NO. 28358

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

PILAʻA 400 LLC, Appellant-Appellant, v.
BOARD OF LAND AND NATURAL RESOURCES and DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI, Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 05-1-0103)

MEMORANDUM OPINION
(By: Fujise, Presiding Judge and Circuit Judge Lee, with Circuit Judge Wilson, concurring separately, in place of Nakamura, C.J., Foley and Leonard, JJ., recused)

In this secondary appeal arising out of the imposition of penalties against a landowner for damage to a bay, a beach and a coral reef, Appellant-Appellant Pilaʻa 400, LLC (Pilaʻa) appeals from the December 29, 2006 Final Judgment of the Circuit Court of the Fifth Circuit (circuit court)[1] in favor of Appellees-Appellees Board of Land and Natural Resources (Board) and Department of Land and Natural Resources (DLNR), State of Hawaiʻi.

[1] The Honorable Kathleen N.A. Watanabe presided.

I. Background

Pilaʻa owns[2] a 383-acre parcel of rural land, (Property), located on the north shore of Kauaʻi. Pilaʻa purchased the Property from Pflueger Properties, a limited partnership, on January 23, 2001.[3]

The Property is situated on a hillside sloping down to Pilaʻa beach, bay, and reef, which lie within the State Land Use Conservation District (Conservation District). It is "a level to gently sloping plateau extending from Kuhio Highway and Koolau Road toward the ocean. The plateau is broken by four gulches which extend to the shoreline. The plateau above and between the gulches naturally drains water and sediment along natural contours that form distinct geographic drainage areas." A thin strip of Conservation District land,[4] 175 to 250 feet wide, runs

---

[2] Pilaʻa obtained the Property from Pflueger Properties by way of warranty deed executed on January 23, 2001, by James H. Pflueger, Manager of Pflueger Properties.

[3] Pilaʻa and Pflueger Properties are both managed by James Pflueger (Pflueger) and share the same mailing address. Prior to Pilaʻa moving for an order declaring Pilaʻa the landowner of the Property and dismissing Pflueger Properties and Pflueger from this case, the DLNR repeatedly misidentified the landowner of the Property, at the time of the November 26, 2001 mudslide, as Pflueger Properties and/or Pflueger.

[4] The DLNR is responsible for managing, administering and exercising control over all of the public land in the state, including beaches and submerged land. Hawaii Revised Statutes (HRS) §§ 26-15(b) (2009) provides now, as it did at the time of the events at issue here,

> The [DLNR] shall manage and administer the public lands of the State and minerals thereon and all water and coastal areas of the State except the commercial harbor areas of the State, including the soil conservation function, the forests and forest reserves, aquatic life, wildlife resources, state parks, including historic sites, and all activities thereon and therein including, but not limited to, boating, ocean recreation, and costal areas programs.

HRS § 171-3(a) (2011) provides now, as it did at the time of the events at issue here,

> The department of land and natural resources shall be headed by an executive board to be known as the board of land and natural resources. The department shall manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other

(continued...)

along the seaward edge of the Property. Pila'a Beach is a white sand beach approximately fifty to a hundred feet wide and is bisected by Pila'a Stream.

Pila'a Bay contains a well-developed fringing reef. Wave action over the reef flushes the inner reef area, creating an environment favorable to marine life. Prior to November 26, 2001, the reef was one of the "few remaining high value coral reef flats in the state that had largely escaped encroachment from development and stress from improper land practices" and is "an extremely valuable resource" with a wide range of reef habitats, abundant marine life, and diverse and almost fourteen percent coral cover.

Unpermitted work on the Property, including land and stream alterations, dates back to the early-to-mid 1990s.

On November 26, 2001, a rainstorm caused a portion of the Property to slump cross Pila'a Beach, enter Pila'a Bay, and cover Pila'a reef. The source of the sediment was outside the Conservation District.

On January 28, 2002, pursuant to HRS ch. 183C, the DLNR issued a Notice and Order (the First Notice and Order) to Pflueger Properties for "illegal work conducted within the Conservation District at Pila'a[,] Kilauea, Kauai, Hawaii." The First Notice and Order continued,

> We have determined that:
>
> 1) The subject property, identified as tax map key 5-1-004:008 is in the Conservation District and is classified as *Limited* Subzone;
>
> 2) The following uses were conducted on the subject premises: grading, grubbing, cutting, and culvert construction;

---

[4](...continued)
interests therein and exercise such powers of disposition thereof as may be authorized by law. The department shall also manage and administer the state parks, historical sites, forests, forest reserves, aquatic life, aquatic life sanctuaries, public fishing areas, boating, ocean recreation, coastal programs, wildlife, wildlife sanctuaries, game management areas, public hunting areas, natural area reserves, and other functions assigned by law.

> 3) These uses were not authorized by the Department of Land and Natural Resources.
>
> YOU ARE HEREBY ORDERED TO CEASE any further activity on the subject premises. Should you fail to cease such illegal activity immediately, you will be subject to fines up to $2,000 per day pursuant to Chapter 13-5, [Hawaii Administrative Rules (HAR)], in addition to administrative costs incurred by the Department and damages to State land.

On June 20, 2002, following a June 13, 2002 site inspection, the DLNR issued a second Notice and Order (the Second Notice and Order) to Pflueger Properties, James Pflueger, Trustee, for "Illegal Activity in the Conservation District; Tax Map Key: 5-1-004:008," ordering Pflueger to submit a remedial Best Management Practices Plan for the affected conservation areas.[5] Some time thereafter, but before August 22, 2002, a plan

---

[5] The Second Notice and Order included a summary description of the site inspection:

> The site inspection was initiated at the mauka extent of the property adjacent to Kuhio Highway. The inspection group proceeded through the center of the property to the edge of a bluff overlooking Pilaa Bay. The distance from the edge of the bluff to the shoreline is approximately 300 yards. This was the most heavily disturbed area of the parcel. Unauthorized work in this area included the clearing of vegetation and excavation and filling of massive quantities of soil. Several swales or gullies were either filled or partially filled. Within the shoreline area in the Conservation District, a massive vertical bench was cut into the hillside and remains unprotected from erosion. Evidently, this was done to construct a new dirt road to provide access to the shoreline from the upper portions of the property. This road now serves as a conduit for water and sediments, which end up in the sea almost unimpeded. A large metal drain was installed at the base of the vertical bench, which concentrates and directs mud and water underneath the road to the sandy beach. A small valley that terminates near the beach was filled with large quantities of excavated soil. This area remains partially unvegetated. This latter action resulted in the diversion of a small stream, which originates from a spring several meters up the valley. This fill area is a serious source of sediments transported to the nearshore waters during periods of rainfall.

The Second Notice and Order also memorialized future remedial action upon which the parties present, including Pflueger, agreed, and warned,

> While these actions will come far short of addressing the long-term environmental impacts that will be difficult if not impossible to mitigate, due to the wholesale modification of the natural environment at Pilaa Bay, there

(continued...)

was submitted and remedial work implemented immediately thereafter.

