Michael J. Green (HI Bar No. 4451)
841 Bishop Street, Suite 2201
Honolulu, HI 96813
Telephone: 808-521-3336
Facsimile: 808-566-0347
Email: michaeljgreen@hawaii.rr.com

Nicholas C. Yost (CA Bar No. 35297)
Matthew G. Adams (CA Bar No. 229021)
Admitted pro hac vice
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105
Telephone: 415-882-5000
Facsimile: 415-882-0300
Email: nicholas.yost@snrdenton.com
matthew.adams@snrdenton.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAII'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAII ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity	Case No. 11-00307 AWT PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS [Docket Nos. 37-40]

as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation. Defendants.	

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

OTHER AUTHORITIES

INTRODUCTION

In their Motion for Judgment on the Pleadings ("Def. Motion" or "Motion"), Defendants pretend that the "Honolulu High-Capacity Transit Corridor Project" (the "Project") is an environmentally-beneficial, universally-supported way to ease Honolulu's traffic problems opposed only by a small band of dilatory extremists. They are wrong on all counts.

The Project is not environmentally-beneficial. As detailed in Plaintiffs' Complaint, the Project consists of a 20-mile concrete viaduct and heavy rail line rising 35 to 50 feet above the ground (approximately the same height as a 3- or 4-story building), 21 new rail stations, 40 acres of parking lots, a 44-acre heavy rail maintenance facility, and various other facilities. Complaint at ¶¶ 23-31. The Environmental Impact Statement ("EIS") prepared by Defendants admits, among other things, that the Project will have an adverse effect on at least 32 historic resources, will significantly interfere with protected views, and will take land from parks and schools. *See* Complaint at ¶¶ 1, 9, 23-31. These are not environmental benefits.

The Project is not universally-supported. Improperly relying on a variety of inadmissible and unpersuasive evidence, Defendants suggest that the Project enjoys broad and "overwhelming" support. Def. Motion at 4. But, as detailed in Plaintiffs' Complaint, the Project has been criticized by a wide variety of federal agencies, state agencies, community groups, professional associations, environmental organizations, and historic preservation advocates, including the following: The National Park Service, the United States Navy, the General Services Administration, the Hawaii Department of Agriculture, the Hawaii Department of Education, the Hawaii Department of Education, the Hawaii Department of Natural Resources, the Office of Hawaiian Affairs, the American Institute of Architects, the National Trust for Historic Preservation, the League of Women Voters, and ***ten of the eleven federal***

judges sitting in the United States District Court for the District of Hawaii at the time of the Project's approval. Complaint at ¶¶ 67, 116.

Traffic congestion would be worse in the future with the rail Project than it is today without the rail Project. Defendants suggest that the Project will address Honolulu's traffic congestion problems. Def. Motion at 1-3. But, as detailed in Plaintiffs' Complaint, Defendants' own EIS admits that "traffic congestion will be worse in the future with rail than [] it is today without rail." Complaint at ¶ 69.

Plaintiffs represent a diverse set of mainstream interests and they have diligently commented on the Project. Defendants have tried very hard to leave the Court with the impression that Plaintiffs are out of step with the rest of Honolulu, and are belatedly interfering with "many years of environmental, economic, and engineering study and analysis." *See* Def. Motion at 3-4. But, as the Complaint clearly demonstrates, Plaintiffs represent a broad spectrum of active community leaders. Complaint at ¶¶ 1-15. They include a former Governor of the State of Hawaii who also served in both houses of the state legislature (Benjamin Cayetano); a Native Hawaiian who formerly served as a United States District Judge, a United States Attorney, a Hawaii State Judge, a Chairman of the Honolulu City and County Council, and a Trustee of the Office of Hawaiian Affairs (Walter Meheula Heen); a non-profit transportation advocacy group and its Chair (Honolulutraffic.com and Cliff Slater, respectively); a prominent non-profit environmental and community advocacy group (Hawaii's Thousand Friends); a business and entrepreneurial organization (Small Business Hawaii Entrepreneurial Education Foundation); a University of Hawaii law professor who (among other distinctions) previously served as president of the Hawaii State Bar Association (Randall Roth); and a native of Honolulu who now practices medicine there (Michael Uechi). *Id*. These Plaintiffs actively participated in the public processes related to the approval of the Project. Complaint at ¶ 15. And, as explained in the remainder of this Opposition, they have not waived any of their claims against Defendants.

BACKGROUND

A. The Project

The Project is a 20-mile elevated heavy rail line proposed to be built from Honolulu's densely-populated, historic core to a sparsely populated, predominantly agricultural area known as Kapolei. *See* Complaint at ¶ 23. The 20-mile rail line is but one part of a larger system of heavy rail lines proposed for the area. *Id*.

The primary component of the Project is an elevated concrete viaduct known as a "fixed guideway." *Id*. at ¶ 24. The fixed guideway is proposed to be approximately 35 to 50 feet tall, roughly the same height as a 3- to 4-story building. *Id*. The Project also includes 21 new rail stations located at various points along the guideway (each of which would be the height of a six-story building); at least four "transit centers" (essentially, combined bus and train stations); approximately 40 acres of parking lots; and a 44-acre vehicle maintenance and storage facility. *Id*. at ¶¶ 25-26.

The heavy rail system would operate non-stop and year-round from 4 a.m. to midnight. *Id*. at ¶ 27. Each train would run over, through, along and/or across a number of sensitive land uses. *Id*. at ¶ 28. There are 11 schools immediately adjacent to the tracks (three of which will lose land as a result) and 35 more within one-half mile of the heavy rail line. *Id*. There are 14 parks immediately adjacent to the tracks and 39 more within one-half mile. The heavy rail line would cross through at least two historic districts. *Id*. And the fixed guideway and operating trains would be located just 45 or so feet from the judges' chambers in a United States courthouse. *Id*. Moreover, the Project is explicitly intended to induce urban growth on sensitive agricultural land. *Id*. at ¶¶ 29, 116.

The Project is not actually expected to materially improve current traffic conditions. *See id*. at ¶¶ 30-31, 69. Although the Project will not have a

meaningful, lasting, positive effect on traffic conditions, it will have a number of significant, negative effects on the environment. *Id*. at ¶¶ 1, 31, 57-58, 88-123. The FEIS acknowledges that the Project will significantly interfere with protected views. *Id*. at ¶ 31. The FEIS also admits that the Project will take land from parks and schools. *Id*. And the FEIS concedes that the Project will have an adverse impact on at least 32 historic resources, including Pearl Harbor National Historic Landmark, the National Historic Landmark at the Pacific Fleet Headquarters, the Chinatown Historic District, the Merchant Street Historic District, the Aloha Tower, the Dillingham Building, eight historic bridges, and four parks. *Id*. at ¶¶ 1, 31. Moreover, the FEIS recognizes that the Project will traverse areas likely to contain Native Hawaiian burial sites and/or Traditional Cultural Properties. Complaint at ¶¶ 45, 100.

