



1 APPEARANCES:

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4 LAURA P. COUCH, ESQ.

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6 TERENCE JAMES O'TOOLE, ESQ. For Kuilima Resort

7 SHARON V. LOVEJOY, ESQ. Company

8 WILLIAM YAMAMOTO, ESQ.

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10 DON S. KITAOKA, ESQ. For City and County

11 LORI SUNAKODA, ESQ. of Honolulu

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21 REPORTED BY:

22 Jamie S. Miyasato

23 Official Court Reporter

24 First Circuit Court

25 State of Hawaii

1 NOVEMBER 13, 2006

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3 THE CLERK: Calling Case No. 3. Civil No.  
4 06-1-0867. Keep the North Shore Company versus City and  
5 County of Honolulu, et al. Re. Defendant Kuilima Resort  
6 Company's, 1) First motion for summary judgment re.  
7 statute of limitations; 2) Second motion for summary  
8 judgment re. non-discretionary actions; 3) Third motion  
9 for summary judgment re. burden of proof; 4) Motion for  
10 judgment on the pleadings; 5) Motion for protective  
11 order; and 6) Plaintiffs Keep the North Shore Country and  
12 Sierra Club, Hawaii Chapter's motion for summary  
13 judgment. Appearances please.

14 MS. COUCH: Good morning, Your Honor. Laura  
15 Couch and Bill Hunt for plaintiffs Keep the North Shore  
16 Country and Sierra Club.

17 THE COURT: Good morning.

18 MR. O'TOOLE: Good morning, Your Honor. Terry  
19 O'Toole, Sharon Lovejoy, Wil Yamamoto, and Dennis  
20 Phillips for Kuilima Resort Company.

21 THE COURT: Good morning.

22 MR. KITAOKA: Good morning, Your Honor. Don  
23 Kitaoka and Lori Sunakoda, deputies corporation counsel  
24 on behalf of the City and County of Honolulu.

25 THE COURT: Good morning. Thank you. All

1 right. Counsel, how should we proceed? I think the  
2 defense motions were filed first; is that correct? And  
3 as a procedural issue, I think on Wednesday the  
4 plaintiffs had filed an ex parte motion to exceed page  
5 limit, which the Court had denied on the grounds that  
6 that reply was being filed past the three-day deadline.  
7 And then when I reviewed everything, I realized that the  
8 defense had filed all of their replies on Wednesday also.  
9 So you did file a reply; correct?

10 MS. COUCH: Correct, Your Honor.

11 THE COURT: Did that actually go ahead and  
12 exceed the page limits?

13 MS. COUCH: No, Your Honor. We filed one  
14 within the page limitation, Your Honor.

15 THE COURT: All right. And counsel, I hope  
16 you understand the three-day limit is not just an  
17 arbitrary rule, but it's to provide not only the Court,  
18 but the Court's law clerk with time to assist the Court  
19 to prepare itself. Okay?

20 In any event, I think I have a sense of the  
21 issues in this case, and I think that the real issue I'm  
22 dealing with is: What is the legal standard to apply in  
23 dealing with these issues? Mr. O'Toole, perhaps would it  
24 make sense to start with the defense motions on this?

25 MR. O'TOOLE: That would be very good, Judge.

1 THE COURT: Okay. Go ahead.

2 MR. O'TOOLE: Your Honor, maybe just a couple  
3 of scheduling questions. I think we have an hour --

4 THE COURT: Yes, we have an hour set aside.  
5 So I was thinking 30 minutes each. And if that's not  
6 enough, we will continue the hearing at a later date.

7 MR. O'TOOLE: I appreciate that. And the  
8 Court has always been great with that. Here's what we  
9 would like to do, if it works for the Court. There's  
10 four motions we filed. Wil and Laura have got their own  
11 motion. There's a cross-matrix of issues. And it was  
12 our thought that maybe the best way to come at it is to  
13 try to first address issues that seem to be common to a  
14 lot of the motions, and then we can answer questions or  
15 address other motions if that's works. So that would be  
16 my intention. And since I'm not smart enough to master  
17 all the cases and all the facts on all the motions, we've  
18 split up some of the motions and some of the issues. So  
19 it could be that either I or Sharon or Wil may take any  
20 one of those, depending upon what the issue is, if that's  
21 okay and counsel's in agreement.

22 THE COURT: Yes. And I think in this case, we  
23 shouldn't restrict counsel to the one-attorney-arguing  
24 rule.

25 MR. O'TOOLE: You say we should?

1 THE COURT: No. I said we should not.

2 MR. O'TOOLE: Okay.

3 THE COURT: I'd like to hear from the people  
4 that would know.

5 MR. O'TOOLE: You gave me heart failure for a  
6 minute. Okay. Then that would be great.

7 Then with that said, Your Honor, I think  
8 addressing the Court's opening comment about the standard  
9 to be applied, I think we've got several issues about  
10 standards. But to us, speaking on behalf of the owner of  
11 the resort, this is the second time in seven months we've  
12 been before the Court on virtually the same issue. And  
13 because standards are important and clear rulings are  
14 important going forward, obviously one of the things we  
15 want to seek here is certainty. Because what would be  
16 certain is that if we don't get certainty somewhere in  
17 here, we'll be back in with another lawsuit. And you  
18 know, this project, like most projects that are large and  
19 already burdened by all the challenges of regulations,  
20 simply don't survive ongoing attacks.

21 THE COURT: Right.

22 MR. O'TOOLE: And so I think I would just  
23 simply say that at this point, we're hopeful that we can  
24 present the standards to the Court clearly and  
25 compellingly.

1 I'd like to say a few words about the project.  
2 I think there's really a couple of framework issues here  
3 that are worth reviewing. And then they come up a lot  
4 more as we get further into the details of each of the  
5 motions. But let's first talk about the project. And  
6 I'm not going to repeat the details that we have in the  
7 motions. I think we've got clear declarations about  
8 what's happened since 1986, where the project is at the  
9 moment.

10 Where we find ourselves is with a project that  
11 is well into the subdivision process. And the  
12 subdivision application was filed before the union took  
13 its shot back in January to attack us and certainly well,  
14 well in advance of both KNSC and the Sierra Club filing  
15 their actions. That subdivision process has proceeded.

16 And obviously, if you look at where we are in  
17 the time line, the next step really for the project is  
18 to, you know, get building permits and start to do some  
19 development. And to get caught in a swamp or never-  
20 never land here of interminable environmental hassles is  
21 not helpful in terms of permitting. It's not helpful in  
22 terms of lenders. It's not helpful in terms of drawing  
23 any joint venture partners to the table.

24 So what we have is an entitlement that goes  
25 back 20 years. What they would like to say on the other

1 side is what the union said back in the spring. And that  
2 is 20 years, okay, bad things have happened, things have  
3 changed, you guys haven't done anything; and so  
4 therefore, we need and in fact the city needs almost  
5 proactively to do an SEIS, to determine whether an SEIS  
6 really ought to be done.