On August 22, 2003, a public meeting was held before the Board, during which the DLNR presented a report that analyzed the environmental impacts of the sediment flow onto Pila'a beach, bay, and reef; discussed the nature and extent of the damage to natural resources; and recommended penalties of $12,000 for failing to obtain approvals for road construction, grading, filling, and storm drain construction in six instances within the conservation district, $38,500 for administrative costs, and $5,830,000 for damage to Pila'a beach, bay, and reef. Before the close of the meeting, Pila'a requested a contested case hearing.[6] Seven days later, counsel for James Pflueger, Pflueger Properties, and Pila'a 400, LLC, supplemented this request, by giving notice that they

> contest the specific facts and issues presented by the DLNR Staff Report (and its appendices) that includes but is not limited to, the following:

---

[5](...continued)

> is a need for immediate physical intervention to slow down runoff and sediments. The landowner is reminded that these interim remedial actions in no way whatsoever, cures, exonerates or pardons the unauthorized despoliation of conservation values at Pilaa by the landowner. The matter of the unauthorized work at Pilaa Bay will be presented to the [Board] at a future date, time and place to be announced. In addition to fines and penalties for damages to State land, the landowner should be made aware of the possibility of the imposition of the requirement to conduct complete land restoration and long term monitoring to assess the recovery of the marine environment.
>
> With this in mind, the Department hereby **ORDERS** the landowner to submit a remedial Best Management Practices Plan for the affected conservation areas within five (5) working days of the date of this letter. Upon approval of the plan by the Department, such practices shall be implemented immediately under the supervision of DLNR personnel.

[6] As a transcript of the public hearing does not appear in the record, Pila'a's oral request for a contested case hearing is not before us. The Board found that Pila'a's oral request made at the public hearing was "regarding BLNR's finding of coral reef damage and recommended damages of $5,842,000." The circuit court found that Pila'a "orally requested a contested case hearing as to the fine measured by damages only." The circuit court's finding is not challenged in this appeal.

- the statutory legal authority
- the responsible parties
- the scope and extent of the alleged damage to the reef flat and near-shore marine environment at Pila'a
- the amount of alleged damage that was directly caused by the Petitioners' grading activities as opposed to other causal factors
- the specific dates(s) when the alleged damage occurred
- evidence regarding assessment of the damages to the reef flat and near-shore marine environment and the alleged causes
- the amount of penalties proposed by the DLNR staff
- the statutory authority for and the method used by the DLNR to calculate penalties for the alleged damage to the reef flat and near-shore marine environment
- all factual and legal issues addressed in the DLNR staff report dated August 22, 2003
- DLNR staff recommendation items nos. 2, 4, 5, 6, 7, 8 and 9 as described in the DLNR staff report and
- any and all finds [sic] of fact and conclusions of law that may arise during the course of the contested case proceeding.

On September 2, 2003, the DLNR sent a letter to "James Pflueger, Pflueger Properties," describing the events at the August 22, 2003 Board hearing and stating that the Board found:

1. The landowner (James Pflueger) violated the provisions of Chapter 183C Hawaii Revised Statutes, and Chapter 13-5, Hawaii Administrative Rules (HAR), by failing to obtain the appropriate approvals for road construction, grading, filling, and storm drain construction in four (4) instances within the conservation district and is fined a penalty of $8,000;

2. The Landowner (James Pflueger) shall be assessed $38,500 for administrative costs associated with the subject violations to be paid within sixty (60) days of the BLNR's action;

3. Mr. Pflueger shall implement a remediation plan for the Conservation District **land areas**, subject to detailed plan review by the DLNR as each project element is implemented. Mr. Pflueger shall provide the DLNR with engineering progress reports after the

> first, second, and third year of the Board's decision on this matter to ensure that the remediation work is being implemented and is effective. The DLNR may require modifications to the remediation work if it determines that the measures are not timely or effective;
>
> 4. That in the event of failure of the Landowner (James Pflueger) to comply with any conditions, he shall be fined an additional $2000 per day until the order is complied with; and
>
> 5. That in the event of failure of the Landowner (James Pflueger) to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

The letter also acknowledged Pflueger's request for a contested case hearing regarding "other items included in the recommendation to the Board." Pilaʻa paid the $8,000 fine and $38,500 in costs. A Notice of Contested Case Hearing was published on October 3, 2003 and received by Pilaʻa. It provided,

> The Board of Land and Natural Resources (BLNR) State of Hawaii, will conduct a contested case hearing on DLNR File No. KA-04-02 regarding an enforcement action involving the alleged damages to State land(s) and natural resources due to excessive sedimentation at Pilaa, District of Hanalei, Island of Kauai, seaward of TMK: 5-1-4:8 (por.). The hearing will be held pursuant to Chapters 91 and 183C, Hawaii Revised Statutes, and Chapters 13-1 and 13-5, Hawaii Administrative Rules (HAR).

A contested case hearing began on July 20, 2004 before Michael W. Gibson, Esq., the appointed Hearing Officer (Hearing Officer), who conducted a site visit, took testimony, received exhibits, and heard arguments during several days of hearings. Hearing Officer entered his Proposed Findings of Fact, Conclusions of Law, and Recommendation on December 22, 2004, which recommended that Pilaʻa should be assessed a penalty of $2,315,000 and administrative costs in the amount of $69,996.93.[7]

---

[7] Hearing Officer also made the following recommendation:

> It is recommended that the $2,325,000 penalty be held in trust and applied to implement the Conceptual Remediation Plans whose estimated cost is three to five million dollars and to monitor the Pilaʻa Bay reef for five years. This will assure that the penalty is used to restore Pilaʻa Bay.

(continued...)

Both parties filed exceptions.

The Board heard oral arguments on March 29, 2005, and issued its Findings of Fact, Conclusions of Law, and Decision and Order on June 30, 2005 (Board Order), which concluded that Pila'a should be assessed $3,963,000 in damages to be paid to the State of Hawai'i special land and development fund as well as $69,996.93 for DLNR's administrative costs.[8] The Board

---

[7](...continued)
If the construction costs of the Conceptual Remediation Plans exceed $2,000,000, Pila'a LLC should pay the balance of the construction costs if the construction and monitoring costs are less than the balance of the penalty not used to fund the Conceptual Remediation Plans and monitor Pila'a Bay for five years, then the balance of the penalty should be retained by the State of Hawaii.

The "Conceptual Remediation Plans" were approved by the DLNR and were designed to ensure the Property was stable and no further runoff would occur. It included removal of a trail in Gulch 2 and restoration of the stream to its previous location and configuration, extensive landscaping in Gulch 2, stabilization, filling and restoration of the shoreline cut, re-vegetation of the shoreline and removal of the rock berm in Gulch 2.

[8] In reaching this conclusion, the Board noted,

12. The value of Pila'a beach, bay and reef includes use value, option value, commodity value, existence value, bequest value, cultural values, including value to indigenous people, and intrinsic value. Economic and use (market) values alone cannot and do not capture the full value of Pila'a. Economic valuation alone understates the true social loss from natural resource damage. The intrinsic value of Pila'a is recognized by the Hawai'i constitution and state laws, including section 183C-1, HRS. The BLNR holds Pila'a and all state property in trust for the people of Hawai'i and for future generations.