B. Brief Overview Of Statutory Background

1. National Environmental Policy Act[1]

The National Environmental Policy Act ("NEPA") requires federal agencies prepare an Environmental Impact Statements ("EIS") on any "major Federal actions significantly affecting the human environment." 42 U.S.C. § 4332(2)(C). The analysis of alternatives is "the heart" of an EIS. 40 C.F.R. § 1502.14. Federal agencies have an affirmative obligation to "[r]igorously explore and objectively evaluate ***all*** reasonable alternatives." *Id*. (emphasis added). In evaluating the environmental impacts of "all reasonable alternatives," federal agencies must consider each and every reasonably foreseeable direct, indirect, and cumulative effect of a proposed action. 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1502.10, 1502.14, 1502.16, 1508.7, 1508.8.

[1] Paragraphs 32 through 41 of Plaintiffs' Complaint contain a full discussion of the National Environmental Policy Act.

2. Section 4(f)[2]

Section 4(f) of the Department of Transportation Act ("Section 4(f)") provides that transportation projects using publicly-owned parks and/or historic sites ("Section 4(f) Resources") cannot be approved unless (1) there is no prudent and feasible alternative to using such Resources and (2) the project includes all possible measures to minimize harm to such Resources. 49 U.S.C. § 303(b). Section 4(f) further requires that a project's potential to use Section 4(f) Resources must be evaluated "as early as practicable" and, in any event, must be considered "when alternatives to the proposed action are under study." 23 C.F.R. § 774.9.

3. National Historic Preservation Act[3]

Section 106 of the National Historic Preservation Act ("NHPA") requires all federal agencies to "take into account" the impact of their actions on historic properties, including sites listed on or eligible for listing on the National Register of Historic Places. 16 U.S.C. § 470f. When an agency proposes to take an action that could adversely affect one or more historic properties, the agency must "develop and evaluate alternatives or modifications to the [action] that could avoid, minimize or mitigate [any] adverse effects." 36 C.F.R. § 800.6(a).

C. Defendants' Approval Of The Project

In 2005, the City undertook an analysis of transit alternatives. *Id*. at ¶¶ 56-57. The "alternatives analysis" included a "screening" process designed to identify a range of reasonable alternatives suitable for (subsequent) consideration in an EIS. *Id*. at ¶¶ 57-61. The City memorialized its screening process in a documents titled "Alternatives Screening Memo Honolulu High-Capacity Transit Corridor Project" (the "2006 Alternatives Screening Memo")

[2] Paragraphs 42 through 50 of Plaintiffs' Complaint contain a full discussion of Section 4(f).

[3] Paragraphs 51 through 54 of Plaintiffs' Complaint contain a full discussion of the National Historic Preservation Act.

and "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report" (the "2006 Alternatives Report"). *Id*.

Among other things, the 2006 Alternatives Screening Memo recommended ***against*** the route ultimately selected for the Project, explaining that such a route "would have severe visual impacts for Aloha Tower and should be avoided if there are other viable alternatives." *Id*. However, neither the 2006 Alternatives Report nor the 2006 Alternatives Screening Memo contained a detailed evaluation of the environmental consequences of the various alternatives identified therein. *Id*. Nor did either document purport to serve as a Section 4(f) evaluation. *Id*. In fact, the FTA does not appear to have been involved in the preparation of either the 2006 Alternatives Report or the 2006 Alternatives Screening Memo. *Id*.

Nevertheless, the City purported to rely on the 2006 documents to eliminate from further consideration several alternatives, including (1) the alternative of developing "managed lanes" for use by buses, high-occupancy vehicles, and emergency vehicles and (2) the alternative of optimizing bus service without constructing major, new infrastructure. *Id*. Then, ***after*** these alternatives were eliminated from consideration, the City and the FTA issued a public notice of their intent to prepare an EIS for the Project. *Id*. at ¶ 62.

In November, 2008, the FTA and the City jointly released for public review a DEIS for the Project. *Id*. at ¶¶ 66-69. The DEIS was widely criticized for failing to address the environmental consequences of — and alternatives to — the Project. Plaintiffs, among others, submitted extensive comments on the DEIS. *Id.*

In June, 2010, Defendants issued a Final EIS ("FEIS"). *Id*. at ¶¶ 70-71. The FEIS considered the same alternatives evaluated in the DEIS. *Id*. The FEIS did not meaningfully address the requests of Plaintiffs (and others) that additional alternatives be considered. *Id*. Nor did it evaluate the other feasible

alternatives proposed by commenters. *Id*. Nor did it correct the analytical errors identified in Plaintiffs' comments on the DEIS. *Id*.

On January 18, 2011, Defendant Rogers, acting on behalf of Defendant FTA, executed a Record of Decision ("ROD"). *Id*. at ¶ 73. The ROD did not respond to any of the points raised in Honolulutraffic.com's comments on the FEIS. *Id*. The ROD constitutes Defendants' approval of the Project and is final agency action within the meaning of the APA. *Id*.

D. Plaintiffs' Complaint

Thereafter, Plaintiffs timely filed suit. Plaintiffs's Complaint raises four NEPA claims:

- Defendants failed properly to define the purpose and need for the Project, thereby unduly restricting the scope of the NEPA analysis (Count 1, Complaint at ¶¶ 74-77);
- Defendants failed properly to evaluate all reasonable alternatives to the Project (Count 2, Complaint at ¶¶ 78-85);
- Defendants failed properly to analyze the environmental consequences of the Project and alternatives thereto (Count 3, Complaint at ¶¶ 86-93); and
- Defendants impermissibly segmented their NEPA analysis by considering only a subset of the full heavy rail system proposed for Honolulu (Count 4, Complaint at ¶¶ 94-96).

Plaintiffs' Complaint also raises three Section 4(f) claims:

- Defendants failed to identify and evaluate the Project's use of Native Hawaiian burials or Traditional Cultural Properties (Count 5, Complaint ¶¶ 97-104);
- Defendants evaluated the Project's use of Section 4(f) Resources in an arbitrary and capricious fashion (Count 6, Complaint at ¶¶ 105-108); and
- Defendants illegally approved the Project despite the existence of prudent and feasible alternatives and the availability of additional

measures to minimize harm to Section 4(f) Resources (Count 7, Complaint ¶¶ 109-118).

And Plaintiffs' Complaint also raises an NHPA claim — namely, that Defendants failed to evaluate Native Hawaiian burials or Traditional Cultural Properties under the NHPA prior to approving the Project. (Count 8, Complaint at ¶¶ 119-123).