7 There has been up until January of this  
8 year -- I should say more appropriately February, when  
9 the union filed its lawsuit, no challenges. I mean, this  
10 project has proceeded forward with not only blessings,  
11 but basically, as there is in the City and County  
12 records, a hold-your-feet-to-the-fire-if-you-don't-move-  
13 forward-and-possibly-face-down-zoning. So that happened.  
14 A hundred million plus has gone into the land since, you  
15 know, 2001. We unfortunately haven't calculated the  
16 dollars that went in between 1986 and 2000. But it's  
17 tens of millions of dollars in terms of golf courses and  
18 wells. I mean, this is not a dead project.

19 There is what appears to be a contention not  
20 only of a timing issue, which would form a foundation for  
21 an SEIS challenge, but also some type of substantive  
22 change in the project itself. And I'll come to that, but  
23 the reality is there's been no change in timing. And  
24 we'll address that. And that's not an issue, and that's  
25 going to be an important issue.

1                   And what came out in reply was effectively,  
2                   you know, here's another one for you. You've changed the  
3                   project because you've got now more hotel units than  
4                   you've got condominium units. And the reality there is  
5                   there's still 4,000 units in this project. And like  
6                   virtually every issue that has been raised here, these  
7                   are issues that are not only decades old. These are  
8                   issues that have gone through a public process and public  
9                   approval. And yet here we are on November 13, 2006,  
10                  trying to defend ourselves.

11                  THE COURT: When was that changed from -- I  
12                  understand there was a thousand units changed from condo  
13                  to hotel.

14                  MR. O'TOOLE: Yes, Judge.

15                  THE COURT: When did that occur?

16                  MR. O'TOOLE: It occurred somewhere around  
17                  1991 or 1990. And we've got a little bit of a flow chart  
18                  on it, and it's really undisputed facts. What happened  
19                  is the EIS had an approximate mix of units that actually  
20                  had fewer hotel than condo. When the entitlements were  
21                  granted -- and this includes the unilateral agreement,  
22                  the zoning approval, and the SMP -- there was a  
23                  determination made. And we believe it probably has to do  
24                  with employment. But they required that the developer do  
25                  a minimum of 51 percent hotel. So that had to change.

1 And in fact, that was the shift that was made. And  
2 virtually on the heels of that -- and I don't have the  
3 exhibit number in front of me, but I believe it's Exhibit  
4 N -- there was a 1991 traffic report that said, here's  
5 what the impact of that is. This is '91.

6 And then we roll all the way up to what we  
7 think is a benchmark event, which is the Koolauloa  
8 Sustainable Community Plan in '99. The full assumption  
9 is moving into that, that the master plan, which has been  
10 approved -- but now there's a unit mix shift -- and I'll  
11 get into this. But the Koolauloa Sustainable Communities  
12 Plan was adopted by ordinance, was the result of numerous  
13 public hearings, citizen groups. I mean it vetted the  
14 whole thing, reestablished, reconfirmed, and said Kuilima  
15 Resort has to be the economic -- on the North Shore. It  
16 specifies in there -- and I've got a copy of the exhibit,  
17 Judge, that says it's a 4,000 unit project, a thousand  
18 are condos. Well, that's exactly the determination made  
19 back in the early '90s.

20 And so we proceed forward. All of the  
21 processing and permits go forward on that basis. And  
22 here we are again. You know, it's the theory that, you  
23 know, everything's up for grabs.

24 So I'll come back to that because a lot is  
25 made at the 11th hour of this change. But I think when

1 the Court talks about standards, certainly one of the  
2 standards for both interested citizens -- and we respect  
3 the rights of interested citizens -- but certainly the  
4 rights of developers who are putting a lot of money into  
5 it and lenders who are lending on it is that there's  
6 certainty. And if in fact the supplemental EIS means  
7 that at any point in time, people can dredge stuff up  
8 that long ago that has been through a public process,  
9 ordinances, City and County, and say, well, you know  
10 what? -- maybe we weren't paying attention -- well, kind  
11 of too bad. But when that happens, you can't go back and  
12 raise these things up and now claim that there are  
13 changes. So that's I think very core to our argument.  
14 And I'm going to bypass some of the other factual issues,  
15 which we'll come back to.

16 But the long and the short of it is we want to  
17 get on with the project. We don't want to have more  
18 lawsuits. We're trying to be sensitive to the community.  
19 By the way, I would like to say -- and I think my client  
20 wants to be absolutely clear on the record -- we're not  
21 arguing that environmental impact statements as a matter  
22 of policy shouldn't have time lines or deadlines. That  
23 can happen. But if they want to do that prospectively,  
24 as apparently the environmental council is going to do,  
25 God bless them, do it prospectively. That's not what we

1 had.

2 So here we are at this point in our lives  
3 faced with what we believe are basically two challenges.  
4 Really one. It has to do with timing. But you know, the  
5 question is: Who are these plaintiffs? And I'm not  
6 raising the issue to attack any of 'em because we spent a  
7 lot of time taking depositions. They're all nice people  
8 and I think most of them are well meaning, have good  
9 hearts, and are looking for good results. And some of  
10 'em frankly just want to shut the project down at any  
11 expense, and it doesn't matter what the reason is.

12 But who is KNSC? It's a small group of local  
13 North Shore folks who filed their complaint before they  
14 ever were KNSC. They filed I think on May 21, and  
15 actually became incorporated on May 25. And then the  
16 Sierra Club comes in. The lawsuit that was filed was a  
17 copycat lawsuit. It is the same claim that the union  
18 made that an SEIS is warranted. And one has to ask, and  
19 I think it's a legal question as well: How do you do  
20 that?

21 The evidence that came out of the discovery is  
22 that both representatives of KNSC and the Sierra Club  
23 were involved with the union back in December and --  
24 December of '05 and -- excuse me -- January of '06,  
25 talking about ways to, quote, get a hook into slowing

1 this development down.

2 Now, I'm not going to go up to the union.  
3 We're done with that. Thank God that was done and  
4 dismissed. But the reality is there is a conscious  
5 choice that was made to help the union develop an SEIS  
6 theory, raise hell with the DPP, and then sit on the  
7 sidelines, choose not to participate as a party in that  
8 lawsuit, wait for this Court to hear testimony over the  
9 course of several days. Everybody spent a lot of time.  
10 Decision comes out not sufficient evidence. And then  
11 they file a lawsuit. You know, it's almost mindless to  
12 me that that could happen.

13 But we're going to address them on the merits.  
14 It's a group that obviously has had some tactical  
15 decisions about not participating and waiting. It's also  
16 very clear that, you know, they want a second bite at the  
17 apple. And what is I would assume most disconcerting to  
18 DPP is that but for one letter that Mr. Revere wrote, who  
19 is very knowledgable in traffic, I mean, he took the time  
20 to go back and look at traffic studies and try to  
21 understand what is the traffic outlook. He wrote a  
22 letter to DPP in April. There was no KNSC at that time.  
23 Sierra Club never sent anything to DPP. Yet what we get  
24 is nobody talks to DPP, a lawsuit hits, sues Henry Eng,  
25 sues DPP, sues us, and claims that there's all these

1 things that should have been considered.

2 What kind of process is that? I mean,  
3 somebody else can speak to the law. I mean, it just  
4 inherently is unfair. And what it does particularly when  
5 things roll in by way of the reply is the pattern becomes  
6 clear. And it became clear in the discovery. There was  
7 no evidence.

