IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAI‘I’S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAI‘I ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI,

Plaintiffs,

vs.

FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity 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 Services,

Defendants.

CIVIL NO. 11-00307 AWT

**MEMORANDUM IN SUPPORT OF MOTION**

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# MEMORANDUM IN SUPPORT OF MOTION

## I. INTRODUCTION

### A. Project Background

This case involves the environmental disclosure for the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project ("Project"), co-sponsored by the United States Department of Transportation, Federal Transit Administration ("FTA"), and the City and County of Honolulu ("City"). (*See* Plaintiffs' Complaint for Injunctive and Declaratory Relief, filed May 12, 2011 ("Complaint").)[1] The Project is a 20-mile elevated fixed guideway rail transit project planned for construction in the highly congested transportation corridor between Kapolei and Ala Moana Center. (*See id.* at ¶ 23.) The Project was subject to a comprehensive environmental review process, leading to the issuance of the *Honolulu High-Capacity Transit Corridor Project Final Environmental Impact Statement/Section 4(f) Evaluation,* dated June 2010 ("Final EIS"), and approval of the Project by the FTA in its *Record of Decision* ("ROD") issued on January 18, 2011. (*See id.* at ¶¶ 55-73; Request for Judicial Notice ("RJN") ¶¶ 2-3; Exhibit B at pp. 1-1 to 1-23; Exhibit C.) The City and FTA provided extensive opportunities

[1] As of July 1, 2011, the Honolulu Authority for Rapid Transportation ("HART") assumed all lawful obligations and liabilities owed by or to the City related to the Project pursuant to Section 16-129.2 of the Revised Charter of the City and County of Honolulu, 1973, as amended.

for public review and comment on the Project during the lengthy administrative process leading to the FTA's January 2011 approval of the ROD. (*See* Complaint ¶¶ 63, 66, 71; RJN ¶ 2; Exhibit B at pp. 1-4 to 1-5, Appendix G.)

Residents and visitors of Honolulu, the largest city in Hawai'i, are largely dependent on the private automobile as their primary means of transportation. Automobile use burdens the City with extreme traffic congestion, and correspondingly results in negative environmental and economic impacts to the residents of the City and surrounding metropolitan area. According to the INRIX National Traffic Scorecard, 2010 Annual Report, traffic congestion in Honolulu is among the worst in the nation -- second only to Los Angeles for peak period Travel Time Tax, a key indicator of congestion.[2] Unless addressed, the negative environmental and economic impacts resulting from traffic congestion will greatly increase.

The geography of metropolitan Honolulu imposes natural and human constraints on transportation solutions. (RJN ¶ 2; Exhibit B at p. 1-6.) The Project study corridor is bordered by the Wai'anae and Ko'olau Mountain Ranges on the north and by the Pacific Ocean on the south. (*Id.*) This narrow area is home to over sixty percent of O'ahu's population and over eighty percent of O'ahu's jobs.

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[2] *Available at* http://scorecard.inrix.com/scorecard/pdf/Scorecard% 202010.pdf, at Table ES-3 on p. ES-5.

(*Id.*) By 2030, these distributions are projected to increase to sixty-nine percent of the population and eighty-three percent of O'ahu's jobs as development continues to be concentrated in the same area. (*Id.*) The Project study corridor also contains the major tourist destinations on O'ahu, including the Honolulu International Airport, Pearl Harbor, downtown Honolulu, and Waikiki. (RJN ¶ 2; Exhibit B at pp. 1-6 to 1-11.) Thus, the Project is intended to, *inter alia,* provide people living, working, and traveling in this highly congested corridor with much needed, faster, more reliable public transportation service. (*Id.* at pp. 1-21 to 1-23.)

The Project is the result of many years of environmental, economic, and engineering study and analysis of many alternative solutions to the area's mobility challenges by the City, the State of Hawai'i, the FTA, and other agencies. (RJN ¶ 2; Exhibit B at pp. 1-1 to 1-5.) Similar transit improvement projects had been studied for over four decades as the need for mobility in the corridor had been anticipated. The *O'ahu Regional Transportation Plan 2030* ("ORTP 2030"), a long range transportation plan and transportation improvement program developed by the O'ahu Metropolitan Planning Organization ("O'ahu MPO") concluded that a "key component of the ORTP 2030 is a fixed guideway that will serve the H-1 travel corridor" and that "the proposed fixed guideway from East Kapolei to Ala Moana will become the backbone of the transit system - connecting major employment and residential centers to each other and to downtown." (RJN ¶ 4;

Exhibit D at D-6; *see also* RJN ¶ 2; Exhibit B at p. 1-4.) As the level of traffic congestion worsened, in accordance with FTA regulations, the City initiated the alternatives analysis process to further evaluate alternatives to provide transit capacity in the corridor between Kapolei and University of Hawai‘i at Manoa. (RJN ¶ 2; Exhibit B at p. 1-4.)