ARGUMENT

A. Defendants' Motion Fails To Meet The Standard For Granting Judgment On The Pleadings

Defendants allege that they are entitled to judgment on the pleadings because (1) all Plaintiffs waived their Section 4(f) claims; and (2) Plaintiffs Cayetano, Heen, Roth, and Small Business Hawaii ("SBH") waived all eight of their claims by failing to participate in the administrative process. *See* Def. Motion at 19-29 (Section 4(f) arguments), 29-33 (arguments with respect to "certain Plaintiffs"). But Defendants' Motion fails to meet even the most basic requirements for such relief.

1. Defendants Fail To Accept As True — Or Even Explicitly To Address — The Material Allegations In The Complaint

Defendants (appropriately) concede that (1) judgment on the pleadings is only proper if the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved; (2) all material allegations in the complaint must be accepted as true; and (3) all doubts must be resolved in the light most favorable to the non-moving party. Def. Motion at 17-18. Moreover, all inferences reasonably drawn from the facts alleged in a complaint must be construed in Plaintiffs' favor. *See, e.g.*, *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009); William W. Schwarzer, A. Wallace Tashima & James Wagstaffe, Federal Civil Procedure Before Trial at § 9:336.

Defendants do not come close to meeting the requirements for a judgment on the pleadings. Their Motion says nothing of substance about "the face of the pleadings." In fact, it never directly addresses (let alone evaluates or analyzes) the material allegations in the Complaint.[4] Those allegations include the following:

- "Honolulutraffic.com's members are concerned about the environmental and other impacts of the Project, and have actively participated in all stages of the environmental review process for the Project." Complaint at ¶ 7.
- "Honolulutraffic.com and its members have participated in the process of identifying, developing, and evaluating the potential impacts of the project and…they have commented on every publicly-available document for the Project." *Id.*
- "All Plaintiffs have participated in the public process related to the approval of the Project and all have exhausted available administrative remedies." *Id*. at ¶ 15.
- "Honolulutraffic.com, among others, made comprehensive comments in response to the…Notice of Intent." *Id*. at 63.
- "Honolulutraffic.com submitted extensive comments on the DEIS. Among other things, the comments…noted Defendants' failure adequately to consider alternatives to the Project; Defendants' failure adequately to address the environmental consequences of the Project;

[4] In reciting the standard of review for a Motion for Judgment on the Pleadings, Defendants do suggest that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and noting that "threadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice." Def. Motion at 17. But Defendants' Motion never actually alleges that any of Plaintiffs' allegations is so "conclusory" or "threadbare" that it should not be accepted as true. Def. Motion at 19-33. And it is easy to see why: Plaintiffs' Complaint covers 55 pages and includes more than 100 paragraphs of substantive, factual allegations. *See* Complaint at pp. 1-55. It is hardly "threadbare" or "conclusory."

[] analytical errors in Defendants' [analysis]; and noted that the DEIS underestimated the environmental consequences of the heavy rail system as a whole by improperly segmenting its analysis." *Id*. at ¶ 68.

- "Honolulutraffic.com and others submitted comments on the FEIS. Honolulutraffic.com's comments again suggested that additional feasible alternatives be considered," and those alternatives would have avoided impacts to "downtown Honolulu and the historic districts in that vicinity." *Id*. at ¶ 71.
- "Plaintiff Honolulutraffic.com requested further study of…alternatives." *Id*. at ¶ 85.

Each of these allegations is explicitly incorporated into all eight of Plaintiffs' claims for relief, and, for purpose of Defendants' Motion, each one must be accepted as true. *See Fleming*, 581 F.3d at 925 (9th Cir. 2009). Defendants' entire Motion is impermissibly premised on the assumption that the allegations listed above are not, in fact, true. Therefore, the Motion must be denied.

2. Defendants Improperly Rely On Evidence Beyond The Scope Of The Complaint

Rather than addressing the specific allegations in Plaintiffs' Complaint, Defendants rely on outside evidence. In the context of a Motion for Judgment on the Pleadings, such reliance is generally improper. *See, e.g., United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Indeed, as Defendants themselves concede, "[g]enerally, the scope of review on a Rule 12(c) motion is limited to the contents of the pleadings." Def. Motion at 18.

Defendants claim that the general rule should not apply to their Motion because (1) the "incorporation by reference" doctrine allows the Court to consider material beyond the four corners of the Complaint and (2) a court may take judicial notice of "matters of public record." Def. Motion

at 18-19. But neither incorporation by reference nor judicial notice justifies Defendants' improper reliance on material outside the Complaint.

a) Incorporation By Reference

Defendants' Motion is based, in part, on the Draft EIS ("DEIS"), the Final ("FEIS"), and the ROD prepared for the Project. Defendants claim that these three documents can be considered by the Court pursuant to the "incorporation by reference" doctrine. *See* Def. Motion at 18-19; Defendants' Request For Judicial Notice at 2-4.

Plaintiffs do not dispute that, as a general matter, material incorporated by reference into a complaint can be considered in the context of a motion for judgment on the pleadings. Nor do Plaintiffs dispute that their Complaint incorporates by reference portions of the DEIS and FEIS. *See, e.g.,* Complaint at ¶¶ 23-31, 89-93.

But Defendants' reliance on the incorporation by reference doctrine is nonetheless improper. First of all, Defendants never served their Exhibit A (the DEIS) or their Exhibit B (the FEIS) on Plaintiffs. *See* Declaration of Matthew Adams ("Adams Dec.") at ¶¶ 2-3. Plaintiffs have independent access to electronic versions of both EISs. *Id*. But they have no access to the "original color hard bound version[s]" of the documents which were provided to the Court. *Id*. Nor do Plaintiffs have access to the "accompanying DVD, and additional CD" Defendants lodged with the Court. *Id*. Therefore, for reasons of fundamental fairness, Defendants should not be allowed to rely on any portion of their Exhibit A or Exhibit B.

