducting its contested case on the identical issue would be redundant and a waste of judicial resources."

The Supreme Court held that "the exemption of the state harbor improvements from the requirement of an environmental assessment was "erroneously granted." The Court did not specifically limit its opinion to Kahului harbor.

[9] At the hearing on the temporary restraining order the deputy attorney general argued, "With respect to the substance of that novel cause of action to enforce the Supreme Court's decision, first of all, I'd point out that the Supreme Court's decision is specifically and directly linked to Kahului Harbor." Transcript of September 6, 2007, at 7, l. 2-6.

[10] Appellants have consistently maintained that Kahana Sunset is controlling on this issue and their claim was timely – as it was filed only days after the Sierra Club v. DOT decision. To hold otherwise would necessitate lawsuits in each of the counties, all challenging the same state action, all within 120 days - to insure that the state law is enforced in each jurisdiction. Maui groups would have to sue to protect Maui citizens under the statewide HEPA. Oahu citizens would have to file separate lawsuits on Oahu to protect their rights. Expert witnesses would spend their days riding the five-county litigation circuit. This trial court's decision invited exactly the type of "redundant waste of judicial resources" that the Kahana Sunset decision warned against.

Id. This is analogous to the case at bar and the same result should be reached. When DOT takes statewide action, it would be a redundant waste of judicial resources to require separate lawsuits in each of the four counties affected by DOT's statewide action. This would also defeat the purpose of the statewide protections afforded by HEPA.

After the Supreme Court decided Sierra Club v. DOT, it was clear that the erroneous exemption determinations affected all citizens of Hawaii. Based on both Sierra Club v. DOT, and Kahana Sunset, Appellants contend that the trial court erred in its interpretation of HRS § 343 when it ruled that citizens on Kauai could not enjoin the statewide HEPA violation the Supreme Court confirmed just days earlier.

Appellants also contend that the Sierra Club v. DOT decision gave rise to constitutional protections that also should have resulted in the protection of injunctive relief for Kauai people.

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Davis v. Burke, 179 U.S. 399, 403, 21 S.Ct. 210, 211, 45 L.Ed. 249 (1900). State v. Rodrigues, 63 Haw. 412, 629 P.2d 1111 (1981).

The Hawaii Constitution provides "[e]ach person has the right to a clean and healthful environment, as defined by 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." Haw. Const., Art. XI § 9.

In Sierra Club v. DOT the Supreme Court noted:

> "[T]his court has not directly interpreted the text of [Article XI, §9]. Because the HEPA statute has specific language regarding who may enforce the law, and the parties have not discussed the constitutional provision in their appellate briefs, further discussion of the meaning of article XI, section 9 of the Hawai'i Constitution is not warranted. See also Kahana Sunset, 86 Hawai'i 132, 134, 948 P.2d 122, 124 (1997) (citing to legislative history of HRS § 607-25, in which the legislature made reference to the constitutional amendment, stating that **"[t]he legislature finds**

> **that article XI, section 9, of the Constitution of the State of [Hawai'i] has given the public standing to use the courts to enforce laws intended to protect the environment**"

Sierra Club v. DOT, infra, at fn. 28. (Alteration in original)(Emphasis added). Article XI, §9 and HRS § 343-7 should be interpreted to permit a claim for injunctive relief to prevent a violation of the state's environmental laws where the violation has been timely challenged in any of the other counties in the State[11]. Such an approach would *harmonize* the statutory provisions of HEPA and the constitutional[12] provisions or Article XI §9. It would provide a mechanism by which the Kahana Sunset issue (agencies approving projects in piecemeal fashion to evade environmental review) could be policed. It would prevent the result that occurred in this case – a non-exempt project operating anyway because timely lawsuits to challenge a single agency action were not filed and litigated separately in each county in the State.

After the trial court's October 11, 2007 ruling on Kauai, the environmental laws were not applied equally in the State. Citizens of Maui were protected from the Superferry, while citizens of Kauai could not enjoin the Superferry, despite the statewide HEPA violation. Appellants contend that requiring citizens from each of the different circuits in the state to file suit within 120 days of agency action – lest statewide environmental protections only be provided to citizens in those circuits in which suit is filed – would undermine the very purpose of HEPA.