13. Given the elements of value discussed above and in consideration of all the facts and evidence, including but not limited to the range of values stated in scholarly papers for reefs, the probable costs of restoration of Pila'a bay and reef and beach, the value of the coral destroyed, and the intrinsic value of Pila'a Bay and reef, and the costs of monitoring for 10 yeas beginning in 2005, the BLNR rejects the Hearing Officer's recommendation of damages. Under the circumstances of this case, the Hearing Officer's recommendation as to the amount of damages is too lenient to reflect the BLNR's duty to protect this valuable natural resource under constitutional and statutory law. Therefore, the BLNR concludes that monitoring as described in Exhibit 2 should be done for a period of 10 years beginning in 2005 and that the State land (including submerged lands) was damaged in the sum of $3,333,000 (Three Million Three Hundred Thirty-three Thousand Dollars).

determined that

> 2. The violation was placement of any solid material on land in the form of dumping or allowing to be put on conservation land (including submerged land) of a large unknown amount of dirt and sediment. The "illegal activity" that was conducted on conservation land (including submerged land) was dumping or allowing to be dumped a large unknown quantity of dirt and mud without a permit as required by HAR §§ 13-5-24 and 13-5-30(b).[9]

---

[9] HAR, Title 13 Department of Land and Natural Resources, subchapter 3 Identified Uses and Required Permits, section 24 (effective December 12, 1994 as amended December 5, 2011, with non-substantive changes) provides, in pertinent part,

> §13-5-24 Identified land uses in the resource subzone.
> (a) In addition to the land uses identified in this section, all identified land uses and their associated permit or site plan approval requirements listed for the protective and limited subzones also apply to the resource subzone, unless otherwise noted.
>
> (b) If a proposed use is not presented below or in section 13-5-22 or 13-5-23, an applicant may request a temporary variance, petition the land use commission for a land use district boundary change, or initiate an administrative rule change to have the proposed use added to the identified land uses.
>
> (c) Identified land uses in the resource subszone and their required permits (if applicable), are listed below:
>
> (1) Identified land uses beginning with letter (A) require no permit from the department or board;
>
> (2) Identified land uses beginning with letter (B) require a site plan approval by the department;
>
> (3) Identified land uses beginning with letter (C) require a departmental permit; and
>
> (4) Identified land uses beginning with letter (D) require a board permit, and where indicated, a management plan.

HAR § 13-5-30 provides, in pertinent part,

> Permits, generally. (a) Land uses requiring comprehensive review by the board are processed as board permits, management plans, or comprehensive management plans, and temporary variances. Departmental permits and emergency permits are processed by the department and approved by the chairperson. Site plans are processed by the department and approved by the chairperson or a designated representative. If there is any question regarding the type of permit required for a land use, an applicant may write to the department to seek a determination on the type of permit needed for a particular action.

(continued...)

(Footnote added.) The Board found that Pilaʻa conducted "massive and unauthorized grading, filling, and other site work on the Property." The Board also found that unauthorized work by Pilaʻa or its predecessors in the conservation district included a "vertical cut ranging in elevation from 40 to 60 feet," construction of a road, and construction of a 30-inch culvert designed to drain water from the Property that ran under the road and onto state property in the Conservation District, i.e., Pilaʻa Beach, approximately 20-40 feet from the water's edge. As to the event in question, the Board found,

> 6. On November 26, 2001, there was a rainfall in the area. While heavy, the rainfall event was not unprecedented or even particularly unusual. (Exhibit 2, page 42).
>
> 7. On November 26, 2001, and as a result of the work described above, rain and erosion caused a portion of the recently graded and filled hillside on the Property to slump downhill from the Property, across Pilaʻa Beach and into Pilaʻa Bay. (Exhibit 1, page 10). Additional sedimentation events occurred in December 2001 and early 2002, in each case resulting in mudflow from the Property into the conservation district. (Exhibit 1, page 5).
>
> 8. The erosion resulted in large gullies on the Property. The Hearing Officer determined that a contemporary videotape accurately depicts the gullies. The size of the gullies shows that a substantial amount of sediment moved from the Property into the conservation district. (Exhibit 12; Exhibit 1, page 11; and Exhibit 25 are photographs that accurately depict the gullies).

---

[9](...continued)

> (b) Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:
>
> (1) Departmental permit (see section 13-5-33);
>
> (2) Board permit (see section 13-5-34);
>
> (3) Emergency permit (see section 13-5-35);
>
> (4) Temporary variance (see section 13-5-36);
>
> (5) Site plan approval (see section 13-5-38); or
>
> (6) Management plan or comprehensive management plan (see section 13-5-39).

(Effective December 12, 1994, amended December 5, 2011 in ways not relevant to this appeal).

. . . .

> 12. Mudflows from Pilaʻa 400's Property into the conservation district occurred because Pilaʻa 400 or its predecessor, managers, or agents failed to obtain permits for the work and failed to implement adequate sediment and water pollution controls.

Pilaʻa appealed the Board Order to the circuit court on July 27, 2005.

On March 9, 2006, the United States Environmental Protection Agency, and the Department of Health, State of Hawaiʻi (DOH), filed a complaint with the United States District Court for the District of Hawaiʻi against "James H. Pflueger; Pflueger Properties; and Pilaʻa 400, LLC," alleging violations of the Clean Water Act, 33 U.S.C § 1251 et. seq., the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 and the Hawaiʻi Water Pollution Act, HRS ch. 342D. See, CV 06-00140-SPK-BMK. The complaint sought civil fines, remedial action, injunctive relief, and costs. On June 16, 2006, Magistrate Judge Barry M. Kurren entered an order approving entry of the consent decree (Consent Decree) resolving the matter. The Consent Decree included an agreement that the defendants would pay monetary civil penalties to the federal and state governments and take extensive remedial actions, without an admission of liability.

By motions filed on July 24 and August 17, 2006, Pilaʻa sought summary judgment, judicial notice and dismissal, or remand to present new evidence, in light of the Consent Decree. A hearing on the motions was held on September 28, 2006, and both motions were denied through an October 23, 2006 order (Circuit Court Order).

The circuit court issued its Findings of Fact, Conclusions of Law, and Order on December 4, 2006, affirming the Board Order. Final judgment was entered on December 29, 2006. This appeal followed on January 9, 2007.

II. Issues on Appeal

Pilaʻa raises seven points of error on appeal, none of which comply with Hawaiʻi Rules of Appellate Procedure (HRAP)Rule

28(b)(4).[10] Pilaʻa argues that

---

[10] HRAP Rule 28(b)(4) (2006) provided,

> Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in order here indicated:
>
> . . . .
>
> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:
>
> (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;
> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;
>
> (C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;
>
> (D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.
>
> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

For example, in Pilaʻa's point of error "A," it alleges that the Board Order exceeded the Board's authority and jurisdiction and provides record cites to the circuit court's Findings of Fact, Conclusions of Law, and Order, and the Board's Findings of Fact, Conclusions of Law, and Decision and Order, but does not provide a record citation for where the alleged error was objected to or otherwise brought to the attention of the court or agency. Furthermore, as the citations provided are to specific pages within the circuit court and Board's findings of fact and conclusions of law respectively, it suggests that either findings or conclusions are being challenged, yet no quotations of the specific findings or conclusions have been provided.