Second, incorporation by reference is not an appropriate means of establishing an "absence of evidence" where, as here, the parties' contentions must be resolved on the basis of an entire administrative record. *See, e.g., Great Basin Mine Watch v. Hankins*, 456 F. 3d 955, 968 (9th Cir. 2006) ("our review of the record indicates that Great Basin adequately raised the issue"); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092-93

(9th Cir. 2006) (relying on administrative record to evaluate waiver and exhaustion issues). Incorporation by reference only allows courts to consider specific documents; by definition, it does not permit consideration of an entire administrative record. *See Coto Settlement v. Eisenberg,* 593 F.3d 1031, 1038 (9th Cir. 2010) (describing incorporation doctrine). For this reason, too, Defendants' reliance on the incorporation by reference doctrine is improper.

b) Request for Judicial Notice

Defendants' Motion is also based on documents and other items of which they seek judicial notice. *See* Defendants' Request For Judicial Notice ("Def. RFJN") at 4-13. A court may take judicial notice of documents or facts "not subject to reasonable dispute in that [they] are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Plaintiffs reliance on judicial notice is improper. First of all, Defendants impermissibly request this Court to accept not only the *existence* of certain exhibits, but also the *contents* of those documents. *See J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d 431, 440 (9th Cir. 2010) ("[a]lthough the existence of a document may be judicially noticeable, the…statements contained in the document…are not subject to judicial notice if those matters are reasonably disputable."); *Lee v. City of Los Angeles,* 250 F. 3d 668, 690 (9th Cir. 2001) (courts take judicial notice "not for the truth of the facts recited therein, but for the existence" of the document, "which is not subject to reasonable dispute over its veracity.") Here, Defendants have improperly requested judicial notice of precisely the matters in dispute — namely, Plaintiffs' participation in the administrative processes for the Project.

Second, many of the matters of which Defendants seek judicial notice amount to nothing more than their own characterizations of legal or factual

aspects of this case. For example, Defendants seek judicial notice of the "fact" that certain Plaintiffs failed adequately to participate in the approval process for the Project. *See, e.g.,* Def. RFJN at ¶ 23. Such characterizations are entirely unsuitable for judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 758, n.3 (9th Cir. 2007); *see also J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice").

B. In Light Of Their Failure To Prepare The Administrative Record, Defendants' Motion Is Premature

As noted above, claims under NEPA, NHPA, and Section 4(f) are resolved on the basis the administrative record as a whole. This is just as true for issues like waiver and exhaustion as it is for "substantive" environmental issues. *See, e.g., Barnes v. United States*, 2011 U.S. App. LEXIS 17752 at *25 (9th Cir. Aug. 25, 2011) ("[c]umulatively, this record demonstrates…"); *Ilio'ulaokalani Coalition*, 464 F. 3d at 1092-93 (relying on and citing specific portions of administrative record); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (plaintiff waived claim where reviewing court was "unable to locate any reference to [the] claim in the administrative record"). Thus, in alleging that Plaintiffs have waived their claims, Defendants are really arguing that the administrative record for the Project is entirely devoid of evidence that Plaintiffs' concerns were raised during the administrative process. *See, e.g.,* Def. RFJN at ¶¶ 15, 23 (improperly seeking judicial notice of the proposition that the "public record is devoid of any comments" from Plaintiffs).

This, in turn, raises a series of difficult questions: Until the administrative record is prepared, how can Plaintiffs properly defend themselves against Defendants' allegations regarding the absence of record evidence? How can Defendants' representations about the contents of the

record be evaluated? And, for that matter, how can Defendants claim to know what is or is not in the administrative record in the first place?

After all, Defendants have steadfastly refused to make any commitments regarding the contents of the administrative record or the timing of its preparation. Plaintiffs filed their Complaint on May 12, 2011. On June 23, 2011, Plaintiffs' counsel received a letter from counsel for the Honolulu Defendants.[5] Declaration of Nicholas C. Yost ("Yost Dec.") at ¶ 3, Ex. A. The letter requested Plaintiffs' assistance in resolving this lawsuit in a manner that will not disrupt the planned construction schedule for the Project: "Rather than using the lawsuit you filed as a basis of delay before any determination has been made as to the merits of your claims, we would urge you to cooperate with us in getting this matter resolved as quickly as possible." *Id.*

That is exactly what Plaintiffs have done. Recognizing that the administrative record is the first step toward the Honolulu Defendants' desired "determination…as to the merits" of the case, Plaintiffs' counsel immediately contacted counsel for the Federal Defendants to discuss the status of the record and to volunteer their assistance in the record preparation process. Adams Dec. at ¶ 4. Since that time, Plaintiffs have made 7 more inquiries as to the status of the administrative record. Yost Dec. ¶¶ 4-9, Ex. B-F; Adams Dec. ¶¶ 5-7, Ex. A-C. But after three months of telephone calls and e-mail exchanges, the only thing Plaintiffs have learned for certain is that the administrative record is likely to consist of approximately 500,000 documents (most of which Plaintiffs have never seen). Yost Dec. ¶ 8, Ex. E.

If the Federal Defendants finished assembling the administrative record prior to filing their Motion, they have materially misled the Plaintiffs

[5] The Honolulu Defendants are the City and County of Honolulu and Wayne Yoshioka (in his official capacity).

and have effectively withheld tens of thousands — if not hundreds of thousands — of documents which might support Plaintiffs' positions.

On the other hand, if the Federal Defendants did not finish assembling and reviewing the entire administrative record prior to filing their Motion, they have materially misled both the Plaintiffs and the Court by implying that the record is devoid of evidence that Plaintiffs' concerns were raised during the administrative process.

Either way, Defendants have no business making representations (explicit or implied) about the absence of evidence in the administrative record. And under these circumstances, it would be thoroughly inappropriate to grant Defendants' request for a judgment on the pleadings.

C. Plaintiffs Did Not Waive Their Section 4(f) Claims

Plaintiffs have not waived any of their claims. Defendants' first waiver argument contends that Plaintiffs waived their Section 4(f) claims (counts four through six of the Complaint) by failing to exhaust their concerns about Section 4(f) during the administrative process for the Project.[6] Specifically, Defendants claim that none of the Plaintiffs submitted comments indicating that the Project violated Section 4(f), and, for that reason, all of Plaintiffs' Section 4(f) claims should be dismissed. Defendants are mistaken in several respects.

1. Plaintiffs Properly Raised Their Section 4(f) Concerns During The Administrative Process.

Defendants contend that Plaintiffs waived their Section 4(f) claims by failing to exhaust administrative remedies. A plaintiff satisfies the exhaustion requirement if its participation in the administrative process, "taken as a whole, provided sufficient notice to the [agency] to afford it the

[6] This type of argument is sometimes referred to as "exhaustion of remedies" and sometimes as "waiver." *See Portland General Electric v. Bonneville Power*, 50 F.3d 1009, 1023-24 (9th Cir. 2007). Defendants' Motion uses the terms interchangeably; accordingly, Plaintiffs do the same.

opportunity to rectify the violations that the plaintiffs alleged." *Great Basin*, 456 F.3d at 965 (9th Cir. 2006). It "need not raise an issue using precise legal formulations." *Id*. Nor must it cite a specific statute, use a term of art, or "incant magic words…in order to leave the courtroom open." *See, e.g.*, *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1066 (9th Cir. 2010); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

As shown below, Plaintiffs easily satisfy the Ninth Circuit's requirements for preserving legal claims.