8 This was very much like the union lawsuit.  
9 When we were sued, the first thing we did was we noticed  
10 30(b)(6) depositions. They're briefed, they're attached.  
11 Other than anecdotal evidence, other than complaints  
12 about traffic regionally, which we can't solve -- this is  
13 not about regional traffic -- other than attacks on  
14 traffic reports done by our consultants that went to the  
15 city, went to DPP, that was it. And yet, after the  
16 lawsuit is filed, we've got monk seals, we've got green  
17 sea turtles. I mean, there may be something else we hear  
18 today that we've never heard about before. That just  
19 can't be the process, and it doesn't make sense. I think  
20 the law tends to do what's fair, tends to do what makes  
21 sense.

22 So I think the question is, as the Court said,  
23 what is the standard? And from our standpoint, and I  
24 think other people who choose to invest in Hawaii, the  
25 question is: What about these 11th hour lawsuits that

1 seek to litigate issues that have been either in the  
2 public knowledge or in the plaintiff's knowledge at a  
3 minimum for decades or at least years? And I think the  
4 one thing -- and we'll come back to this in a moment.  
5 But I think the one thing that is very clear from  
6 everything everybody's written and everything the  
7 legislature said when it created HEPA is that there is a  
8 balance to be struck here. Certainly we've gotta pay  
9 attention to environmental concerns. But that doesn't  
10 trump everything else.

11 And to the extent people have concerns about  
12 the environment, then those concerns have to be voiced  
13 very quickly. I mean, you can choose 343-7(a), (b), or  
14 (c), and any one of those doesn't give them more than 120  
15 days from a trigger date. Some of it's 30, some of it's  
16 60. It isn't ten years, it isn't five years, it isn't a  
17 year. And that makes sense and it's fair. And in fact,  
18 I think the committee report that went with the enactment  
19 said, you know, these are really the kind of things that  
20 should be raised long -- before a project is long under  
21 way.

22 THE COURT: The question I have really is the  
23 application of 11-226 and 27.

24 MR. O'TOOLE: Yes.

25 THE COURT: And you know, the process and the

1 standards that apply to that. The Marsh case, the U.S.  
2 Supreme Court seems to be saying that the rule of reason  
3 test, which is the standard test applied to sufficiency  
4 of environmental impact statements, is also the test to  
5 be applied in determining sufficiency of supplemental  
6 EIS's. However -- Ms. Lovejoy.

7 MS. LOVEJOY: I'm sorry. I know the case  
8 well.

9 THE COURT: Okay. Please tell me what the  
10 holding of that case is.

11 MS. LOVEJOY: The holding of Marsh, Your  
12 Honor, is that the agency's decision in deciding whether  
13 an SEIS should be made instead of reviewing it should be  
14 applied by the rule of reason. And then once they make  
15 the decision, their decision can only be overturned if  
16 it's found to be arbitrary and capricious.

17 THE COURT: Was there a publication in that  
18 case of notice of non-requirement of SEIS?

19 MS. LOVEJOY: That I don't know, but I'll find  
20 out.

21 THE COURT: And let me ask you this. Kepoo v.  
22 Kane, which says that when there's a determination that  
23 an EA, an environmental assessment, is not required,  
24 that's subject to the Statute of Limitations under  
25 243-7(b), the 30 days. And it says non-determination

1 pursuant to 343-3, which seems to suggest a requirement  
2 of a publication.

3 MS. LOVEJOY: Yes. But we take issue, as you  
4 might well know, Your Honor, with any application of the  
5 EA requirements at all to an SEIS because of the --

6 THE COURT: Do the federal regs -- well, why  
7 -- okay.

8 MS. LOVEJOY: Your Honor, the federal regs  
9 don't have an independent cause of action.

10 THE COURT: Okay. Yes.

11 MS. LOVEJOY: It's something -- that -- in  
12 that instance, in that respect, they're very different  
13 from Hawaii's.

14 THE COURT: Okay.

15 MS. LOVEJOY: So what they do is they apply  
16 the APA to all of the determinations because that's the  
17 only way that somebody could challenge the determination  
18 is through the APA process. So they do it that way. But  
19 there still has to be a final determination from which  
20 the appeal would lie.

21 MR. O'TOOLE: And Judge, I think there's one  
22 other overlay.

23 THE COURT: Yes.

24 MR. O'TOOLE: And if we kind of time-lined out  
25 what analysis happens when, I think the question that

1 gets asked even before that I believe --

2 THE COURT: Yes.

3 MR. O'TOOLE: -- is: If the basis for the  
4 claim is barred by the statute, it doesn't matter. And  
5 there's case law. And we've cited two California cases  
6 that deal with the surplus statute that is very, very  
7 similar to the statute here that basically said if a --  
8 an entrusted party seeks to litigate the issue as to  
9 whether there's been a substantive change, it's the same  
10 two words there as here. And this was an en banc  
11 decision of the California Supreme Court. And if there  
12 is no publication, there's no -- you know, that doesn't  
13 happen, then you have to look at whether the plaintiffs  
14 knew or should have known of the substantive change. And  
15 when you determine that time frame, then the statute  
16 begins to run. That was the Concerned Citizens case.  
17 That's an 87 Supreme Court of California. And there's a  
18 2004 case called Cummings, both of which I've got extra  
19 copies of.

20 And almost -- you know, they're very much on  
21 parallel here. One was a situation where a stadium was  
22 to be constructed. And lo and behold, somewhere between  
23 the original EIS and the construction, they increased the  
24 size of the stadium like 200 fold in terms of the seats.  
25 Reoriented it, expanded the area upon which it sat. The

1 Court said no, no doubt, clearly a substantive change in  
2 that case they found there was, but said the issue here  
3 is: When did the plaintiffs know about that? Because  
4 they can't sit on that right and then argue that they can  
5 raise it sometime later.

6 And then in Cummings, the same thing happened  
7 and it's even closer to our case because there was public  
8 notice. A facility that was to be light industrial in  
9 Southern California morphed into something that was  
10 really a recycling waste facility. And people were  
11 unhappy about that. But what was made known to the  
12 community at large was there was no SEIS required. There  
13 was no publication of it. And the Court said we're going  
14 to mark the time frame of when the statute runs and it  
15 was virtually the same as 343-7(a), which was 180 days in  
16 California. Here's it's 120. And it said, if you're  
17 looking at that -- because that doesn't have a  
18 publication to it. If you're looking at that, then you  
19 have to look at when was knowledge there.

20 And from that -- so if you're talking about --  
21 if you go back to the complaint, which is timing, the  
22 change in timing has caused all these other things to  
23 happen, then the, quote, change in timing, which we say  
24 there isn't a change because it was allowed, so you never  
25 get there. But if we give them their argument, by '96,

1 by their own allegations, the resort should have been  
2 wherever they believe the resort should have been under  
3 the EIS, which clearly wasn't so. And so virtually  
4 everybody in this community knew that that project was  
5 going on since '96. You can't wait 11 years and raise  
6 your hand and say substantive change which causes  
7 traffic, issues with green sea turtles.