(continued...)

(1) affirmation of the Board Order was error inasmuch as the Board Order,

(a) exceeded the statutory authority and jurisdiction of the agency under HRS § 183C-3(7) because the subject grading activity occurred outside of the conservation district;

(b) violated HRS § 91-9(b), and Pila'a's due process rights insofar as Pila'a did not receive notice of the nature of the land use violation;

(c) violated HRS § 91-3 and HRS § 183C-3(3), as the DLNR and the Board failed to adopt rules for calculating and assessing environmental damages to state land;

(d) violated HRS § 91-12, as it did not include express findings supporting the damage award;

---

[10](...continued)
Although

> it is well settled that failure to comply with HRAP Rule 28(b)(4) is alone sufficient to affirm the circuit court's judgment[,] Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 235, 948 P.2d 1055, 1076 (1997); O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994); see also Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001) (recognizing that non-compliance with HRAP Rule 28(b)(4) "offers sufficient grounds for the dismissal of the appeal")[,] [the Hawai'i Supreme Court] has consistently adhered to the policy of affording litigants the opportunity "to have their cases heard on the merits, where possible." O'Connor, 77 Hawai'i at 386, 885 P.2d at 364 (citations omitted). Inasmuch as Hawai'i constitutionally recognizes the significance of conserving and protecting Hawai'i's natural beauty and all natural resources for present and future generations, the seawall and its effect on Kaua'i's coastline and neighboring properties is of great importance to the people of Hawai'i. Haw. Const. art. XI, § 1. Accordingly, because the issues raised in the instant case are of great importance, we address the merits of the issues raised by the Planning Department and Planning Commission, notwithstanding the technical violation of HRAP Rule 28(b)(4).

Morgan v. Planning Dept., County of Kauai, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004). However, while we choose to reach the merits of this case, the failure to properly designate specific findings of fact as challenged in this appeal leaves us no choice but to take those findings as established fact. Okada Trucking Co., Ltd. v. Board of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002) (unchallenged findings of fact are binding on the appellate court).

(e) found Pilaʻa responsible for the illegal activity of its predecessors-in-interest; and

(f) violated HRS § 91-11, "by rejecting the Hearing Officer's recommendation and not issuing a 'proposal for decision'"; and

(2) the October 23, 2006 Circuit Court Order was in error "since the federal Consent Decree acts as a full and fair resolution of the State of Hawaiʻi's claims against [Pilaʻa] arising from [Pilaʻa 's] unpermitted construction activities at the [Property] under the doctrine of *res judicata*."

III. Standard of Review

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which [the appellate] court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) (1993) to the agency's decision.

United Pub. Workers, AFSCME, Local 646, AFL-CIO, v. Hanneman, 106 Hawaiʻi 359, 363, 105 P.3d 236, 240 (2005) (brackets and citations omitted). Pursuant to HRS § 91-14(g), an agency's conclusions of law are reviewed *de novo*, Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984), while an agency's factual findings are reviewed for clear error, HRS § 91-14(g)(5).

> In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

In re Application of Hawaii Electric Light Co., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979) (quotation marks and citations omitted).

IV. Discussion

A. The Board Order did not exceed the statutory authority and jurisdiction of the Board under HRS § 183C-3(7).

Pilaʻa argues that the circuit court should not have affirmed the Board Order, because the Board lacked jurisdiction

over land use activities conducted outside of the Conservation District defined in HRS Chapter 183C.[11]

The powers and duties of the Board and the DLNR, with respect to Conservation District lands, are set forth in HRS § 183C-3 (2011) which states, in pertinent part, that the Board and the DLNR shall "[a]dopt rules, in compliance with chapter 91 which shall have the force and effect of law;" and "[e]stablish and enforce land use regulations on conservation district lands including the collection of fines for violations of land use and terms and conditions of permits issued by the department." In accordance with this directive, the Board adopted HAR § 13-5-30(b), which specifies that "[u]nless provided for in this chapter, land uses shall not be undertaken in the [C]onservation [D]istrict." "Land use" is defined in HRS § 183C-2 (2011)[12] as:

> (1) The placement or erection of any solid material on land;

---

[11] The Conservation District is defined as "those lands within the various counties of the State bounded by the conservation district line, as established under provisions of Act 187, Session Laws of Hawaii 1961, and Act 205, Session Laws of Hawaii 1963, or future amendments thereto." HRS § 183C-2; see also, HAR § 13-5-2.

[12] Similarly, the definition of "Land use" within the HAR consists of the following:

> (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;
>
> (2) The grading, removing, harvesting, dredging, mining or extraction of any material or natural resource on land;
>
> (3) The subdivision of land; or
>
> (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.
>
> For purposes of this chapter, harvesting and removing does not include the taking of aquatic life or wildlife that is regulated by state fishing and hunting laws nor the gathering or natural resources for personal, non-commercial use or pursuant to Article 12, Section 7 of the Hawaii State Constitution or section 7-1, HRS, relating to certain traditional and customary Hawaiian practices.

HAR § 13-5-2.

> (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;
>
> (3) The subdivision of land; or
>
> (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

The Board found that the unauthorized grading activity included "a massive vertical cut ranging in elevation from 40 to 60 feet in height within the conservation district" and that "Pila'a . . . also constructed an unauthorized 30 inch pipe or culvert to drain water from the Property. The culvert ran under the road and onto state property in the conservation district." (Emphasis added.)

It is also undisputed that on November 26, 2001, sediment from the Property flowed into and onto Pila'a beach, bay, and reef, which lie within the Conservation District. In addition, in its January 28, 2002 First Notice and Order, the DLNR notified Pila'a that unauthorized work had been conducted in the Conservation District. The Board concluded that "[d]umping soil onto conservation land falls within the definition of 'land use' in HRS § 183C-2[,]" i.e., the "placement or erection of any solid material on land." Nothing in the plain language of HRS § 183C(2) or HAR § 13-5-2 requires that the soil or other material placed on conservation district land originate from Conservation District land as well.

Although its basis is not entirely clear, Pila'a seems to argue that because "the Board found four land use violations and Appellant paid the assessed fine for those four unauthorized land uses" the Board could not consider the dumping of mud onto Conservation District land--which the evidence showed flowed at least in part along and/or through the unauthorized road and culvert--nor the damage caused by the dumping of mud. Pila'a cites no authority for this proposition.

More importantly, Pila'a had reason to know that damage to the beach, bay and reef caused by the mud flow from the

Property was unquestionably of concern and the reason for DLNR's enforcement action.[13] To the extent Pila'a argues that it was unaware damage caused by soil runoff was at issue, we conclude that argument is unsupported by the record.