a) Honolulutraffic.com

Plaintiff Honolulutraffic.com submitted eight separate sets of written comments during the administrative process for the Project.[7] Relevant portions of those comments include the following:

- Honolulutraffic.com's comments on the FEIS and Section 4(f) Evaluation note that "[i]n evaluating alternatives one of the more important legal requirements is the avoidance of historic properties, including burial grounds…with an injunction to avoid historical properties if at all possible." Adams Dec. ¶ 8, Ex. D at 3-4. Honolulutraffic.com objected that "[c]ompared to the other alternatives" the Project would "require more acquisitions and affect more potentially historic structures." *Id*. at 4. In particular, Honolulutraffic.com noted that the City's own Alternatives Analysis states that the Project would have "severe visual impacts for Aloha Tower and should be avoided if there are other viable alternatives." *Id*.
- Honolulutraffic.com's December, 2009 letter to the federal Advisory Council on Historic Preservation ("ACHP") objects to Defendants'

[7] During this process, Honolulutraffic.com was not represented by environmental counsel. *See* Slater Dec., ¶ 4.

failure properly to evaluate impacts on Section 4(f) Resources: "[T]he potential use of land from Section 4(f) properties was not evaluated during the Alternatives Analysis stage. The closest evaluation of historic properties was the Alternatives Screening Memo issues at the time of the Alternatives Analysis. The Memo does not mention section 4(f) or its requirements…" Declaration of Cliff Slater ("Slater Dec.") ¶ 2, Ex. B at 2. On January 7, 2010, the ACHP forwarded Honolulutraffic.com's comments to Defendant FTA. Slater Dec. ¶ 3, Ex. D.

- Honolulutraffic.com's November 4, 2009 letter to Defendant Leslie Rogers notes that Section 4(f) "does not allow the [Federal Transit] Administration to approve a transportation project using, even constructively, 4(f) property unless there is no 'feasible and prudent avoidance alternative.'" Slater Dec. ¶ 2, Ex. C at 1. The letter went on to propose an alternative to the Project and to explain why that alternative was "feasible and prudent" within the meaning of Section 4(f). *Id*. at 1-3.
- Honolulutraffic.com's December, 2009 letter to ACHP clearly states "[h]ad the Section 4(f) process been followed as required by statute, then a different alternative might well have been chosen that would have avoided the historic downtown area altogether." Slater Dec. ¶ 2, Ex. C at 2. As noted above, the ACHP forwarded Honolulutraffic.com's December, 2009 letter to Defendant FTA on January 7, 2010. Slater Dec. ¶ 3, Ex. D.
- Honolulutraffic.com's comments on the DEIS and Section 4(f) Evaluation express concern that "the proposed elevated rail structure will block…view corridors [] along Nimitz Highway through historic Chinatown and Downtown" and, further, that "[e]levated rail stations and structures along the waterfront will make a poor situation worse by

introducing an additional physical and visual barrier." Adams Dec., ¶ 9, Ex. E at Part II, page 1.

- Honolulutraffic.com's comments on the DEIS and Section 4(f) Evaluation express concern that "[t]he proposed Honolulu Transit Corridor project will have a dramatic impact on the landscape of the island of Oahu," including "not only the direct impact to specific parcels, but [also]…the visual effect on…historic resources." Adams Dec., ¶ 9, Ex. E at Part II, page 1. The comment notes that "the Draft EIS does not accurately take into account these larger impacts, but rather focuses on those adverse impacts caused by the direct taking of land." *Id*.
- Honolulutraffic.com's comments on the DEIS and Section 4(f) Evaluation include photo simulations illustrating the organization's concerns about visual impacts on Aloha Tower and Mother Waldron Park. Adams Dec., ¶ 9, Ex. E at Part II, pp. 4-7.
- Honolulutraffic.com's comments on the FEIS and Section 4(f) Evaluation explicitly objected to Defendants' approval of "a noisy elevated rail line, 40 feet high and 30 feet wide, traversing the most historically sensitive part of Honolulu's waterfront area." Adams Dec., ¶ 8, Ex. D at 9.

b) Michelle Matson

Michelle Matson is a member of Honolulutraffic.com and is identified as such on Honolulutraffic.com's website. *See* Slater Dec. ¶ 1, Ex. A. Relevant portions of Ms. Matson's comments include the following:

- Ms. Matson's April 13, 2007 written comments on the Project stated that the Project "must comply with…Section 4(f) of the Department of Transportation Act of 1966 because of federal involvement in the project." They noted that the City's evaluation of the Project is "fatally flawed because it avoids addressing the

significant long-term environmental impacts of the presently-proposed elevated route alignment on Aloha Tower, Irwin Park, and the Dillingham Transportation Building along the Downtown Waterfront, and Mother Waldron Park along Halekauwila Street - all registered historic sites." And they noted that "[i]t is most curious that this significant impact was utterly and completely ignored…" Adams Dec., ¶ 10, Ex. F at pp. A-169 to 170.

- Attached to Ms. Matson's April 13, 2007 comment letter was a rendering produced by the Hawaii Chapter of the American Institute of Architects to illustrate "the significant impact of the proposed elevated transit guideway along the Honolulu Waterfront." *Id*. at A-170, A-172.
- Ms. Matson spoke at a December 6, 2008 public hearing on the DEIS and Section 4(f) Evaluation. At that hearing, she said "there are very serious public concerns surrounding the city's disregard and neglect of the significant adverse impacts of an elevated transit route along the Honolulu Waterfront specific to the historic sites. This badly planned project cannot be allowed to overshadow and overpower these significant historic sites or destroy the visual character and integrity of the vital Downtown Waterfront." Adams Dec., ¶ 11, Ex. G at 5.
- Ms. Matson's December 6, 2008 hearing testimony raised the issue of impacts to Mother Waldron Park: "[t]he city proposes to slam the elevated heavy rail route…adjacent to…Mother Waldron Park on Halekauwila Street, diminishing its historic character and integrity, and usefulness and attraction as a vital recreational open space." Adams Dec., ¶ 11, Ex. G at 4-5.
- Ms. Matson's February 3, 2009 written comments on the DEIS and Section 4(f) Evaluation provide detailed analyses (covering four

pages of text, as well as a photograph) of the Project's impacts on Irwin Park, Piers 10/11, Aloha Tower, the Dillingham Transportation Building, and Mother Waldron Park. In addition, she noted "the significance of the Honolulu Waterfront as a historic complex, which is greatly understated and poorly depicted" in the DEIS and Section 4(f) Evaluation. Adams Dec., ¶ 13, Ex. I at 1.