There is significant public interest in, and support for, the Project. Surveys of public opinion indicate that the public overwhelmingly supports developing rail transit to solve the area's traffic woes.[3] In 2005, the Hawai‘i Legislature passed Act 247, authorizing the City to levy an excise and use tax surcharge to construct and operate a mass transit system serving O‘ahu. (RJN ¶ 5; Exhibit E; *see also* RJN ¶ 2; Exhibit B at p. 1-4.) The City Council subsequently adopted Ordinance 05-027 to levy a tax surcharge to fund the Project. (RJN ¶ 6; Exhibit F; *see also* RJN ¶ 2; Exhibit B at p. 1-4.) And, in November 2008, the voters of O‘ahu passed a charter amendment that declared that the City should establish a steel-wheel on steel-rail transit system. (RJN ¶ 7; Exhibit G at G-2; *see also* RJN ¶ 2; Exhibit B at p. 1-5.)

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[3] (*See, e.g.,* Honolulu Rail Transit Study, dated May 2011, available at http://www.honolulutransit.org/media/15253/rail%20transit%20qmark%20research%20report%20may%202011.pdf.)

**B. Plaintiffs' Department of Transportation Act Section 4(f) Claims**

Despite the elaborate and extensive environmental evaluation of the Project, potential alternatives, and available mitigation measures, Plaintiffs contend that the FTA's approval violates the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303, and section 106 of the National Historic Preservation Act ("Section 106"), 16 U.S.C. §§ 470 *et seq.* Section 4(f) requires the FTA to make certain findings in order to approve a project that "uses" a publicly owned park, recreation area, or wildlife or waterfowl area, or an historic site of national, state or local importance ("Section 4(f) sites").

Plaintiffs' Complaint asserts that the FTA violated Section 4(f) with regard to fourteen Section 4(f) sites. (Complaint ¶ 107.) Specifically, Plaintiffs allege that the Project's Final EIS arbitrarily and capriciously concludes that the Project will not use nine Section 4(f) sites (Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, United States Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, Pier 10/11, and Aloha Tower). (*Id.*) Plaintiffs also allege that the Final EIS arbitrarily and capriciously concludes that the Project will have only a *de minimis* impact on five Section 4(f) sites (Ke'ehi Lagoon Beach Park, Pacific War Memorial Site,

Makalapa Navy Housing Historic District, Hawai‘i Employers Council, and the Tamura Building). (*Id*.)

**C. Motion for Partial Judgment on the Pleadings**

This Motion seeks to dismiss the Section 4(f) claims asserted in Plaintiffs' Complaint that Plaintiffs did not raise during the administrative process for the Project. The failure of any of the Plaintiffs to raise certain specific claims regarding alleged violations of Section 4(f) during the administrative process constitutes a waiver of these claims. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004).

This Motion also seeks to dismiss the claims of Plaintiffs Cayetano, Heen, Roth and SBH (collectively, "Certain Plaintiffs"), all of whom failed to participate in any manner whatsoever in the administrative process concerning the Project. By choosing not to bring their concerns to the agencies' attention during the environmental review process, Certain Plaintiffs failed to exhaust their administrative remedies and have forfeited their right to now challenge the approval of the Project. Accordingly, Certain Plaintiffs' claims must be dismissed.

## II. STATEMENT OF FACTS[4]

In December 2005, a notice of intent to prepare an alternatives analysis for the implementation of transit improvements that potentially included high-capacity transit service in a 25-mile travel corridor between Kapolei and the University of Hawai‘i at Manoa and Waikiki was published in the *Federal Register*. (*See* Complaint ¶ 56; RJN ¶ 8; Exhibit H; *see also* RJN ¶ 2; Exhibit B at p. 1-4.) The December notice of intent asked the public to comment on the proposed alternatives, the purpose and need for the project, and the range of issues to be evaluated in a series of scoping meetings in December 2005. (RJN ¶ 8; Exhibit H; *see also* RJN ¶ 2; Exhibit B at p. 1-4.) The alternatives analysis culminated on November 1, 2006, with the issuance of the *Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report* ("Alternatives Report"). (Complaint ¶¶ 57-59; *see also* RJN ¶ 2; Exhibit B at p. 1-5.)