We agree with the circuit court that the Board had jurisdiction over Pila'a's actions in this case.

B. The Board did not fail to give proper notice.

Pila'a argues that the Board failed to provide proper notice as required by HRS § 91-9(b). Specifically, Pila'a maintains that the notice of contested case hearing failed to include "the particular sections of the statutes and rules involved" and an "explicit statement" of the issues involved.[14]

Pursuant to HRS § 91-9(b) (1993), notice of a contested case hearing shall include, the following:

> (1) The date, time, place, and nature of hearing;
>
> (2) The legal authority under which the hearing is to be held;
>
> (3) The particular sections of the statutes and rules involved;
>
> (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable

---

[13] For example, in its Second Notice and Order, it was stated with regard to the unauthorized work,

> Within the shoreline area in the Conservation District, a massive vertical bench was cut into the hillside and remains unprotected from erosion. Evidently, this was done to construct a new dirt road to provide access to the shoreline from the upper portions of the property. This road now serves as a conduit for water and sediments, which end up in the sea almost unimpeded. A large metal drain was installed at the base of the vertical bench, which concentrates and directs mud and water underneath the road to the sandy beach. A small valley that terminates near the beach was filled with large quantities of excavated soil. This area remains partially unvegetated. This latter action resulted in the diversion of a small stream, which originates from a spring several meters up the valley. This fill area is a serious source of sediments transported to the nearshore waters during periods of rainfall.

[14] Pila'a also argues that the notice failed to inform it that it was entitled to retain counsel and could appeal. However, Pila'a acknowledges that it was represented by counsel throughout these proceedings.

> to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;
>
> (5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust or association.

It is true, as Pilaʻa argues, that the notice of contested case hearing did not cite to "particular sections" of the statutes and rules, but only to the HRS and HAR chapters. However, Pilaʻa does not point to, nor do we find, in the record that Pilaʻa challenged the notice on this basis before or during the contested case hearing. Yet, in its written supplement to its oral request for a contested case hearing, more than a month before the October 3, 2003 public notice, Pilaʻa challenged "the statutory legal authority" and "the statutory authority for and the method used by the DLNR to calculate penalties for the alleged damage to the reef flat and near-shore marine environment" but did not do so on the basis that it did not know which specific provisions were being relied upon. Thus, Pilaʻa has failed to preserve this challenge to the notice.

Pilaʻa's argument that the notice was deficient because it did not contain an explicit statement of the issues involved is also unpersuasive. The notice did contain an explicit statement of the essential issue, that is, "the alleged damage to State land(s) and natural resources due to excessive sedimentation" from Pilaʻa's land. Nothing more was required by HRS § 91-9(b). See Application of Hawaii Elec. Light Co., Inc., 67 Haw. 425, 430, 690 P.2d 274, 278 (1984) ("The nature and complexity of rate-making proceedings make it impractical to adopt a particularistic standard of issue identification. Each item and calculation used in arriving at the proposed rate schedule is an inherent and integral part of the proceeding. The

utility should expect that all items relative to the stated general issues are subject to PUC review.").

Moreover, it is clear, on this record, that Pilaʻa was "aware of the general issues" and "sufficiently apprised of the nature of the proceeding," as the circuit court concluded, well before the contested case hearing. Most notably, Pilaʻa's written request for a hearing specifically stated that, "[t]he matter being considered by the [Board] concerns alleged damage to the reef flat and near-shore marine environment stemming from grading activities in the conservative [sic] district which allegedly resulted in discharges of sediment following a severe rainstorm on the night of November 26, 2001, December 2001, and early 2002" and included an eleven-point list of matters contested by Pilaʻa. As Pilaʻa itself identified the matters to be considered in the contested case hearing as including the statutory basis for the assessment of damage, it cannot claim to be surprised by a hearing that involved DLNR's arguments regarding the basis for the assessment. It was the Hearing Officer's decision to accept or reject the DLNR's argument. Application of Hawaii Elec. Light Co., Inc., 67 Haw. at 430, 690 P.2d at 278 ("The PUC's exercise of judgment in declining to accept the methodology used by any of the parties in the case does not mandate particularized notice of its plan to do so.")

C. The Board Order did not violate HRS §§ 91-3 or 183C-3(3).

Pilaʻa claims that the Board failed to adopt rules establishing a reasonable and just methodology for assessing environmental damages under HRS § 91-3 and HRS § 183C-3(3).

HRS § 183C-3(3) states that the Board and the DLNR shall "[a]dopt rules, in compliance with chapter 91 which shall have the force and effect of law." HRS § 91-3 (Supp. 2011) provides the procedure for the adoption, amendment, or repeal of rules. As such, while the Board and the DLNR have the authority to adopt rules in accord with chapter 91, neither HRS § 183C-3(3) nor HRS § 91-3 required the Board or the DLNR to engage in rulemaking in this case.

In Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947), the court was asked to review a decision by the Securities and Exchange Commission (SEC) approving amendments to a registered corporation's reorganization plan. To the argument that the SEC was wrong in adjudicating the application rather than promulgating a rule on the subject, the court responded,

> It is true that our prior decision explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers, in which case the issue for our consideration would have been entirely different from that which did confront us. 318 U.S. at pages 92, 93, 63 S. Ct. at pages 461, 462, 87 L. Ed. 626. But we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case. To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. See Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of

> statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. See Columbia Broadcasting System v. United States, 316 U.S. 407, 421, 62 S. Ct. 1194, 1202, 86 L. Ed. 1563.

Chenery, 332 U.S. at 201-03. See also Application of Hawaiian Elec. Co., Inc., 81 Hawai'i 459, 918 P.2d 561 (1996) called into doubt on jurisdictional grounds by Peterson v. Hawaii Elec. Light Co., Inc., 85 Hawai'i 322, 944 P.2d 1265 (1997) (Public Utilities Commission did not err in approving placement of power lines by adjudication rather than rule making).

Hawaii Prince Hotel v. City & Cnty. of Honolulu, 89 Hawai'i 381, 974 P.2d 21 (1999) also does not support Pila'a's argument. Hawaii Prince involved an appeal from a real property tax assessment for a golf course. Revised Ordinances of Honolulu (ROH) 1990 § 8-7.4 listed several factors to be considered in assessing the value of golf course property for property tax purposes including: "rental income, cost of development, sales price [collectively "base assessment"] and, the effect of the value of the golf course on the value of the surrounding lands ["imparted value"]." Id., at 384 n.9, 974 P.2d at 24 n.9.

The court upheld the City appraiser's base assessment, which utilized cost and market data approaches, id., at 389-91, 974 P.2d at 29-31, yet rejected the City appraiser's imparted value, which he claimed to have determined utilizing standards "in his head." Id., at 391-93, 974 P.2d at 31-33. The court found the City appraiser's methodology for imparted value to be arbitrary and erroneous, resulting in a lack of uniformity and inequality in golf course assessments, id., at 391-92, 974 P.2d at 31-32, and within the definition of a rule under HRS § 91-1(4) (1993)[15] inasmuch as the methodology was admittedly based on the

---

[15] HRS § 91-1(4) defines a rule as an:

> [A]gency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or (continued...)