- Ms. Matson's February 3, 2009 written comments stated that "introduction of visual, atmospheric, or audible elements that diminish the integrity of [a] property's significant historic feature" constitutes an "adverse effect" on historic resources. Adams Dec., ¶ 13, Ex. I at 3. These impacts are important, she noted, because of "the high visual quality of [the downtown] historic complex" as approached from "Fort Street and historic Walker Park to Aloha Tower." *Id*. at 2.

c) Hawaii's Thousand Friends

Plaintiff Hawaii's Thousand Friends ("HTF") submitted extensive written comments on the DEIS and Section 4(f) Evaluation. Relevant portions of HTF's comments include the following:

- HTF presented a list of facilities about which it was especially concerned. Adams Dec., ¶ 14, Ex. J at 8-12. *Id*. That list included Makalapa Naval Housing, the Pearl Harbor Complex, Irwin Park, Mother Waldron Park, Walker Park, Queen Street Park, and Ke'ehi Lagoon Park. *Id*. HTF made it clear that its concerns about those resources were related to Defendants' failure to comply with Section 4(f). *Id*. For example, the portion of HTF's comments immediately following the above-described list explicitly notes that "[w]hile the DEIS states that properties that meet the Federal criteria under Section 4(f) [] have been evaluated[,] that evaluation information is not in this

disclosure document." *Id*. at 12.

- HTF commented on the impacts of the Project to Section 4(f) Resources in downtown Honolulu: "[v]isual resources in the project corridor include landmarks, … historic and cultural sites, parks, [and] open spaces" and "[i]n downtown…the guideway and columns would change the visual character of the streetscape and the historical []connection[8] between downtown and the waterfront." *Id*. at 15.
- HTF expressed concern about the fact that "[t]he fixed guideway system and Chinatown station 30 feet above Nimitz will be a dominant visual element and will bifurcate historical Chinatown from its historical connection to the Honolulu waterfront," noting "[s]ome things can't be mitigated and this is one of them." *Id*. at 16.
- HTF objected to Defendants' suggestion that some effects of the Project would be studied as part of project implementation: "The time to 'evaluate effects' is during the disclosure phase not after.'" *Id*. at 11.

d) Summary of Evidence

Taken as a whole, the evidence cited above was more than sufficient to provide Defendants with notice of Plaintiffs' Section 4(f) concerns. *See Great Basin*, 456 F.3d at 965 (plaintiffs' administrative participation considered "as a whole," exhaustion requires only that agency receive notice of plaintiffs' concerns and an opportunity to address them); *City of Sausalito*, 386 F.3d at 1208 (9th Cir. 2004) (plaintiffs only required to "alert" the agency to their position and claims). Honolulutraffic.com, Michelle Matson, and HTF each submitted comments alleging that

[8] The text of HTF's comments reads "historical disconnection between downtown and waterfront." This appears to be a typographical error in the original comment letter. Read in context, it is quite clear that HTF is concerned that the construction of the Project will divide downtown from the waterfront.

Defendants' failed to comply with Section 4(f). Though not required to do so, each one of them identified the statute by name. Each one of them identified Section 4(f) resources about which it was concerned. Each one made its opposition to the Project quite clear. And Honolulutraffic.com took the additional step of proposing an alternative explicitly designed to satisfy the requirements of Section 4(f). These actions provided Defendants with more than sufficient notice of — and opportunity to address — Plaintiffs' Section 4(f) concerns. Nothing further was required.

And yet Defendants have the nerve to assert that Plaintiffs failed to participate in the Section 4(f) process. More specifically, they suggest that Plaintiffs waived their Section 4(f) claims because their comments on the EISs did not refer to the specific Section 4(f) Resources listed in paragraph 107 of the Complaint.

Defendants' argument is a poor one. First of all, they have not identified any legal support for their position. They have not identified a single statute or regulation explicitly requiring that the commenting public refer to Section 4(f) resources individually and by name.[9] *See* Def. Motion at 20-24. Nor have they identified any circumstance in which either of the two cases on which they rely (*Vermont Yankee* and *Public Citizen*) has been interpreted as imposing such a requirement on participants in the Section 4(f) process. Def. Motion at 19-24. In fact, Defendants' Motion fails to identify a single published decision dismissing a Section 4(f) claim on the grounds of waiver and/or exhaustion. *Id*.

[9] In reviewing the statutory background of the case, Defendants suggest that "the language of the [4(f)] statute and its implementing regulations make clear that Section 4(f) sites must be evaluated individually." Def. Motion at 16. But that requirement applies to ***the agency doing the evaluation***; it does not mandate that the commenting public employ special terminology or "magic words" in their comments on an agency's Section 4(f) evaluation. *See Idaho Sporting Congress*, 305 F.3d at 966 (9th Cir. 2002) (no need for "magic words").

Second, as explained in the bullet-point summaries presented in section C(1), above, Plaintiffs' comments on the Project did, in fact, identify concerns about specific Section 4(f) Resources.

Third, the exhaustion doctrine does not prohibit Plaintiffs from raising further-refined versions of the arguments they made at the administrative level. Indeed, "the Ninth Circuit has long permitted plaintiffs to raise arguments…where they presented a much less refined legal argument" to an agency. *Shasta Resources Council v. United States*, 629 F. Supp. 2d 1045, 1058 n.4 (E.D. Cal. 2010) (Shubb, J.) citing *Great Basin*, 456 F.3d at 965; *see also Lands Council*, 629 F.3d at 1076 ("While [plaintiff's] arguments are now more fully developed than they were in prior proceedings, [plaintiff] clearly put the Forest Service on notice"); *Native Ecosystems Council*, 304 F.3d at 898-90 (allowing "less refined" claims at the administrative level).

Fourth, and perhaps most fundamentally, Defendants misrepresent the relationship between the allegations in paragraph 107 of the Complaint and Plaintiffs' Section 4(f) claims as a whole. Paragraph 107 contains allegations (1) identifying three types of arbitrary and capricious Section 4(f) decisions by Defendants and (2) presenting examples of some of the Section 4(f) Resources within each of these categories. Those examples are not the only Section 4(f) Resources affected by the Project. *See, e.g.*, Complaint at ¶¶ 1, 28. Nor are they the only Section 4(f) Resources on which Plaintiffs' claims are based. *See id.* at ¶¶ 1, 97-118. Nor, for that matter, do the arbitrary and capricious decisions identified in paragraph 107 constitute the only grounds on which Plaintiffs seek relief under Section 4(f). *See id.* at ¶¶ 97-118. In short, Plaintiffs' Section 4(f) claims are far broader that the list of examples in paragraph 107. Therefore, the extent to which Plaintiffs exhausted their administrative remedies with respect to the specific Section 4(f) Resources presented in that paragraph does ***not*** determine the extent to

which Plaintiffs exhausted their administrative remedies with respect to their three Section 4(f) claims.

2. In Any Event, Defendants Had Actual Notice Of — And An Opportunity To Address — The Issues Raised In Plaintiffs' 4(f) Claims.