During the extensive scoping process, only Plaintiffs Dr. Michael Uechi and HonoluluTraffic.com (through its Chair, Cliff Slater) submitted comments. (RJN ¶¶ 9-10; Exhibits I, J.) Plaintiffs Cliff Slater (in his individual capacity), Hawaii's Thousand Friends, the Small Business Hawaii Entrepreneurial Education

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[4] The factual background set forth below is based on the allegations in the Complaint, documents incorporated by reference into the pleadings, and official public agency documents identified in Defendants' Request for Judicial Notice. The factual allegations from the Complaint are treated as true only for the purpose of this Motion for Partial Judgment on the Pleadings.

Foundation, Benjamin Cayetano, Walter Heen, and Randall Roth did not submit any comments or participate in any of the scoping meetings. (RJN ¶ 11; *see also* RJN ¶ 1; Exhibit A, Appendix E.)

In March 2007, a notice of intent to prepare an environmental impact statement ("EIS") was published in the *Federal Register*. (Complaint ¶ 62; RJN ¶ 12; Exhibit K; *see also* RJN ¶ 2; Exhibit B at p. 1-5.) Only Plaintiff HonoluluTraffic.com (through its Chair, Cliff Slater) submitted comments on this notice of intent. (Complaint ¶ 26; RJN ¶¶ 13-14; Exhibits L, M; RJN ¶ 15; *see also* RJN ¶ 1; Exhibit A, Appendix E.)

The FTA and the City thereafter issued the *Honolulu High-Capacity Transit Corridor Project Draft Environmental Impact Statement/Section 4(f) Evaluation* ("Draft EIS") for the Project in or about November 2008. (Complaint ¶ 66; RJN ¶ 1; Exhibit A.) On November 21, 2008, a notice of availability of the Draft EIS was published in the *Federal Register,* notifying the public of a 45-day comment period on the Draft EIS. (RJN ¶ 16; Exhibit N.) The public comment period on the Draft EIS was subsequently extended an additional 30 days to February 6, 2009. (RJN ¶ 16; Exhibit N.) The City and the FTA conducted five noticed public hearings on the Draft EIS in December 2008. (RJN ¶ 17; Exhibit O; *see also* RJN ¶ 2; Exhibit B at p. 8-9, Appendix G.) In addition, the City and the FTA conducted an extensive public outreach program to inform the public of the Project's potential

environmental impacts and to solicit public comments on the Draft EIS. (RJN ¶ 18; *see also* RJN ¶ 2; Exhibit B at pp. 8-2 to 8-8, Appendix G.)

The Draft EIS identified ten publicly owned parks and recreation sites adjacent to the Project that were subject to evaluation under Section 4(f). (RJN ¶ 1; Exhibit A at p. 5-4.). It also evaluated eighty-four historic resources under Section 4(f) within the Area of Potential Effect ("APE") of the Project. (RJN ¶ 1; Exhibit A at pp. 5-3 to 5-9.)

Plaintiffs HonoluluTraffic.com (through its Chair, Cliff Slater), Hawai'i's Thousand Friends, and Dr. Michael Uechi submitted comments on the Draft EIS. (RJN ¶¶ 19-22; Exhibits P, Q, R, S; *see also* RJN ¶ 2; Exhibit B, Appendix A.) Hawai'i's Thousand Friends, however, was the only Plaintiff to allege that the Project would use a Section 4(f) site in violation of Section 4(f), and limited this allegation to one Section 4(f) site – Ke'ehi Lagoon Beach Park. (RJN ¶ 20; Exhibit Q at pp. 23-24.) The other Plaintiffs did not submit any comments on the Draft EIS (RJN ¶ 23; *see also* RJN ¶ 2; Exhibit B, Appendix A.)

In June 2010, the FTA and the City issued the Final EIS. (Complaint ¶ 70; (RJN ¶ 2; Exhibit B.) On June 25, 2010, a notice of availability of the Final EIS was published in the *Federal Register*. (RJN ¶ 24; Exhibit T.) The Final EIS included a revised evaluation of the potential impacts of the Project on Section 4(f) sites. (RJN ¶ 2; Exhibit B at pp. 5-1 to 5-73.) The Final EIS documents the

extensive consultation by the FTA and the City with the Hawai‘i State Historic Preservation Officer, the United States Navy, the Advisory Council on Historic Preservation, and numerous other parties regarding potential impacts to resources subject to Section 4(f). (RJN ¶ 2; Exhibit B at pp. 5-1 to 5-73.).