City appraiser's interpretation of the ROH § 8-7.4 factors, id., at 392-93, 974 P.2d 32-33; therefore, the court ordered the City to reassess the property after promulgating a rule establishing a methodology for ascertaining imparted value, noting that otherwise

> the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe[s] the determination process. The public and interested parties are without any firm knowledge of the factors that the agency would deem relevant and influential in its ultimate decision. The public has been afforded no meaningful opportunity to shape these criteria that affect their interest.

Id. at 393, 974 P.2d at 33 (quoting Aluli v. Lewin, 73 Haw. 56, 60, 828 P.2d 802, 804, reconsideration denied, 73 Haw. 625, 831 P.2d 935 (1992)).

Here, the circumstances are recognizably different. Assessing damage to Conservation District lands, which "contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply[,]" HRS § 183C-1 (2011), is a complex undertaking involving numerous and variable components, often unique to a particular situation. Due to the infinitely diverse nature of the lands and resources, and the myriad of ways damage may occur on such lands and resources, measuring value and value lost must be on a case-by-case basis, especially when of the magnitude under the circumstances presented here. Devising and imposing a single formulaic methodology for assessing penalties would be impracticable. See N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (deciding the NLRB could decide whether persons were "managerial employees" by adjudication rather than rulemaking, as "adjudication is especially appropriate in the instant context . . . '(t)here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers,

---

[15](...continued)

> practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting the private rights of or procedures available to the public[.]

and hundreds of thousands of the latter.' . . . Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility.")

In line with such considerations, HRS § 183C-7 broadly provided for "damages to state land" to be included as part of the fine for chapter 183C violations. Contrary to Pilaʻa's claims, there is no support in the record that the assessment was admittedly subjective or based on subjective standards. Moreover, alleged concerns over public awareness are unfounded inasmuch as the affected parties were involved in this assessment process.

That other agencies, guided by different statutory provisions, have implemented extensive rules for environmental matters or the fact that Florida has passed a statute setting a value for reefs does not change this analysis.

D. The Board Order did not violate HRS § 91-12.

Pilaʻa claims that the Board failed to make its findings reasonably clear as HRS § 91-12 required.

HRS § 91-12 (1993) requires that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law." As interpreted by the Hawaiʻi Supreme Court:

> All that is required [by § 91-12] is that the agency incorporate its findings in its decision. In so doing, however, the agency must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency.

Rife v. Akiba, 81 Hawaiʻi 84, 87, 912 P.2d 581, 584 (App. 1996) (quoting In re Terminal Transp. Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972)).

Here, after methodically enumerating eighteen findings of fact pertaining to damages, the Board Order concluded:

> Given the elements of value discussed above and in consideration of all the facts and evidence, including but not limited to the range of values stated in scholarly papers for reefs, the probable costs of restoration of Pila'a bay and reef and beach, the value of the coral destroyed, and the intrinsic value of Pila'a Bay and reef, and the costs of monitoring for 10 years beginning in 2005, the BLNR rejects the Hearing Officer's recommendation of damages. Under the circumstances of this case, the Hearing Officer's recommendation as to the amount of damages is too lenient to reflect the [Board's] duty to protect this valuable natural resource under constitutional and statutory law. Therefore, the [Board] concludes that monitoring as described in Exhibit 2 should be done for a period of 10 years beginning in 2005 and that the State land (including submerged lands) was damaged in the sum of $3,333,000 (Three Million Three Hundred Thirty-three Thousand Dollars). . . . Pila'a 400 is obligated to pay the total damages of $3,963,000.

(Emphasis added.)

Despite Pila'a's claim that the Board Order, or the findings contained therein on the issue of environmental damage assessment, did not meet the requirements of HRS § 91-12, Pila'a's argument does not support its claim, e.g., that the Board's findings are unclear. Instead, Pila'a appears to be making, *inter alia*, a sufficiency of the evidence argument, questioning the "basis for each of the five elements of value used in the [Board's] damage assessment." As Pila'a did not specifically challenge any of the Board's findings of fact as a point on appeal, we reject this argument. To the extent Pila'a challenges the Board's legal conclusions, we address them as follows.

1. Probable Costs of Restoration.

Pila'a argues that the inclusion of an explicit provision providing for restoration costs in HRS § 183C-7(b) as amended in 2003 is compelling support for their argument that the provision had prospective application only and consequently the Board lacked the authority to order such costs prior to the 2003 amendment. However, the legislative history behind the 2003 amendment reveals otherwise.

HRS § 183C-7(b) (2003) provides, in pertinent part:

> Any person violating this chapter or any rule adopted in accordance with this chapter shall be fined not more than $2,000 per violation in addition to administrative costs and

> costs associated with land or habitat restoration, or both, if required, and damages to state land. [Emphasis added].

The committee reports accompanying the bill amending HRS § 183C-7(b) each begin with the statement that the purpose is to clarify the powers of the DLNR. S. Stand. Comm. Rep. No. 155, in 2003 Senate Journal, at 1092 ("The purpose of this measure is to clarify that the Board of Land and Natural Resources may impose fines for each violation within a Conservation district where multiple violations occur, in addition to costs associated with land or habitat restoration where necessary."); S. Stand. Comm. Rep. No. 618, in 2003 Senate Journal, at 1287 ("The purpose of this measure is to clarify that the Department of Land and Natural Resources may impose fines for each violation, require payment of restorative costs, and provide verbal notification to violators."); H. Stand. Comm. Rep. No. 1027, in 2003 House Journal, at 1494 ("The purpose of this bill is to clarify that the Department of Land and Natural Resources (DLNR) may impose fines for each violation, require payment of restorative costs, and provide verbal notification to violators of the conservation district statute."). Inasmuch as to clarify is "to free of confusion" or "to make understandable," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 228 (11th ed. 2003), clarifying the DLNR's powers connotes explaining a matter that was already present; in other words, making explicit, powers that were previously implicit.

2. Use of the Florida Statute.

Pila'a argues that the Board's use of the "value of the coral destroyed" was not supported by the record and to the extent the Board relied on the measure contained in a Florida statute, it erred. The only finding including a dollar amount the Board made regarding the value of the reef was Finding V.D.12 which stated,

> 12. The State of Florida passed a statute reasonably valuing reefs at $1000 per square meter. (Exhibit 1, page 51).

We note that this finding does not apply the Florida measure to this case, but merely acknowledges its existence. Moreover, Pila'a does not provide any authority or persuasive argument showing that the Board was required to specify a dollar amount for the value of the coral destroyed or a methodology for determination of the value of coral damaged.

The Florida statute referenced, Fla. Stat. § 253.04, states, in pertinent part:

> (3) The Department of Environmental Protection is authorized to develop by rule a schedule for the assessment of civil penalties for damage to coral reefs in state waters. The highest penalty shall not exceed $1,000 per square meter of reef area damaged. The schedule may include additional penalties for aggravating circumstances, not to exceed $250,000 per occurrence.