3. THE COURT ERRED WHEN IT RULED THAT HRS §§632-1 AND 603-21.5 WERE REMEDIES, NOT CAUSES OF ACTION.

The Fifth Circuit Court had jurisdiction to hear their Petition based on HRS §§632-1 and 603-21.5. Petition for Declaratory and Injunctive Relief, ¶ 7. ROA Vol.1 at 6. Indeed, Appellants argued at the Hearing on Respondents' Motions to Dismiss that the Hawaii Supreme Court has repeatedly found jurisdiction based on HEPA cases under HRS §632-1:

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[11] This was argued at the hearing on the TRO. "So, again, we believe that generally speaking, the very broad protections of our Constitution do support an equitable claim to enjoin a threatened violation and it's just like first amendment cases. People go to court all the time and seek restraining orders to invalidate prior restraints on speech. Many constitutional rights have this. People go to court to invalidate or enjoin threatened violations." Id., Transcript of September 6, 2007, p. 40, l. 25 through p. 41. l. 7.

[12] See SCI Management Corp. v. Sims, 101 Hawai'i 438, 453. 71 P.3d 389, 404 (2003).

> MR. MEYERS: So our point is we are just like the plaintiffs in Citizens for Protection of North Kohala, just like the plaintiffs in Akau v. Olohana Corp., and just like the plaintiffs in Life of the Land v. LUC, all of which were Hawaii Supreme Court cases that permitted jurisdiction based on the exact same declaratory and injunctive relief statute, 632-1.

Id., Transcript of September 21, 2007, p. 38, l.18-25. This case is similar to Citizens for the Protection of North Kohala Coastline v. County of Hawaii, 91 Haw. 94, 979 P.2d 1120 (1999), where the Supreme Court held that plaintiffs had standing to bring an "original action" under HRS § 632-1. Id. at 99. 979 P.2d at 1125. Petitioners' Combined Opposition To Respondents' Motions to Dismiss, p. 4. ROA Vol. 3 at 88.

In support of this analogy, Counsel stated:

> MR. MEYERS: Again, we are like the - the plaintiffs in Citizens for Protection of North Kohala, who in that case sued based on the County's failure to require an environmental impact statement. In that case the plaintiffs sought to invalidate the non-public process by which the County Planning Commission denied the special management area permit.
>
> In this case we're suing to invalidate the non-public process by which the DOT granted permission for the Superferry to use State harbors. And in fact the Supreme Court in its opinion in the – what we've referred to as the Maui case Sierra Club, said towards the end of its opinion I believe on page 102 and 103 of the slip opinion, that the public needs to be involved in the process.

Hearing on Motions to Dismiss, Transcript of September 1, 2007, p. 40, l.4-19. Thus, the court below erred in its failure to permit Appellants jurisdiction under HRS §632-1, relying instead exclusively on HRS §343-7 and its 120 day statute of limitations.

> The case at bar is similar to Citizens. Here, Petitioners seek declaratory and injunctive relief based on threatened injury-in-fact and procedural injury that will result from actions of DOT in its facilitation of the Superferry project. And, even though HRS Chapter 343 – like HRS Chapter 91 discussed above and in Punohu – provides procedural remedies for contesting agency decisions, HRS §632-1 provides separate authorization to sue for declaratory and injunctive relief.

Petitioners' Combined Opposition To Respondents' Motions to Dismiss: p. 6. ROA Vol. 3 at 88.

Based on these cases, and the fact that HRS §603-21.5 provides the Circuit Court with general jurisdiction to hear these matters, Appellants contend that the trial court below erred in determining their claims were time-barred under HRS §343-7.

4. THE COURT ERRED WHEN IT RULED THAT APPELLANTS COULD NOT RELY ON LEGAL PRESUMPTIONS OF HARM BASED ON PROVEN VIOLATIONS OF HEPA.

Proven violations of HEPA normally give rise to strong presumptions of irreparable harm in the context of requests for injunctive relief. These presumptions almost universally result in the balance of harm tipping in favor of plaintiffs in environmental cases and the granting of injunctive relief. This is a common theme in environmental law.

Procedural violations of Endangered Species Act (ESA) § 7(a)(2), for example, mandate injunctive relief because the balance of the hardships has already been struck by Congress in favor of endangered species. TVA v. Hill, 437 U.S. 153, 174, 194 (1978). Accordingly, courts "may not use equity's scales to strike a different balance." Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987)(emphasis added); see also Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.")

With respect to injunctive relief under NEPA, the Supreme Court has noted that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

Moreover, as Judge King observed in a similar situation, "NEPA's purpose is 'to protect the environment, not the economic interests of those adversely affected by agency decisions.' Surely, Congress did not intend that the interest in preventing financial loss outweighs the interest in environmental protection whenever the two clash, as they often do." Greenpeace Foundation v. Mineta, 122 F. Supp. 2d at 1139 (citations omitted).