Plaintiffs HonoluluTraffic.com, Cliff Slater, and Hawai‘i’s Thousand Friends submitted additional comments on the Final EIS prior to the FTA’s issuance of the ROD for the Project. (RJN ¶¶ 25-27; Exhibits U, V, W.) None of the comments alleged violations of Section 4(f) with respect to specific sites, except for Hawai‘i’s Thousand Friends’ comment regarding the Ke‘ehi Lagoon Beach Park. (*Id.*). The other Plaintiffs failed to submit comments on the Final EIS. (RJN ¶ 28; *see also* RJN ¶ 3; Exhibit C, Attachment C.)

On January 18, 2011, the FTA issued the ROD approving the Project. (Complaint ¶ 73; RJN ¶ 3; Exhibit C.) The ROD includes the FTA’s responses to comments submitted on the Final EIS. (RJN ¶ 3; Exhibit C, Attachment C.) The ROD also includes the Programmatic Agreement entered into by the FTA, the City, the Hawai‘i State Historic Preservation Officer, the United States Navy, and the Advisory Council on Historic Preservation documenting the FTA’s compliance with the National Historic Preservation Act and commitments concerning the historic resources impacted by the Project. (RJN ¶ 3; Exhibit C, Attachment B.)

## III. STATUTORY BACKGROUND

### A. The FTA Administrative Process

NEPA requires federal agencies to prepare an EIS for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). For over four decades, federal regulations have required federal agencies to seek public review and comment on EISs, as well as comments from local, state and federal agencies with an interest in the proposed action. *See* 40 C.F.R. § 1503.1 and parallel requirement in the FTA's regulations at 23 C.F.R. § 771.123(g).

These comments are assessed and considered in the preparation of the final EIS. 40 C.F.R. § 1503.4 and 23 C.F.R. § 771.125(a). After the completion of the final EIS, the agency announces its selected alternative, mitigation, and other project features in the ROD. Agencies must wait for at least 30 days after the availability of the final EIS to issue a ROD. 40 C.F.R. §§ 1505.2 and 1506.10(b) and 23 C.F.R. § 771.127(a).

The NEPA process is also used to document compliance with other federal environmental requirements, including Section 4(f). The NEPA regulations applicable to all federal agencies require federal agencies to coordinate their responsibilities under NEPA with "other planning and environmental review procedures required by law or by agency practice so that all such procedures run

concurrently rather than consecutively." 40 C.F.R. § 1500.2(c). The regulations require agencies to "reduce excessive paperwork" and "reduce delay" by "[i]ntegrating NEPA requirements with other environmental review and consultation requirements," 40 C.F.R. §§ 1500.4(k), 1500.5(g), and "[c]ombining environmental documents with other documents." 40 C.F.R. §§ 1500.4(o), 1500.5(i). Coordinating the NEPA process with other required review is mandated throughout the NEPA regulations. *See*, *e.g.*, 40 C.F.R. § 1501.7(a)(6) (requiring, during the scoping process, that the lead agency "[i]dentify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement . . . ."); 40 C.F.R. § 1502.25(a) (requiring a draft EIS be prepared "concurrently with and integrated with environmental impact analyses and related surveys and studies required by . . . the National Historic Preservation Act of 1966 . . . and other environmental review laws and executive orders.").

Congress has long been concerned about the excessive amount of time required to complete the environmental review process for transportation projects. In 1998, Congress revised the federal environmental process applicable to highway and transit projects to require federal agencies to streamline the process, enhance cooperation between agencies, and establish schedules for the completion of NEPA

reviews, and related reviews and approvals. Pub. L. No. 105-178, § 1309 (June 9, 1998). In 2005, Congress went further by expressly requiring federal agencies to carry out their obligations "concurrently and in conjunction with" reviews of transportation projects under NEPA. 23 U.S.C. § 139; Pub. L. No. 109-59, § 6002(d)(7)(A) (Aug. 10, 2005).