Although parties challenging an agency decision are generally responsible for alerting the agency to their concerns, ***the agency*** bears the ultimate responsibility for complying with the law. *See Public Citizen,* 541 U.S. at 765. For that reason, no exhaustion is required where an agency's mistakes are "so obvious that there is no need for a commentator to point them out." *Id*. The Ninth Circuit has interpreted the "so obvious" standard to mean that no exhaustion is required where the agency has "independent knowledge of the issues that concern[] plaintiffs." *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F. 3d at 1092; *see also Barnes*, 2011 U.S. App. LEXIS 17752 at *19.

Here, Defendants' own documents make it clear that they had "independent knowledge" of the Section 4(f) issues raised in Plaintiffs' Complaint. For example, Defendants' 2006 alternatives analyses explicitly noted that the route selected for the Project "would have severe visual impacts for Aloha Tower and should be avoided if there are other viable alternatives" and that the Project would "require more displacements and affect more potentially historic structures than the other alternatives." *See* Complaint at ¶¶ 58, 113. These documents clearly demonstrate that Defendants had "independent knowledge" of (1) the Project's impact on historic resources in downtown Honolulu and (2) the importance of finding alternatives to the Project capable of avoiding those impacts. *See* '*Ilio'ulaokalani Coalition*, 464 F. 3d at 1092-93 (agency's own memoranda demonstrate "independent knowledge" of issue).

Comments submitted by other entities also provided Defendants with "independent knowledge" of Plaintiffs' Section 4(f) concerns. For example:

- The Hawaii State Historic Preservation Officer explicitly recommended that Defendants evaluate the entire fixed guideway route for "archaeological resources" and "Traditional Cultural Properties" before approving the Project. *See* Complaint at ¶ 102.
- Several commenters on the DEIS, including the American Institute of Architects Honolulu Chapter, proposed alternatives that would avoid impacts on historic resources in downtown Honolulu by placing certain portions of the heavy rail lines underground. *See id*. at ¶ 85.
- The National Trust for Historic Preservation objected to Defendants' failure to evaluate the potential for the Project to impact Section 4(f) Resources in the vicinity of rail stations. *See id*. at ¶ 116.

In short, even the limited record now before the Court is sufficient to establish that Defendants had "independent knowledge" of the Section 4(f) issues that form the basis of Plaintiffs' claims.[10]

D. The Court Should Not Dismiss The Claims of Plaintiffs Cayetano, Heen, Roth, and SBH

Defendants' second waiver argument contends that Plaintiffs Cayetano, Heen, Roth, and SBH each waived all eight of their claims by failing to participate in the administrative process at all. This argument, too, should be rejected.

1. Exhaustion And Waiver Requirements Are Not Relevant To The Claims Of Plaintiffs Cayetano, Heen, Roth, and SBH

Exhaustion and waiver are not relevant to Plaintiffs Cayetano, Heen, Roth, and SBH. Indeed, Defendants candidly admit that several courts within the Ninth Circuit have held that "where at least one plaintiff has

[10] It bears repeating that Defendants' decision to file the Motion prior to completing the administrative record has inappropriately limited (1) the evidence available to Plaintiffs and therefore (2) the scope of the Court's review. *See* section B, above. The administrative record will almost certainly contain additional evidence demonstrating the extent to which Defendants had "independent knowledge" of Plaintiffs' concerns.

exhausted its administrative remedies," it is not necessary to inquire into exhaustion and/or waiver by other plaintiffs. Def. Motion at 32.

Here, it is undisputed that (at least) some Plaintiffs properly raised their NEPA and NHPA claims during the administrative process. *See* Def. Motion at 1-34. And, for the reasons presented in section C, above, Plaintiffs' Section 4(f) were properly raised as well. In short, at least one Plaintiff has already exhausted administrative remedies with respect to all issues. Therefore, the extent to which Plaintiffs Cayetano, Heen, Roth, and SBH have also exhausted those same remedies with respect to those same issues is simply not relevant.

Defendants nonetheless urge the Court to find that Plaintiffs Cayetano, Heen, Roth, and SBH have waived all claims. Specifically, they contend that the Court should find such a waiver because "the Ninth Circuit has never extended the futility exception to the exhaustion of NEPA and Section 4(f) administrative remedies required by *Public Citizen*." Def. Motion at 33.

Defendants' emphasis on the "futility exemption" is too narrow. "Futility" is one of the bases on which the courts in this Circuit have authorized claims by parties who did not participate in prior administrative processes. *See, e.g, Southeast Alaska Conservation Council v. Watson*, 697 F. 2d 1305, 1309 (9th Cir. 1983). But it is not the only basis. Such claims are also allowed if they are (1) based on an issue of which the defendant agency had actual knowledge or (2) based on an issue previously raised by someone other than the plaintiff. *See 'Ilio'ulaokalani Coalition*, 464 F. 3d at 1092 (actual knowledge); *Portland General Electric v. Bonneville Power Administration*, 501 F.3d 1009, 1023-24 (9th Cir. 2007) (claim previously raised by others). As explained below, the claims of Plaintiffs Cayetano, Heen, Roth, and SBH are justified on both bases.

Defendants do not appear to contest that Plaintiffs' NEPA and NHPA claims were properly raised during the administrative process. Thus, each of the issues on which those claims are based was raised by another party and/or was actually known to the Defendants. Accordingly, the NEPA and NHPA claims of Plaintiffs Cayetano, Heen, Roth, and SBH should not be dismissed.

As explained in section C(1), above, Plaintiffs raised each of the issues on which their Section 4(f) claims are based during the administrative process for the Project. And as explained in section C(2), above, Defendants had actual knowledge of each of those issues. Therefore, the Section 4(f) claims of Plaintiffs Cayetano, Heen, Roth, and SBH should not be dismissed.

Moreover, it is worth noting that the administrative record is almost certain to contain additional evidence relevant to (1) the existence of other comments on the issues which form the basis of Plaintiffs' claims and/or (2) the extent to which Defendants had independent knowledge of those issues. *See also* sections B and C(2), above (discussing administrative record issues).

2. Neither *Vermont Yankee* Nor *Public Citizen* Mandates Dismissal Of The Claims Of Plaintiffs Cayetano, Heen, Roth, and SBH

Defendants also suggest that it would be "inconsistent with *Public Citizen* and *Vermont Yankee* to allow [] Plaintiffs to initiate a challenge to the agency decision when the Plaintiffs failed to participate at all in the administrative process." Def. Motion at 33. Once again, Defendants are mistaken.