8 So what we were going to do, which I hope  
9 would be helpful is -- you know, we've had scrambled eggs  
10 here between how they look at HAR and how we look at it.  
11 I wonder if we took just a few minutes and walk through  
12 it --

13 THE COURT: Yes.

14 MR. O'TOOLE: Would that be okay?

15 THE COURT: Yes.

16 MR. O'TOOLE: And we'll try to --

17 THE COURT: Could we move the board? I can't  
18 see.

19 MR. O'TOOLE: I'll try to move a little more  
20 swiftly through the beginning part because I understand  
21 where the Court's focus is.

22 We went back and just took a hard look on what  
23 are we doing here. This is really an informational  
24 document. This is not, you know, a permit. We're not  
25 fighting about whether they had a right to build. This

1 is an informational document. It's a balance. It is  
2 not, you know, let's throw out all the environmental  
3 issues and see how many more you've got and whether we  
4 tip over and we have to have a statement. It's very much  
5 a balance. It's for the agency.

6 And the agency, which now has been through not  
7 only the challenges early on, but a lawsuit, depositions  
8 -- there's no question this agency has looked at it.  
9 It's not even DPP. DOT's got it. They sent this  
10 information out. And the senate committee report on the  
11 statute is to allow interested parties sufficient  
12 opportunity to initiate a challenge before a project is  
13 long under way, not raise timing issues that are decades  
14 old.

15 Okay. We believe if you read both Chapter 343  
16 and the HAR, there's a presumption that the original EIS  
17 is valid because it says it both in the chapter in HRS as  
18 well as HAR. And if you go on to the next one, Dennis --  
19 or maybe I passed it -- it's clear that not only is there  
20 a presumption, but in fact the determination that an  
21 SEIS needs to be made is the equivalent of throwing out  
22 the original EIS, that's a huge decision. I mean, the  
23 time that went into the original EIS -- if the equivalent  
24 is for this agency to decide that an SEIS is appropriate,  
25 it is the same as saying the old one no longer has any

1 validity. Where do we go from there? So it's simply by  
2 way of saying, this is not, as they would suggest, the  
3 burden over here on DPP to go figure it out.

4 So very quickly, DPP is charged under the  
5 regulations with determining whether it's required. It's  
6 the accepting agency. And Price and the other cases we  
7 cite -- you know, pretty clear. You really get down to,  
8 you know, rule of reason and arbitrary and capricious.

9 I'm going to touch on this and move on. It's  
10 clear in a lot of the challenges that are raised by the  
11 plaintiffs here these things go back to the original EIS.  
12 There's complaints by their traffic guy about the  
13 original EIS not being adequate. I think that's not  
14 worth spending time on. You just can't do that now.  
15 Time has come and gone. 343-7.

16 The guts I think here, and I'm going to put  
17 aside publication for a moment, which I know is something  
18 the Court is focusing on. If we look at 200-26 and  
19 200-27, but mostly 200-26, which really has the guts of  
20 the test. And the Court went through that the last time  
21 with the union, and I know you have in other cases.  
22 There's really a three-prong test. Substantive change in  
23 the project. That's a predicate. If you can't get past  
24 one, you don't get to go to 2 and you don't get to go to  
25 3. 2 means you've gotta show that there's a significant

1 effect from the substantive change. And there's gotta be  
2 causation, which is really our No. 3. You can't say  
3 substantive change and then throw up an effect that has  
4 no connection.

5 Here -- and I think you'll hear most of the  
6 argument -- No. 1 just doesn't happen. And they don't  
7 get to go to No. 2. There is no change. And to the  
8 extent we would concede for the sake of argument there's  
9 a change, they're time barred. So you don't even get up  
10 to what DPP did really.

11 And this was just -- so it didn't look like we  
12 were making things out of whole cloth, we just broke out  
13 200-26. And you can really see how the 1, 2, 3's work in  
14 terms of each of those tests.

15 What is the substantive change? It is  
16 essentially a different action. And I'll come to action  
17 in a moment because we've got any number of views on what  
18 action means. But it's defined, so we really don't have  
19 to debate it. It means essentially a different action  
20 such that the original statement is no longer valid.  
21 There's nothing here that would begin to suggest that  
22 this project, which is the action, has essentially  
23 changed.

24 Certainly not -- and I think this is a point  
25 Wil made when we were just working through the statute of

1 limitations argument. The simple way to look at it is  
2 they filed their complaint on May 21 and then I think --  
3 May 18th, and then the Sierra Club came in on June 6 or  
4 thereabouts. The best they can do is to go back 120 days  
5 from the filing of the complaint. That's really the  
6 retrospective application of the statute of limitations.

7 If what they're complaining about are issues  
8 or changes or significant effects that happened before  
9 that were known to them, you know, that's the end of it.  
10 Okay?

11 The action is the project. Clearly it is, and  
12 we've briefed that in the past case. We've briefed it  
13 here. It's the project. It's clear under the HAR that  
14 if it's phased, it doesn't each become a separate  
15 project. It is the project. The words in their various  
16 motions or their motion and their opp. seems to focus  
17 very much on the word "may," which I think is intended to  
18 stress to the Court that, you know, "may" has a very low  
19 threshold. "May" in terms of significant effect means  
20 likely. And we've got, you know, a case that talks about  
21 that.

22 And then if you look at 11-200-2 and  
23 11-200-12, which actually gives examples of significant  
24 effect, these are grave serious terms. The adjectives  
25 that are used in this list of what might be considered

1 significant aren't, you know, de minimis or minimalist.  
2 It is irrevocable loss or destruction of a resource  
3 substantially effects a rare endangered species. And  
4 then 11-200-27 is -- has to be modified. The entire  
5 framework is these have to be significant if you're going  
6 to throw out the original EIS.

7           There must be a causal connection. I think  
8 we've covered that. And I've mentioned before that, you  
9 know, how they connect the change in timing to a green  
10 sea turtle is a mystery to me, since this thing has been  
11 studied before and there really isn't anything new there.  
12 So there's a causative effect.

13           And then we really come back to where we  
14 started. And that is: What's the standard of review  
15 here? If they made a determination based on the rule of  
16 reason and there's nothing arbitrary or capricious about  
17 what they did, then that action should stand, and it's  
18 not a de novo review.

19           And I think the other issue here is plaintiffs  
20 seem to suggest that the DPP didn't do its homework.  
21 Have done nothing to put anything in front of DPP that  
22 would cause I think anybody to get concerned. And we  
23 know from the affidavits of the DPP people, you know,  
24 they've had a record that's been replete with studies of  
25 traffic, studies of water quality, archeological stuff.

1           So the record is complete. The decision which  
2           was made in January -- and certainly DPP had every right  
3           from January till now to raise its hand and say, You know  
4           what? We've got something new here, we better reconsider  
5           it. Has heard everything they have to give, all the  
6           information's put forward, and said we don't see reason  
7           for an EIS.