The FTA's NEPA regulations, 23 C.F.R. part 771, declare it is the agency's policy that "[t]o the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the [EIS]." 23 C.F.R. § 771.105(a) (emphasis added). Moreover, the "Administration . . . will perform the work necessary to complete . . . an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process." 23 C.F.R. § 771.113(a) (emphasis added).

NEPA regulations contain elaborate requirements for public comment and review during the EIS development process. The regulations provide that "Federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(c); *see also* 40 C.F.R. § 1506.6. As noted above, a lead agency must, after preparation of a draft EIS, "[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be

interested or affected." 40 C.F.R. § 1503.1(a)(4). The agency must then "assess and consider comments both individually and collectively," and then respond to those comments in the final EIS. 40 C.F.R. § 1503.4(a); *see also* 40 C.F.R. § 1502(b) ("Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter.").

Agencies must file an EIS, together with comments and responses, with the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R. § 1506.9, and EPA must then publish notice in the *Federal Register* of every EIS that has been filed that week. 40 C.F.R. § 1506.10(a). Agencies are prohibited from approving any project for thirty days after filing a final EIS. 40 C.F.R. § 1506.10(b)(2). This requirement provides the public with additional time during which it can provide comments on the agency action.

The FTA's NEPA regulations also provide for extensive public participation throughout the NEPA process. *See*, *e.g.*, 23 C.F.R. § 771.111(a) (stressing early coordination between the appropriate agencies and the public); 23 C.F.R. § 771.123(b) (calling for public and agency involvement in the EIS scoping process); 23 C.F.R. § 771.124(g) (requiring a draft EIS be made available to the public for comment no later than the time it is filed with the EPA); 23 C.F.R. § 771.125(a)(1) (requiring a final EIS to "discuss substantive comments received on the draft EIS and responses thereto" and "summarize public involvement").

The clear purpose of the above regulations is to provide a robust opportunity to the public to review and comment on environmental impacts of federal agency actions and so that the applicable federal agency has an opportunity to consider and respond to the public comment in the agency's decision. NEPA and the Administrative Procedure Act ("APA") (5 U.S.C. § 551 *et. seq*.) impose a concomitant requirement on plaintiffs to raise any issues concerning an agency action during the administrative process. As held by the Supreme Court:

> Persons challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration.

*Pub. Citizen*, 541 U.S. at 764 (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

**B. Section 4(f)**

Section 4(f) establishes certain requirements applicable to approval of federal transportation projects that "use" a publicly owned park, recreation area, or wildlife or waterfowl area, or an historic site of national, state or local importance. 49 U.S.C. § 303. The FTA may approve the use of land from a Section 4(f) site if there is no feasible and prudent alternative and if the project includes all possible planning to minimize harm to the site. 49 U.S.C. § 303(c). The requirements of Section 4(f) "shall be considered to be satisfied" if the FTA determines that the

Project will have a *de minimis* impact on the applicable Section 4(f) site. 49 U.S.C. § 303(d).

Both the language of the statute and its implementing regulations make clear that Section 4(f) sites must be evaluated individually. *See* 49 U.S.C. § 303(c). The statute refers to "any land from a *park* . . ." or "an *historic site* . . . ." *Id.* (emphases added). Thus, Congress clearly envisioned that each Section 4(f) use is subject to a separate determination under the statute. This means that to effectively participate in the administrative process, commentors must provide separate comments on each Section 4(f) site about which they may be concerned.

The FTA's regulations implementing Section 4(f) provide that the "potential use of land from a Section 4(f) site shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. § 774.9(a) (emphasis added). Like NEPA, the objective of the public comment and review in the Section 4(f) process is to ensure agency decision-makers have the full benefit of views and concerns of interested parties before making a decision. The FTA specifically mandates that Section 4(f) approval be integrated with the analysis in a final EIS or ROD. 23 C.F.R. § 774.9(b).

## IV. STANDARD OF REVIEW FOR RULE 12(C) MOTIONS FOR JUDGMENT ON THE PLEADINGS

"[T]he same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c) analog," because the motions are "functionally identical." *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner Co.*, 896 F.2d 1542, 1150 (9th Cir. 1989). A Rule 12(c) motion may thus be predicated on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

When ruling on a Rule 12(c) motion, the Court must "accept all material allegations in the complaint as true," and resolve all doubts "in the light most favorable to the plaintiff." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the Court is "not bound to accept as true a legal conclusion couched as a factual allegation.") Moreover, "[t]hreadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft,* 129 S.