Prior to the contested case hearing, in response to Pila'a's motion to exclude the Florida statute as a measure of damages to Hawai'i state land, Hearing Officer entered Minute Order No. 8, which ordered:

> Florida Statute § 253:04 shall not be applied in the contested case. However, [t]he Department of Land and Natural Resources is not prohibited from presenting evidence concerning the methodology used by the Florida statute if the evidence is relevant to the issues presented during the contested case hearing.

Accordingly, the DLNR submitted Exhibit 1, which included the following discussion on page 51:

> The State of Florida can charge up to **$1,000**/square meter for damages to its coral reefs, which are also held in trust for the people of Florida. Florida has imposed fines for damages to coral reefs from ship groundings. Many of these cases have resulted in out of court settlements. In a recent shipping damage case, Great Lakes Docks and Dredging has agreed to pay **$1,000,000** for damages to sea grass and other resources in the Florida Keys National Marine Sanctuary. A large pipe was accidentally dragged over a sea floor destroying almost 196,764 square feet (± 22,000 square meters) of sea grass beds.

Thus, while it is true that Minute Order No. 8 precluded the application of the Florida statute in this case, it specifically permitted evidence of the methodology used by the statute if the evidence was relevant.

Pila'a seems to imply that the Florida statute was irrelevant because it was a civil penalty statute without any basis in value or not representing a methodology for determining damage to state land; however, this does not change the fact that the method used in determining civil penalties for damage to coral reefs in Florida pursuant to the statute may have been relevant and useful in arriving at a method for assessing damages to coral reefs in Hawai'i in this case, especially considering the unprecedented nature of this case in Hawai'i.

3. Intrinsic value.

Pila'a also complains that the Board failed to find a numeric value based on this factor, there was no testimony regarding this value or how this value was diminished and, as Dr. John Dixon (Dr. Dixon) testified, it is a value "by its very nature . . . impossible to give a monetary value to." The Board made the following finding pertaining to "intrinsic value":

> Indirect and non-use values are related to human use or knowledge. However, based upon the provision of the Hawaii State Constitution, reef and natural resources, including Pila'a beach, bay and reef, have value beyond that which can be measured by human use and price alone. (Dixon transcript 8/13/04, p. 141-142).

As such, in considering various elements of value, the Board included the value recognized by Article XI, Section 1 of the Hawai'i State Constitution, referred to as intrinsic value:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

Although Pila'a correctly notes Dr. Dixon's testimony regarding the impossibility of assigning a monetary value to intrinsic value or the inappropriateness of economic analysis, Pila'a fails to acknowledge Dr. Dixon's own statement that "[j]ust because a value cannot be measured or easily calculated, does not mean it does not exist."

As for the lack of an exact amount attributed to the intrinsic value of Pila'a, once again, Pila'a does not provide any authority or persuasive argument showing such was required.

4. Costs of monitoring.

Pila'a argues that the Board improperly based monitoring costs on reef damage occurring during the 1990's, prior to the November 26, 2001 land slide, failed to find that monitoring costs were a proper component of damages under HRS § 183C-7, and exceeded its authority by imposing the equitable relief of monitoring for 10 years.

The Board made the following finding pertaining to the "costs of monitoring":

> Long term monitoring of the reef community at Pila'a will be required. (Exhibit 1, page 50). The cost of monitoring the reef at Pila'a is approximately $63,000 per year. Although the Hearing Officer recommended that monitoring occur for 5 years, taking into consideration that the amount of time for Pila'a beach, bay and reef to fully recover is unknown, and taking into consideration that some reef damage (although not the reef damage at issue in this case) occurred in the 1990's, the BLNR concludes that monitoring should occur for 10 years.

Holding Pila'a accountable for the costs associated with monitoring the recovery of the resources Pila'a was responsible for damaging reasonably falls under the Board's broad authority to assess "damages to state land." HRS § 183C-7(b).

As noted by the DLNR in its report to the Board, labeled Exhibit 1, in order to remedy the degradation at Pila'a, besides controlling the source of the sediment and removing the sediment, long-term monitoring was required to assess the rate and type of reef recovery. Monitoring costs were necessary because "[t]here is no conclusive evidence of when, if ever, the area will return to its pre mudflow conditions." As such, the Board's consideration of this cost of the damage to the reef was reasonably within its authority to assess damages.[16]

---

[16] Damages are "compensation for loss or injury," and loss is an "undesirable outcome of a risk." BLACK'S LAW DICTIONARY 445, 1029 (9th ed. 2009).

As for the Board's reference to the reef damage from the 1990's, the Board was not assessing monitoring costs for damages not at issue in this case, as Pila'a suggests. Rather, when read in context, it is clear that it was considering the longstanding effects of prior damage to the bay in deciding how long monitoring should last for the damage caused in this case.

Finally, although Pila'a characterizes the Board's award as equitable relief, the Board in fact assessed a dollar amount and did not require any action by Pila'a.[17]

We conclude that the Board Order did not violate HRS § 91-12.

E. The Board Order did not find Pila'a responsible for the illegal activity of its predecessors.

Pila'a claims that the Board had no authority to penalize Pila'a for land use violations occurring before Pila'a's ownership of the Property.

The land use violation at issue occurred on November 26, 2001, when Pila'a owned the Property. Pila'a acknowledged as much in its motion to "Exclude Land or Habitat Restoration," where it argued that the 2003 amendment to HRS § 183C-7 did not apply in this case: "In this case the alleged violations occurred from 2001 to late 2002."

Moreover, even if Pila'a's predecessors' pre-2001 illegal activities resulted in the land use violation, Pila'a was in control of the Property before the November 26, 2001 mudslide and subsequent run-off that caused the damage to the beach, bay and reef. Consequently, the Board found,

> As the owner of the Property on November 26, 2001, thereafter, Pila'a 400 was responsible to assure that there was no unpermitted dumping onto conservation land, including submerged lands. As the owner of the Property on November 26, 2001, and thereafter, Pila'a 400 was responsible to the State for the condition of the Property and for the consequences of any illegal activity on the

---

[17] "Equitable remedy" has been defined this way: "A remedy, usu. a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usu. monetary damages, cannot adequately redress the injury." BLACK'S LAW DICTIONARY, 1408 (9th ed. 2009).

> Property by its predecessors that resulted in damage to the State land (including submerged land) after it acquired the Property. As between Pila'a 400 and its predecessors, liability is a matter of agreement between them.

As discussed in section A *supra*, the Board had authority to penalize Pila'a for the November 26, 2001 land use violation. Therefore, we reject Pila'a's argument.

F. The Board Order did not violate HRS § 91-11.

Pila'a claims that the Board's categorical rejection of the Hearing Officer's recommendation and failure to issue a "proposal for decision" was a violation of HRS § 91-11.