These holdings directly apply to the case at bar. In passing HEPA, the Legislature surely didn't intend to make the stated purpose of protecting humanity subordinate to economic hardship. As a matter of law, the potential for damage to the environment based on a known HEPA violation outweighs the economic harm of enjoining a project until it is in compliance. Wealth is transient, but our environment is to be shared by all of generations to

come. Legislative intent of HEPA, administrative regulations, and case law all require HEPA compliance as a condition precedent to operation. The Court should not become a place of refuge for HEPA violators who can show that they may lose a lot of money if the environmental laws are applied to them.

The words of the court in Seattle Audubon Society v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991) are no less apt today:

> "Any reduction in federal timber sales will have adverse effects on some timber industry firms and their employees, and a suspension of owl habitat [lumber] sales in the national forests is no exception. But while the loss of old growth is permanent, the economic effects of an injunction are temporary and can be minimized in many ways. To bypass the environmental laws, either briefly or permanently, would not fend off the changes transforming the timber industry. The argument that the mightiest economy on earth cannot afford to preserve old growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today. It would be even less so a year or a century from now."

Id. at 1096, aff'd, Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991).

After the Sierra Club v. DOT opinion revealed that a violation of HEPA had, in fact, occurred with respect to the harbor improvements and the failure to consider the primary and secondary impacts of HSF's operation as a whole, Appellants requested the benefit of these presumptions of harm.

The Court ruled that Appellants could not use HEPA in any manner[13] because the HEPA claim was time-barred.

Appellants contend that their HEPA claim was not time barred, but in the alternative, argue that even if the direct HEPA claim was time-barred the Court should have still permitted them to rely on the presumptions of irreparable harm that were implied by the decision in Sierra Club v. DOT. Appellants believe that their right to a "clean and healthful environment, as defined by the environmental laws" pursuant to Article XI, §9 should have

[13] "However, to the extent that the public nuisance claim is not reliant on H.R.S. 343, the motion to dismiss is denied . . .In regards to claim number four, which is the constitutional claim, any reliance on the –pursuing the consti—constitutional claim pursuant to H.R.S. 343, again, is time barred by 343, and is dismissed." Hearing on Motions to Dismiss, Transcript of September 21, 2007 at 95 l. 1-8.

entitled them, in these circumstances, to rely on the already-proven HEPA violation and invoke the presumed harm associate with it in their request for injunctive relief.

In Bremner v. City & County of Honolulu, 96 Haw.134, 28 P.3d 350 (2001) the Court suggested that direct actions under Article XI, §9 might be limited by time limitations in HRS §343-7, however, it mentioned nothing about presumptions of harm in requests for temporary injunctive relief:

> "We observe that HRS § 343-7(a) (1993) requires a plaintiff, who wishes to challenge a party's failure to perform an environmental assessment, to file a complaint "within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement [environmental impact statement] is or is not required, ... within one hundred twenty days after the proposed action is started."

Bremner at 145, 361.

First, in this case there was a timely challenge to the exemption determination. Second, the Court in Sierra Club v. DOT noted that the Bremner decision "has not directly interpreted the text of the amendment." Sierra Club v. DOT, infra, at fn 28. This is because the Bremner case involved a challenge to a County ordinance, brought two years after the ordinance went into effect – and without any court determination invalidating the action. Third, no HEPA violation was ever proved in Bremner. This is a major distinction from the case at bar which sought to enjoin the continuation of a known and proven HEPA violation.

Whether Appellants were afforded a presumption of harm in their request for injunctive relief was an important issue in the case. Appellants presume that the TRO was denied only because this presumption was not available to them because its use was time-barred. Had the presumption been applied, injunctive relief should have issued. The State of Hawaii argued, "[w]hat is altogether missing from petitioners' motion for temporary relief is any showing of the immediate and irreparable harm required to support such relief. [The] harm is no more immediate and irreparable now than it was during the years of inaction by petitioners after the Department of Transportation issued its Environmental Review Exemption Determination in 2005." State of Hawaii's Opposition to Motion for a Temporary Restraining Order filed September 5, 2007, p. 2. ROA Vol. 1 at 138.

In Sierra Club v. DOT, the Hawaii Supreme Court held:

> "Contrary to the expressly stated purpose and intent of HEPA, the public was prevented from participating in an environmental review process for the Superferry project by DOT's grant of an exemption to the requirements of HRS chapter 343. The exemption was erroneously granted as DOT considered only the physical improvements to Kahului harbor in isolation and did not consider the secondary impacts on the environment that may result from the use of the Hawaii Superferry in conjunction with the harbor improvements. "All parties involved and **society as a whole**" would have benefited had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai'i Environmental Protection Act."

Sierra Club v. DOT, 115 Haw. at 337 (emphasis added).