In *Vermont Yankee*, the exhaustion doctrine arose in the context of a series of rulemaking processes by the Nuclear Regulatory Commission. The Commission "continually requested" that one of the participants in the rulemaking (an entity referred to by the Supreme Court as "Saginaw")

clarify certain of its comments. *Vermont Yankee*, 435 U.S. at 554. Saginaw "decline[d] to further focus its contentions" and flatly refused provide any additional information to the Commission. *Id*. When Saginaw later brought a challenge to the rulemaking, the Supreme Court upheld the Commission's actions, observing that "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism." *Id*. at 553-54.

In *Public Citizen*, the Supreme Court considered the exhaustion doctrine in the context of a NEPA claim. The *Public Citizen* plaintiffs submitted comments on a NEPA document, but none of those comments "identified…any rulemaking alternatives beyond those evaluated" by the agency. *Public Citizen*, 541 U.S. at 764. As a result, the agency "was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available." *Id*.

Vermont Yankee and *Public Citizen* are readily distinguishable from the instant case. Unlike *Vermont Yankee*, this case is not one of "those instances in which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency's request for assistance in exploring the party's contentions." *See Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984) (interpreting scope of *Vermont Yankee*); *'Ilio'ulaokalani Coalition*, 464 F.3d at 1092 (same). And unlike *Public Citizen*, the Defendants in this case had notice of — and a reasonable opportunity to consider — the issues and alternatives which form the basis of Plaintiffs' claims. Under these circumstances, the exhaustion requirement has been satisfied. *See Native Ecosystems Council v. Dombeck*, 304 F.3d at 899-900 ("[t]his result comports with the purposes of the exhaustion requirement").

Moreover, *Public Citizen* makes it quite clear that parties are not always required to exhaust administrative remedies before initiating litigation. *See Public Citizen*, 541 U.S. at 765. Indeed, the Ninth Circuit has

never interpreted *Vermont Yankee* or *Public Citizen* as an absolute bar on challenges to agency action. On the contrary, "[t]his Circuit has declined to adopt a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *'Ilio'ulaokalani Coalition*, 464 F.3d at 1092; *see also Northwest Environmental Defense Center*, 117 F.3d 1520, 1534 ("We have held that the language in *Vermont Yankee* does not establish a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of agency action.").

The *'Ilio'ulaokalani Coalition* case is a particularly relevant example of the Ninth Circuit's interpretation of *Vermont Yankee* and *Public Citizen*. The case concerned an EIS prepared by the Army. Plaintiffs alleged that the EIS' analysis of alternatives was inadequate. *See Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F. Supp. 2d 1246, 1252-53 (D. Hawaii 2005). Relying on *Public Citizen* and *Vermont Yankee*, the District Court held that plaintiffs had waived their claims about the Army's alternatives analysis by failing to participate in the NEPA process. *Id.* The Ninth Circuit reversed, holding that the administrative record was "replete with evidence" that "the Army had independent knowledge of the very issue that concerns Plaintiffs…such that there [was] no need for a commentator to point them out specifically." *Ilio'ulaokalani Coalition*, 464 F.3d at 1092 (quoting *Public Citizen*).[11]

The same reasoning applies here. Like *Ilio'ulaokalani Coalition*, this case concerns issues about which the relevant agencies had "independent knowledge." *See Ilio'ulaokalani Coalition*, 464 F.3d at 1092-93. And like

[11] It is well worth noting that the Ninth Circuit based that conclusion on a careful review of the documents in the administrative record. *See 'Ilio'ulaokalani Coalition*, 464 F.3d at 1092-93. Moreover, the specific documents on which the court relied were ***not*** part of the Army's EIS. *Id*. Both of these aspects of the *Ilio'ulaokalani Coalition* decision underscore the premature nature of Defendants' Motion (also discussed in sections B, C(2), and D(1), above).

Ilio'ulaokalani Coalition, that "independent knowledge" is evidenced in Defendants' own documents. To cite just one example, the City and County of Honolulu's 2006 Alternatives Screening Memo explicitly states that the location of the Project "would have severe visual impacts for Aloha Tower and should be avoided if there are other viable alternatives." Complaint at ¶ 58.

Finally, the Ninth Circuit is not alone in its refusal to impose an absolute requirement that parties participate in agency proceedings prior to seeking judicial review. For example, in *BioDiversity Alliance v. Bureau of Land Management*, the Tenth Circuit held rejected the argument that every plaintiff challenging an EIS must exhaust available administrative remedies. *BioDiversity Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709, 714 (10th Cir. 2010). When "one group…protested the Bureau's decision" to approve the project, the court held, "it exhausted the administrative processes for all groups." *Id*. The Second Circuit, Sixth Circuit, and D.C. Circuit have also allowed plaintiffs to seek judicial review of an agency decision without first participating in available administrative processes. *See, e.g., New York State Broadcasters Association v. United States*, 414 F.2d 990, 994 (2d. Cir. 1969); *Buckeye Cablevision v. United States*, 438 F.2d 948, 951-52 (6th Cir. 1971); *CTIA-Wireless Association v. Federal Communication Commission*, 466 F.3d 105, 117 (D.C. Cir. 2006).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendants' Motion be denied.

Dated: September 26, 2011

Respectfully submitted,

/s/ Michael J. Green
Michael J. Green (HI Bar No. 4451)

Attorneys for Plaintiffs HonoluluTraffic.com, Cliff Slater, Benjamin J. Cayetano, Walter Heen, Hawaii's Thousand Friends, The Small Business Hawaii Entrepreneurial Education Foundation, Randall W. Roth, and Dr. Michael Uechi.

/s/ Nicholas C. Yost
Nicholas C. Yost (CA Bar No. 35297)
Matthew G. Adams (CA Bar No. 229021)
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

Attorneys for Plaintiffs HonoluluTraffic.com Cliff Slater, Benjamin J. Cayetano, Walter Heen, Hawaii's Thousand Friends, The Small Business Hawaii Entrepreneurial Education Foundation, Randall W. Roth, and Dr. Michael Uechi.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of LR7.5 (b) and (e) because the brief contains 8,789 words, excluding the parts of the brief exempted by local rule. This brief complies with the typeface requirements of LR10.2 (a) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 14-point Times New Roman.

/s/ Nicholas C. Yost

CERTIFICATE OF SERVICE

I certify that on September 26, 2011, I electronically filed the above document with the Clerk of the District Court using its CM/ECF system, which will send notice of electronic filing to the following:

Peter Whitfield
Ignacia Moreno
Attorneys for Defendants
Federal Transit Administration, et al.

John P. Manaut
Robert D. Thornton
Edward V.A. Kussy
Lindsay N. McAnneeley
Robert C. Godbey
Don S. Kitaoka
Gary Y. Takeuchi
Attorneys for Defendants
City and County of Honolulu, et al.

/s/ Kimberly J. Soto
Kimberly J. Soto