HRS § 91-11, which stands unchanged since its enactment in 1961, provides:

> Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

In this case, Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation reasonably fulfilled the "proposal for decision" requirement of HRS § 91-11. White v. Board of Education, 54 Haw. 10, 11-14, 501 P.2d 358, 360-362 (1972). As in White, "the hearing officer's report had been treated by all of the parties as the Board's 'proposal for decision' and accordingly exceptions were filed thereto, and a hearing was held before the Board in connection therewith." Id., at 13, 501 P.2d at 361. The White court went on to note,

> To require the Board to serve the teacher with the draft of its decision and to grant the teacher another opportunity to file exceptions and present arguments would add little towards meeting the requirement that the agency consider the record or at least 'such portions thereof' cited by the teacher which it had already done and on the other hand would greatly increase the complexity of administrative decision making.[2] As stated in Comment to Section 11 of The Revised Model State Administrative Procedure Act, Fourth Tentative Draft (1961), "[t]he purpose of this section is to make certain that those persons who are responsible for the

> decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude signing on the dotted line."
>
> It would appear that the objective of this particular provision of § 91-11 was fully accomplished and we cannot see what more could have been done. Thus we hold that under the record of this case the service of the hearing officer's report reasonably fulfilled the requirement that a "party adversely affected" be served with the proposed decision.
>
> [2]If such were the requirement, it would mean that a proposal of the decision must be served every time a change or amendment is made to every draft of a decision until a decision is ready to be filed without a change whatsoever.

White, 54 Haw. at 13-14, 501 P.2d at 361-62.

That the Board ultimately rejected Hearing Officer's recommendation is of no consequence inasmuch as the Board was not bound by the findings, conclusions, and recommendations of Hearing Officer. Id., at 15-16, 501 P.2d 362-63.

G. This action was not barred by the Consent Decree under the doctrine of *res judicata*.

Pila'a claims that the October 23, 2006 Circuit Court Order denying Pila'a's motions, which sought summary judgment, judicial notice and dismissal, or remand to present new evidence, was in error since the June 16, 2006 Consent Decree barred the State of Hawai'i's claims against Pila'a under the doctrine of *res judicata*.

> The doctrine of *res judicata* essentially provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim or defense which might have been properly litigated in the first action but were not litigated or decided." Estate Bernice P. Bishop, 36 Haw. 403, 416 (1943). In the application of the doctrine, three basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous adjudication? Morneau v. Stark Enterprises Ltd., 56 Haw. 420, 424, 539 P.2d 472, 475 (1975).

Silver v. Queen's Hospital, 63 Haw. 430, 435-436, 629 P.2d 1116, 1121 (1981). Taking the last question first, we conclude that this action and the federal action did not involve the same parties or their privies. DOH was not a party to this action, and the DLNR was not a party to the federal action. It is true that,

> [t]he concept of privity has moved from the conventional and narrowly defined meaning of mutual or successive relationship[s] to the same rights of property to merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other with the res ajudicata. This comports with modern case law, which recognizes that the determination of who are privies requires careful examination into the circumstances in each case as it arises.
>
> Adequate representation of the interests of the party, and proper protection to the rights of the person sought to be bound are major considerations in privity analysis. Moreover, since res judicata is an affirmative defense under [Hawai'i Rules of Civil Procedure] Rule 8(c), the party asserting the defense has the burden of proving adequate representation of the interests and proper protection of the rights of the nonparty in the prior action.

In re Dowsett Trust, 7 Haw. App. 640, 646, 791 P.2d 398, 402-03 (1990) (citations, quotation marks, and footnote omitted) (observing that close family relationships, without more, is insufficient to create privity).

The DLNR and the DOH are separate departments within the state's executive branch, with different statutory mandates, compare HRS § 26-15 with HRS § 26-13, and without authority to enforce the laws defining the other department's jurisdiction. "They represent distinct interests." Jones v. Securities & Exchange Commission, 115 F.3d 1173, 1180 (4th Cir. 1997).

In Jones, the question was whether disciplinary action taken by the National Association of Securities Dealers (NASD) against Jones, a stockbroker, barred a later administrative proceeding brought by the Securities and Exchange Commission (SEC) against Jones for the same conduct. In analyzing Jones's argument that the NASD and SEC were the same parties for res judicata purposes, the Fourth Circuit observed that the roles of

the NASD and SEC were different, the latter serving as a reviewer of the former's action and in any event was an adjudicator, not a party. Moreover,

> [e]ven though for purposes of res judicata the identity of parties may be satisfied by persons in privity with parties, the privity requirement assumes that the person in privity is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 493 (4th Cir. 1981) (quoting Jefferson Sch. of Soc. Science v. Subversive Activities Control Bd., 331 F.2d 76, 83 (D.C. Cir. 1963)). "[P]rivity attaches only to those parties whose interests in a given lawsuit are deemed to be 'aligned.'" Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't. of Labor, 995 F.2d 510, 514 (4th Cir. 1993). In the case before us, NASD's interest in prosecuting a disciplinary action does not represent the same legal right that the SEC has in reviewing it.

Jones, 115 F.3d at 1180-81. See also, Iles v. Commonwealth, 320 S.W.3d 107 (Ky. App. 2010) (Lawsuit brought by Department of Highways (DOH) under "Junkyard Act" did not bar subsequent suit by Energy and Environment Cabinet (EEC) enforcing different statute prohibiting dumping of waste without a permit as the EEC could not have been a party to the first lawsuit where only the DOH had the authority to enforce the Junkyard Act, thus the two suits had no identity of parties or causes of action.).

Nor were the causes of action in the federal action identical to those in the instant case. The June 16, 2006 Consent Decree resolved violations of the federal Clean Water and Rivers and Harbors Acts and the Hawai'i Water Pollution Act. The current administrative action arose from alleged violations of statutes protecting state lands within the Conservation District. In addition to the obvious distinction between each agency's area of responsibility, water pollution and conservation land preservation, the state agencies were given different enforcement mechanisms. For example, the Water Pollution Act provides for civil, administrative, and criminal penalties. The Conservation District provisions are limited to fines and recovery of damages. As in Jones, while both agencies have regulatory roles, the legislative decision to separate the protection of water and land

into two different agencies was a reflection of those agencies' distinct interests.

Finally, while the June 16, 2006 Consent Decree is final, it cannot be said it was a determination of the merits. The consent decree states that it was being entered "without the adjudication or admission of any issue of fact or law except as provided in Section I [regarding Jurisdiction and Venue][.]"

As such, it cannot be said that the DOH and DLNR are sufficiently aligned to be considered in privity and the June 16, 2006 Consent Decree did not bar the adjudication of the case before us.

VI. Conclusion

Accordingly, the Circuit Court of the Fifth Circuit's December 29, 2006 Final Judgment is affirmed.

DATED: Honolulu, Hawai'i, December 21, 2012.

Wesley H.H. Ching and
Kathleen M. Douglas,
for Appellant-Appellant.

Presiding Judge

David M. Louie,
Attorney General,
(Russell A. Suzuki and Diane Erickson, Deputy Attorneys General, with him on the briefs)
for Appellee-Appellee, Board of Land and Natural Resources.

K.O. Lee

Acting Associate Judge

William J. Wynhoff,
Deputy Attorney General,
for Appellee-Appellee,
Department of Land and Natural Resources.