8           They brought this lawsuit under Chapter 347.  
9           You gotta live with Chapter 347.

10          THE COURT: 343?

11          MR. O'TOOLE: Yup. I'm sorry. You're right.  
12          You gotta live with 343. Somebody else might have to  
13          live with 347, but 343 is the predicate of their  
14          complaint. So we said, you know, it's instructive to go  
15          back and -- what they pled is what they have to live with  
16          at this point. We do have notice pleading. But the  
17          reality is the complaint is what they intended at that  
18          time. It's basically the way they framed the action.  
19          And it's based upon an alleged -- the substantive change,  
20          which is the first prong of the test, is an alleged  
21          change in timing. Paragraphs 39 and 40. Twenty years  
22          have elapsed. We've heard that before. Ten years have  
23          passed since the last phase of the project. And the  
24          project has substantively changed in timing.

25          And so I think the first inquiry, Judge,

1 before we even ever get to what DPP did or didn't do is  
2 on its face, and given what we think is undisputed facts,  
3 they're just -- just way too late to raise these issues.  
4 I mean, they can complain all they want about the agency  
5 process. But if in fact the underlying cause of action  
6 is barred, it doesn't matter.

7 MR. HUNT: Judge, we got maybe 20 minutes till  
8 the next hearing is set. And I don't know whether the  
9 city's going to argue too or what the timing of this is  
10 going to be, so I just want to raise that point.

11 THE COURT: Good point. Let me hear from the  
12 plaintiffs now, Mr. O'Toole. Okay?

13 MR. HUNT: Is the city then --

14 THE COURT: Did you wish to --

15 MR. KITAOKA: Five minutes, Your Honor?

16 THE COURT: Sure. Go ahead.

17 MR. O'TOOLE: Judge, could I ask -- and to the  
18 extent we're going back and forth, would we have an  
19 opportunity later in the day to come back?

20 THE COURT: If necessary, yes.

21 MR. O'TOOLE: Okay.

22 MR. KITAOKA: I just want to point out a few  
23 things, Your Honor. No. 1, the city is not the  
24 developer. The city is interested in preserving its  
25 process. The integrity of the process is utmost in the

1 hearts and minds of the people at the Department of  
2 Planning and Permitting. Any implication --

3 THE COURT: Basically -- let me ask you a  
4 question.

5 MR. KITAOKA: Yes, Your Honor.

6 THE COURT: Basically the city determined that  
7 this project was not qualified by the timing as asserted  
8 by plaintiffs. Is that correct?

9 MR. KITAOKA: There was no timing requirement  
10 set forth in the permits. Because what is happening with  
11 the monitoring of the permits is that there's a planner  
12 assigned to the UA. There's a planner assigned to the  
13 SMP. All of the conditions in the UA and the SMP are  
14 being continuously monitored by these planners to make  
15 sure that this developer is in compliance with all of the  
16 conditions. None of those conditions specifically said  
17 you must construct by a certain time or else your permit  
18 expires.

19 There is a provision in the SMP I believe that  
20 states that understandably there are times when economic  
21 conditions can change and the length of the project can  
22 be extended. I think that was acknowledged in the  
23 permits, and DPP acknowledged the changes in  
24 circumstances and the economic changes that did occur.  
25 So it's not holding an expiration date as set forth in

1 those permits.

2 THE COURT: But it's not really the UA or the  
3 permits that we look at; right? It's really the EIS, the  
4 statement, that we look at as to the time period that was  
5 covered by the statement; right?

6 MR. KITAOKA: Right. What is key is -- and  
7 I'm going to reiterate what the developer is saying -- is  
8 that the provisions of 11-200-26 and 27 have a first  
9 element in all of that. And the first element is whether  
10 the project has changed.

11 Now, any implication that plaintiffs are  
12 making that DPP is a do-nothing, know-nothing agency is  
13 pretty much demeaning and insulting when in fact this  
14 project has been through the gamut of land use approvals.  
15 And I don't have to rehash for this Court exactly what  
16 that gamut is because it started back in '86, with the  
17 land use classification or reclassification of land, it  
18 went through an SMP, it went through a shoreline  
19 variance, it went through a zone change.

20 And now it's going through a subdivision  
21 process. And that subdivision process is a process which  
22 involved extensive and comprehensive agency review. When  
23 I say agency review, I'm referring to such agencies as  
24 Department of Transportation Services, the Honolulu Fire  
25 Department, Department of Environmental Services, the

1 Board of Water Supply, Department of Parks and  
2 Recreation, various state agencies, like the State  
3 Department of Transportation, State Department of Health,  
4 State Historic Preservation Division.

5 I can go on with more agencies, Your Honor,  
6 but all I'm trying to emphasize is that it's not a simple  
7 do-nothing, know-nothing, see-no-evil process that the  
8 subdivision process is going through. It's going through  
9 all of these agency reviews because DPP is in fact taking  
10 a hard look at what are the effects of this project. And  
11 all of these agencies have a chance to have their input  
12 into it. So preserving --

13 THE COURT: Let me ask you a question. So  
14 basically the DPP concluded that the project was not  
15 necessarily qualified by the timing as asserted by  
16 plaintiffs. Did you reach the next step of even if it  
17 was, there was no likelihood of a significant effect?

18 MR. KITAOKA: Well, the first element would be  
19 whether there has been change.

20 THE COURT: Okay.

21 MR. KITAOKA: In all of its agency reviews and  
22 its monitoring of the permit conditions and the  
23 monitoring of the unilateral agreement, DPP has not been  
24 convinced -- I shouldn't even say convinced -- hasn't  
25 even been given notice that there has been a change in

1 the project. So they haven't even gotten through the  
2 first element of whether in fact a supplemental EIS is  
3 required.

4 Through all of these agency reviews and  
5 monitoring, DPP is in the continuous process of receiving  
6 information, and receiving information from all of the  
7 effected agencies, receiving information from the  
8 community, if necessary. DPP is not a do-nothing, know-  
9 nothing agency. DPP is in fact a very experienced and --

10 THE COURT: Mr. Kitaoka, where it says to the  
11 extent that the action has not changed substantively in  
12 timing, among other things, then the statement which was  
13 previously accepted satisfies the requirements of the  
14 chapter and no supplemental EIS is required. So  
15 substantively means what under that regulation?

16 MR. KITAOKA: Well, substantively would mean  
17 that it would have a significant effect. If there are  
18 any changes in timing, scope, and the rest of the  
19 alliteration of the conditions that are set forth in the  
20 administrative rules, then DPP needs to determine whether  
21 those changes have a significant effect.

22 THE COURT: I understand your concerns about  
23 process. And of course, the Court is always concerned  
24 about process too. I tend to agree with you that I can't  
25 imagine that just a letter to the city would require --

1 someone writing a letter saying, you know, we think that  
2 there's a timing issue here, would require you to then go  
3 through everything and publish.

4 MR. KITAOKA: Right.

5 THE COURT: But I'm just wondering in terms of  
6 process. At times you folks have gone through the  
7 supplemental process. I'm just wondering what triggers  
8 that. It's when you look at it and you see what people  
9 submit to you to see if there is a substantive change or  
10 significant effect, then you analyze it and decide  
11 whether or not a supplemental is required? And sometimes  
12 you do decide it's required, and sometimes you decide  
13 it's not required?