It does not make sense, as Respondents suggest, to hold that Article XI §9 and HRS §343-7 must, as a matter of law, be interpreted to mean that any claim for injunctive relief to prevent any ongoing Article XI §9 violation is limited by the time limits set forth in a single statute. Moreover, Respondents' approach would result in the time limits of HRS §343-7 impermissibly burdening or impairing the rights guaranteed to all citizens by Article XI §9. The better approach is to *harmonize* the statutory and constitutional provisions[14], and provide Appellants the opportunity to protect their constitutional rights by relying on HEPA.

5. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANTS' REQUEST FOR A TEMPORARY RESTRAINING ORDER.

HEPA incorporates several provisions making it clear that no actions are to be taken to commence or implement the proposed action until the environmental process has been lawfully concluded. HRS §343-5(b) provides:"[a]cceptance of a required final statement shall be a condition precedent to approval of the request and commencement of proposed action." HRS §343-5(b) also provides that completion of the environmental process shall be a condition precedent to approval of the request and commencement of the proposed action, including to the use of state lands, state harbors and state waters. HAR §11-200-23(c) Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005); KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

[14] See SCI Management Corp. v. Sims, infra, 101 Haw. at453 71 P.3d at 404.

A required statement is a "condition precedent" to: (a) the issuance of approvals or entitlements for the project; (b) the commencement or implementation of a proposed project; and (c) the use of state lands or funds in implementing the proposed action. See HRS HRS §343-5(b); HRS § 343-5(c); HAR § 11-200-23(c). HAR § 11-200-23(d); HAR § 11-200-23(d). Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005); KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

According to the 2004 "Guidebook for the Hawaii State Environmental Review Process" published by the Hawaii Office of Environmental Quality Control: "A final EIS must be accepted by a government agency **before a project can proceed**;" (p. 9) and "[a]ny program or project that triggers the EIS law must complete the environmental review process **before final approval can be granted**." Id. (emphasis added). See Ex. E to Motion for a Temporary, Preliminary and/or Permanent Injunction. ROA Vol 1 at 24.

The fact that a known HEPA violation had just occurred in their harbor sho0uld have entitled Appellants to injunctive relief.

Once judgment is granted, as it was in the nearly identical case of Sierra Club v. DOT, injunctive relief barring implementation of the project is the appropriate relief, without consideration of the traditional "likelihood of success on the merits" and "balance of hardships" factors. Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518 (D. Haw. 1991). In order to protect the environment, Petitioners are entitled to a preliminary injunction in this case until the rights of the parties can be fully and fairly determined on the merits. See Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978).

According to the Ninth Circuit Court of Appeals, "when a project may significantly degrade some human environmental factor, injunctive relief is appropriate." SEAC v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006)(citations omitted).

Moreover, Appellants also submitted numerous declarations to the Court that irreparable harm would occur if the Superferry returned to Kauai before a valid EA has been completed. Given these declarations, coupled with the presumption of harm and the Supreme Court's ruling in Sierra Club v. DOT, Appellants contend that they made a sufficient showing of irreparable harm to mandate injunctive relief. Appellants assert that the court abused its discretion, due to erroneous interpretations of HRS §343-7, in denying injunctive relief.

CONCLUSION

For all of the above reasons Appellants request that the trial court's dismissal of the HRS 343-5 claim be vacated and that the Court provide injunctive relief until the matter of Appellants' Petition is heard on the merits.

Dated: Lihue, Hawaii,

By_____

Daniel G. Hempey
Gregory Meyers
Attorneys for Appellant

STATEMENT OF RELATED CASES

Sierra Club, et. al. v. Department of Transportation et. al. Case No. 29035. Intermediate Court of Appeals. Notice of Appeal Filed February 29, 2008.

This case is related to the case at bar. This case is currently pending the ICA. While Appellees may argue that some of the issues reaised in this appeal have been mooted by recent legislation, the related case claims that said legislation is unconstitutional.

Dated: Lihue, Hawaii,

By_____
Daniel G. Hempey
Gregory Meyers
Attorneys for Appellant

APPENDIX

NO. 28845

IN THE INTERMEDIATE COURT OF APPEALS
THE STATE OF HAWAI`I

1000 FRIENDS OF KAUAI, a Hawaii non-profit incorporation; RICHARD HOEPPNER, an individual, Petitioners/Appellants vs. THE DEPARTMENT OF TRANSPORTATION et al Respondents/Appellees	CIVIL NO. 06-1-0049 (Injunctive Relief) (Declaratory Judgment) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing Appellants Opening Brief were duly served upon each of the following attorneys by placing the same in the United States mail, first class postage prepaid, on _____, 2008:

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DATED: Lihue, Hawai`i,

_____
DANIEL G. HEMPEY
Attorney for Defendant-
Appellant/Cross-Appellee