14 MR. KITAOKA: Right. In this case, the  
15 problem is DPP was never asked. And DPP was never  
16 presented with evidence of a change or DPP was never  
17 given something to say, Look, the project has changed in  
18 this aspect; therefore, you should do your due diligence  
19 in investigating to see whether that change, No. 1,  
20 happened, and No. 2, whether the change caused  
21 significant effects or had significant effects.

22 THE COURT: On the merits, seeing now the  
23 changes that the plaintiffs allege, what is the city's  
24 position? First of all, you don't think that there's a  
25 substantive change. And do you think that there's a

1 significant effect that it's likely to have a significant  
2 effect based on what the plaintiffs are alleging here?

3 MR. KITAOKA: Given what the plaintiffs are  
4 alleging, let me first remind the Court that the  
5 plaintiffs are alleging it for the first time in the form  
6 of Circuit Court.

7 THE COURT: Which the Court understands the  
8 concern with. And I think that in my prior experience,  
9 these issues should be presented to the accepting  
10 authority first. Otherwise the Court will be bombarded  
11 with lawsuits attacking these issues time after time.

12 MR. KITAOKA: Exactly. And in choosing the  
13 Circuit Court as the forum, it was never presented to DPP  
14 in any comprehensive fashion. Anything that was  
15 presented in these motions for summary judgment are seen  
16 for the first time.

17 But even so, if these pleadings were given to  
18 DPP -- and I'm not saying that they were because they  
19 were just filed. But if these pleadings were given to  
20 DPP, I would say that DPP would look at them and say that  
21 it hasn't been presented to them that there is a change  
22 in the project. There hasn't been a change and no  
23 significant effects of anything that they allege.

24 But what is troubling, Your Honor, is choosing  
25 the forum and then expecting DPP -- and then saying DPP

1 didn't do anything. I'm troubled with that because DPP  
2 was never given a chance to do anything.

3 THE COURT: I understand that concern. Let me  
4 hear from the plaintiffs.

5 MR. KITAOKA: Thank you, Your Honor.

6 MR. HUNT: Thank you, Your Honor. Just a  
7 couple of things that you mentioned earlier. In the  
8 Marsh case, the core of engineers did a study. They  
9 hired independent experts to comment upon evidence that  
10 had been presented to them already.

11 THE COURT: Presented to the Court?

12 MR. HUNT: To the Court.

13 THE COURT: And was that the accepting  
14 authority?

15 MR. HUNT: Yes.

16 THE COURT: Why did you not present any  
17 evidence to the DPP if you thought there were issues?  
18 Why file a lawsuit and for the first time bring it up  
19 here in court?

20 MR. HUNT: Because, Your Honor, the DPP had  
21 already made a determination. January 19th -- January  
22 31st, two months after the subdivision application was  
23 filed, which isn't a public notice to anybody -- you have  
24 to go down and make sure you know about it -- they decide  
25 without doing any investigation whatsoever there's no

1 SEIS required. At that point a determination has been  
2 made. And the environmental council wrote two letters to  
3 them saying, Wait a minute, we think maybe someone ought  
4 to step back, it's 20 years, and look at this. And they  
5 said, Well, it's in litigation, so we can't do anything  
6 about that.

7 So we didn't have an opportunity. And that's  
8 one of the primary things we're raising here. Nobody, no  
9 public person, had an opportunity really to engage with  
10 the DPP to present any positions. And I think the case  
11 law, if you look at HAR 200-13, Your Honor, it doesn't  
12 say that the agency has to wait for people to send  
13 things. It says it has an affirmative duty to go out and  
14 look. And it can't rely on prior statements alone. It  
15 must compare and analyze.

16 THE COURT: Doesn't that pertain to the  
17 initial environmental impact statement requirements?  
18 Isn't -- isn't supplemental covered in a separate --

19 MR. HUNT: It talks about not relying on past  
20 actions and past statements.

21 THE COURT: Okay.

22 MR. HUNT: It specifically says that when you  
23 are presented with a new action, you have to make an  
24 investigation, do an affirmative review.

25 THE COURT: So what are you saying triggers

1 this requirement? That every time there's a subdivision  
2 approval request or every time there is a -- some type of  
3 building permit request, the Department of Planning and  
4 Permitting is then required to reexamine the issue of  
5 whether or not a supplemental EIS is required, even if  
6 the original EIS is a -- is a phased -- contemplated  
7 phases and covered the various phases of the --

8 MR. HUNT: Can Ms. Couch explain?

9 THE COURT: Okay.

10 MS. COUCH: Yes. Your Honor, the trigger is a  
11 discretionary action. Not at every stage. But when you  
12 have discretionary action where DPP has the power to  
13 impose conditions on the project, that's when  
14 environmental review is triggered and that's when the  
15 agency needs to take an affirmative look and look at the  
16 big picture and see what this project is going to have an  
17 impact on, if it's changed. And I'll let Bill continue.  
18 I'm sorry for interrupting.

19 THE COURT: Thank you.

20 MR. HUNT: Your Honor, let me point to the  
21 Price case. Because I think your first question when we  
22 came out was: What is the standard review here? What am  
23 I supposed to be doing?

24 THE COURT: Right.

25 MR. HUNT: And in the Price case, this is a

1 quote from the Supreme Court.

2 THE COURT: What page?

3 MR. HUNT: I've got the Westlaw version. It's  
4 hard to tell. Looks like page 158. No. I'm sorry.

5 THE COURT: Well, please. I'll look for it.

6 MR. HUNT: Okay. And it's just a short quote,  
7 Your Honor. It says, The Court is not to substitute as  
8 judgment for that of an agency environmental consequence  
9 of an action. Fine. Rather, the Court must insure that  
10 the agency has taken a hard look at environmental  
11 factors. Then it says, If the agency has followed the  
12 proper procedures, its actions will only be set aside if  
13 the Court finds the action to be arbitrary and capricious  
14 given the known environmental consequences.

15 Here we've already shown that the agency has  
16 not followed the appropriate procedures set forth in HAR,  
17 which they admit they are required to follow. They did  
18 not do -- the evidence presented to Your Honor --and I  
19 know we've inundated you with paper. But the evidence is  
20 that we've deposed the various planners. And when they  
21 wrote those letters in January saying no SEIS is  
22 required, they had done no investigation at all. They  
23 had never looked at the 1985 EIS. They had only relied  
24 upon the fact -- in fact Mr. Siu-Li, who's the planner in  
25 charge of the subdivision, said, Well, I assumed there

1 were no changes. He didn't even look. He assumed. And  
2 then he said, Okay -- and he's the one that also in the  
3 TRO hearing presented a declaration saying, Based on  
4 everything I know, no EIS is required -- SEIS. He didn't  
5 even know about the environmental council's letters. No  
6 one told him.

7 They've made a decision. They didn't say, We  
8 don't think the EIS process applies here. We don't --  
9 they didn't say, we think this project is exempt. They  
10 said, Okay, yes, we think this should require an SEIS  
11 review.

12 THE COURT: Where's that letter again? The  
13 one that you're referring to?

14 MR. HUNT: The January 19th letter to --

15 THE COURT: Which of the exhibits?

16 MR. HUNT: Oh, boy. Is it one of the  
17 exhibits?

18 MR. HUNT: We'll find it in a second, Your  
19 Honor. If I could just continue briefly.

20 THE COURT: Okay.

21 MR. HUNT: There were two letters, of course,  
22 the one to Ben Shafer on January 19th and the one to Eric  
23 Gill on January 31st, drafted by separate DPP planners.  
24 Both of those people eventually testified in their  
25 deposition that that was meant to be a final

1 determination. They were signed by Mr. Eng, the director  
2 of DPP, saying that no supplemental environmental  
3 statement is warranted. They made that decision without  
4 any investigation whatsoever.

5 And if you'll look at the attachments from  
6 Mr. Siu-Li's deposition that we attached to our motion,  
7 he made that clear. He made assumptions, and those  
8 assumptions were that there was no change in the project.  
9 He never prepared to look.

10 Sorry, Judge. There were two letters. And  
11 they admitted in their deposition that that was a final  
12 decision. It was never published with the environmental  
13 council is as required under HAR.

14 THE COURT: That's really what I'm trying to  
15 get to. What triggers a requirement of publication?

16 MR. HUNT: When they make a decision that no  
17 supplemental EIS is required, that they've done a hard  
18 look --

19 THE COURT: Is that just based on a letter  
20 sent to them? Do they have to publish every time a  
21 letter is sent to them?

22 MR. HUNT: No, Your Honor. They have to  
23 publish every time they make a determination that we've  
24 decided, we've looked at this.

25 THE COURT: On what basis? That's where I'm

1 going. That's why I wanted to know upon what basis did  
2 DPP rule. That's why it was kind of important --

3 MR. HUNT: Our position is no basis. If you  
4 look at the deposition testimony -- I mean, they've  
5 presented a lot of conclusory affidavits drafted by  
6 attorneys. But if you look at their deposition  
7 testimony, they did absolutely nothing.

8 THE COURT: It seems to be their position that  
9 there really is no change in this project.

10 MR. HUNT: That is the position --

11 THE COURT: And if that's true, why would --  
12 if there really is no change, why would an accepting  
13 authority have to publish?

14 MR. HUNT: Because they don't know there's no  
15 change. They just assumed there is no change. They  
16 didn't look.

17 THE COURT: Well, I think Mr. O'Toole is  
18 probably correct. I think 11-200-26 creates a rebuttable  
19 presumption. And it seems to me that when it comes to a  
20 supplemental EIS situation, it says the original EIS is  
21 accepted, it's fine unless there's a change that  
22 substantively effects the various issues, scope, timing,  
23 et cetera, and may have a significant effect. I'm glad  
24 you pointed out the Kepoo case because I was wondering  
25 what "may" means. And it means likely. And which is

1 likely to have a significant effect. Then the original  
2 statement is no longer valid and -- because it's a new  
3 action that's being contemplated and it's basically --  
4 the original EIS is broad is basically -- seems to be  
5 what they're saying, or it's a new action or at least it  
6 could be a portion that's a new action. Then they -- the  
7 accepting agency has to decide whether or not the  
8 supplemental EIS is required and publish that  
9 information.

10 But I can't imagine that any letter -- you  
11 know, Gee, what's going on? Oh, we now have to do a  
12 complete review? I don't think that that's what the  
13 process is here.

14 MR. HUNT: No, Your Honor. But subdivision --  
15 forget the letters.

16 THE COURT: Okay.

17 MR. HUNT: A subdivision application in itself  
18 requires some discretionary approval by the city.

19 THE COURT: Yes.

20 MR. HUNT: When they get that, they have to  
21 decide: Is there a change to this project from the last  
22 time we approved it some 20 years ago? Duh. I mean,  
23 they've all agreed that -- even Mr. Siu-Li says, Well, of  
24 course, 20 years, there's gotta be some changes, but I  
25 assume that nothing had changed. So it's a subdivision

1 application and then their decision without doing any  
2 further review, regardless of any letters.

3 THE COURT: So you're saying that any time  
4 there's a subdivision application on a project where  
5 there was an original EIS, the agency then has to examine  
6 whether or not a supplemental EIS -- whether there's any  
7 changes?

8 MR. HUNT: Yes. Because that is an action.  
9 And nobody's discussed this attorney general opinion we  
10 cited back in 1975. A subdivision proposal is an action  
11 under 343 under HAR that requires some review.

12 Now, maybe they review it and they say, We  
13 don't think an SEIS is required, here's why, there's been  
14 no substantive change. They file it with the  
15 environmental council. And then the public knows that  
16 some review has occurred and here's their opportunity to  
17 challenge it or question it. That never happened here.

18 THE COURT: What would be the processes? What  
19 would be the steps in this phase that you believe would  
20 then trigger a DPP's requirement or any other accepting  
21 agency's requirement to reexamine this issue and publish  
22 other than the subdivision approval?

23 MR. HUNT: Well, as Ms. Couch said, any  
24 approval that's going to require some discretionary  
25 function. Now, obviously if they filed a subdivision

1 application in 1987 or 1986, it's going to be a much  
2 shorter process because the EIS had just been approved.

3 THE COURT: You're saying that even though the  
4 EIS was approved in October of 1985, and if they had gone  
5 in for the subdivision approval in 1987 and there was no  
6 change in timing, they still have to reexamine whether an  
7 SEIS is required?

8 MR. HUNT: At least reexamine that issue, to  
9 at least look at it, because I think that's exactly what  
10 13 and 26 and 27 are saying.

11 THE COURT: Doesn't 200-26 say that a  
12 statement that is accepted is usually qualified by its  
13 size, scope, location, intensity, use, and timing, among  
14 other things?

15 MR. HUNT: Right.

16 THE COURT: A statement that is accepted shall  
17 satisfy and no other statement shall be required to the  
18 extent that the action has not changed substantively in  
19 those factors.

20 MR. HUNT: And how does DPP know that, that it  
21 has not changed substantively if all they do is say,  
22 well, here's a subdivision application, let's go ahead  
23 and approve it, let's not do an investigation, let's not  
24 ask any questions? And that's exactly what they did  
25 here.

1 THE COURT: What does "changed substantively"  
2 mean?

3 MR. HUNT: And that's one of those things,  
4 Your Honor. In any of those issues, obviously their  
5 position seems to be, and they had this mantra in the  
6 depositions, that timing in and of itself is not  
7 sufficient. But because the city council in their  
8 resolution never said you have to do it within a  
9 particular time. But they also never said you have to do  
10 it a certain size or scope. They relied on the EIS.

11 And clearly if Kuilima came in today with a  
12 subdivision application and said, We've expanded the  
13 project times two, the DPP would have to say, whoa, we  
14 better look at this. To me, it's no different than  
15 saying, It's been 20 years, that's one of the criteria  
16 under the provision, we better look at it. That's all  
17 we've said -- is that they better look at it. And when  
18 they do, what they will find is that there's been  
19 significant traffic impacts that have not been adequately  
20 studied. They've changed the mix of units in the hotel  
21 versus condo. There are monk seals on the beach now.  
22 Maybe they decide after all that it's not going to have a  
23 significant effect. But they need to make that decision  
24 so that the public and our clients and others can then  
25 have an opportunity to present this type of evidence.

1           And I don't think that -- that's the first  
2     step, Your Honor. And without -- they -- if you read  
3     through the deposition testimony we've attached, nobody  
4     at the DPP took the hard look that's required by U.S.  
5     Supreme Court and Hawaii Supreme Court cases to determine  
6     whether or not any substantive change has occurred and  
7     whether or not an SEIS is required. They made the  
8     decision simply because timing in and of itself is not  
9     sufficient they felt. But they haven't looked at it to  
10    determine if it's changed at all.

11           And all this other stuff about, well, they've  
12    gone through all of these piecemeal reviews, that was the  
13    whole purpose of having HEPA in the first place -- is to  
14    have an overall umbrella of environmental review that  
15    somebody could take charge of collecting all of this  
16    evidence and analyzing it. Not that the building  
17    department looks at one thing, the traffic department  
18    looks at something else.

19           HEPA is supposed to preserve and protect the  
20    Hawaiian environment and to have this umbrella under  
21    which the DPP as the agency is going to step back and  
22    look at everything and say: Is a supplemental  
23    environmental impact statement required or not? And if  
24    it's not, file it with the environmental council, give  
25    the public an opportunity to comment, and maybe change

1 your mind. That didn't happen here.

2 And we believe with the declarations that  
3 we've already presented with Mr. Brohard and Dr. Littnan  
4 and others, there are substantive changes and new impacts  
5 and effect that need to be at least looked at. It's been  
6 20 years. We take another six months to look at impacts.  
7 What's the harm in doing that? It's not the plaintiff's  
8 fault that it took 20 years for them to get going on this  
9 project.

10 You know, we're asking that the DPP do what  
11 it's mandated to do under the statute. And if you look  
12 at the testimony, they never did that. They never --  
13 they made assumptions and they proceeded based on the  
14 fact that, well, timing alone is not enough; therefore,  
15 we don't need to review anything. That's not what the  
16 regulations require.

17 I know we're out of time, Your Honor.

18 THE COURT: Okay.

19 MR. HUNT: So if you have any other questions,  
20 we can try and respond.

21 THE COURT: Ms. Couch.

22 MS. COUCH: Yes, Your Honor. I know we're  
23 short on time. But I was prepared to talk about the  
24 procedural issues raised by this motion for judgment on  
25 the pleadings, statute of limitations issues, and non-

1 discretionary actions. If you have questions, I'd be  
2 happy to address them. Maybe we should continue. I'll  
3 leave it to you.

4 THE COURT: Right. I'm not sure exactly how  
5 to handle it right now. Actually I was looking more at  
6 the merits of this case. I was looking at your motion  
7 and your motion on the burden of proof really. I think  
8 that -- and I'm trying to figure out how I'm supposed to  
9 analyze this. That's obviously what I'm trying to do  
10 here. And I'm still not quite sure.

11 So let me just say -- would you like to  
12 present any rebuttal argument?

13 MS. LOVEJOY: There's a couple of points, just  
14 overview. And then again, like Ms. Couch, if there's  
15 anything you'd like to get into further, we'd be happy to  
16 come back.

17 Plaintiffs are picking and choosing from the  
18 depositions of the city's witnesses. Their witness,  
19 Jamie Peirson, clearly said that once they totally  
20 understood what the issue was that was being presented  
21 regarding a change in the project argued to be timing,  
22 which the argument was that it should have further  
23 environmental review, that the DPP looked at that. And I  
24 can leave it to Mr. Kitaoka to give you page specifics.  
25 But that was absolutely in the testimony, and it's in the

1 deposition transcripts that are attached.

2 The environmental council issue I thoroughly  
3 briefed. And having lived it, it is an entire red  
4 herring. The environmental council heard from the union  
5 only, invited them to speak as one of the people in  
6 their -- at one of their meetings, and based on the one-  
7 sided presentation, sent the letter. The letter  
8 specifically says that they were asking about a  
9 supplemental EIS and that they were doing it based on  
10 limited information.

11 They also had a follow-up action item that  
12 they would undertake a fact-finding investigation to  
13 determine whether a supplemental EIS should be required.  
14 Not that it is required, but should it be required for  
15 the Turtle Bay expansion project. They later totally  
16 backed off of that once they understood that they didn't  
17 have a lot -- all the information -- there's much  
18 information they didn't have -- and that it was currently  
19 an issue in the court. And they absolutely changed what  
20 they were going to be doing on a going-forward basis.

21 Their fact-finding was to determine whether  
22 there should be a limited shelf life for EIS's generally,  
23 and there would be no specific focus on the Turtle Bay  
24 project. And that's very clear in all of the exhibits  
25 that we've attached to our motions and the arguments. So

1 I think that environmental council issue is taken  
2 completely out of context.

3 I did hear that the discretionary action is  
4 the trigger and that there's been no issue of the  
5 subdivision being an action. Your Honor, sub -- as you  
6 know, subdivision can happen at the very beginning of a  
7 very small project. To say that the subdivision is an  
8 action in and of itself runs directly afoul of 11-200-7  
9 that basically says if we were to take each individual  
10 approval that's being requested -- and I'm going to  
11 assume for the moment that this is a discretionary  
12 approval -- that we would run afoul of that by improperly  
13 segmenting a project. Instead what you have to do is you  
14 have to take everything as a whole. And so I think it is  
15 inappropriate to say that the AG's opinion -- which by  
16 the way, Your Honor, predated the 1981 exemption list  
17 which includes subdivisions. It's a 1975 opinion. But I  
18 think it's inappropriate to say that that's controlling  
19 in any way in this case.

20 Vermont Yankee, Your Honor, is a case we cite  
21 in our briefing that specifically says it is  
22 inappropriate -- it's a federal NEPA case. It says it's  
23 inappropriate for the plaintiffs to complain about -- to  
24 not present their issues to the agency in a forceful  
25 manner and then to pursue a lawsuit and complain about

1 the agency not taking a hard look. And that case is  
2 cited in our briefing. It's called Vermont Yankee.

3 THE COURT: Which court?

4 MS. LOVEJOY: In our burden of proof.

5 THE COURT: Which court was that?

6 MS. LOVEJOY: I have it in front of me.

7 MR. O'TOOLE: It's gotta be an East Coast  
8 court.

9 MS. LOVEJOY: Exactly. Vermont Yankee. U.S.  
10 Supreme Court. 1978 case. That's at 435 U.S. 519.

11 MS. COUCH: Your Honor, if I could address the  
12 issue of what constitutes an action?

13 MS. LOVEJOY: Can I finish my rebuttal?

14 MS. COUCH: I'm sorry.

15 THE COURT: Uh-huh.

16 MS. LOVEJOY: Thank you. Going back to the  
17 issue --

18 THE COURT: I'm sorry. Could you go back to  
19 the amendment that you stated, the exemption?

20 MS. LOVEJOY: The exemption list. There's a  
21 list of exemptions which is promulgated by the DPP. This  
22 is briefed extensively in our subdivision discretionary  
23 action motion. And that list was promulgated in 1981,  
24 approved by the environmental council. And right now,  
25 Your Honor, the environmental council is re-looking at