Ct. at 1949. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

Generally, the scope of review on a Rule 12(c) motion is limited to the contents of the pleadings. Fed. R. Civ. P. 12(c), (d) (explaining that, should the court decide to consider "matters outside the pleadings," the motion is converted into a motion for summary judgment under Rule 56). However, there are two exceptions to this rule. First, under the "incorporation by reference" doctrine, a court may consider materials that are not attached to the pleadings "where the complaint *necessarily relies* upon a document or the contents of the document are *alleged in a complaint,* the document's authenticity is not in question and there are no disputed issues as to the document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (emphasis added); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Second, a court may also consider "facts that 'are contained in materials of which the court may take judicial notice.'" *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999) (quoting *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994)); *see also Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("[a] court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment," as long as the facts noticed are not "subject to reasonable dispute.") (quoting *Lee v. City of Los*

*Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (although a court generally is confined to the pleadings on a Rule 12(c) motion, "[a] court may, however, consider certain materials – documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice – without converting the motion [for judgment on the pleadings] into a motion for summary judgment.").

"Although Rule 12(c) does not specifically provide for judgment on the pleadings as to less than the entire complaint, courts in the circuit have allowed a partial judgment on the pleadings." *Smith v. California*, 2007 U.S. Dist. LEXIS 54960, at *4 (S.D. Cal. 2007); *see also Strigliabotti v. Franklin Res., Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005); William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, *Federal Civil Procedure Before Trial* § 9:340 (2011) (common practice to permit "partial judgment on the pleadings").

## V. ARGUMENT

### A. Plaintiffs' Section 4(f) Claims that Were Not Raised in the Administrative Process Must Be Dismissed.

#### 1. *Plaintiffs Were Obligated to Raise Their Section 4(f) Claims in the FTA Administrative Process.*

Judicial review of agency decisions under NEPA and Section 4(f) is governed by the APA. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 961 (9th Cir. 2006) (stating that judicial review of NEPA actions conducted pursuant to the APA); *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147,

1152 (9th Cir. 2008) (stating that judicial review of Section 4(f) actions conducted pursuant to the APA). Thus, the APA requirement that potential plaintiffs exhaust their administrative remedies before bringing suit in federal court thus applies to all of Plaintiffs' claims.

Under the APA, "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Pub. Citizen*, 541 U.S. at 764 (citing *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 533). As the Supreme Court noted, an EIS serves two purposes:

> First, [i]t ensures that the agency, in reaching the decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

*Pub. Citizen*, 541 U.S. at 768. The "informational role" of an EIS ensures that the public can provide input as necessary to the agency making the relevant decisions. *See* 40 C.F.R. § 1500.1(c); *Pub. Citizen*, 541 U.S. at 768.

In *Public Citizen*, unions and environmental groups challenged the Federal Motor Carrier Safety Administration's ("FMCSA") decision not to prepare an EIS when it promulgated rules allowing Mexican trucks to operate in the United States

and instead issue an Environmental Assessment ("EA") concluding that the proposed rules would have no significant impact on the environment. 541 U.S. at 762. After the agency issued the rules, the groups filed petitions arguing that the approval of the rules violated NEPA. *Id.*

The Supreme Court held that the groups' arguments were not properly before the Court because they had neither "identified in their comments any rulemaking alternatives" other than those evaluated under the Environmental Assessment, nor "urged FMCSA to consider alternatives." *Id.* at 764. "Because respondents did not raise these particular objections to the EA, FMCSA was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." *Id.* at 764.

*Public Citizen* reaffirms the Supreme Court's prior admonition that:

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

*Vt. Yankee Nuclear Power Corp.,* 435 U.S. at 553-54.

The principle behind the waiver doctrine is "to allow the administrative

agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative process." *Daly-Murphy v. Winston*, 820 F.2d 1470, 1476 (9th Cir. 1987), quoting *United Farm Workers v. Arizona Agr. Employment*, 669 F.2d 1249, 1253 (9th Cir. 1982); *see also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). This means that during the NEPA comment period plaintiffs must submit comments that are "significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." *Vt. Yankee*, 435 U.S. at 533 (citation and quotations omitted). Where the agency affords the public the opportunity to participate in the decision making process, plaintiffs have an obligation, absent a showing of "exceptional circumstances," to present their criticisms of a proposed project at that point. *See Havasupi Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991); *see also Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice."). Accordingly, when plaintiffs have failed to raise claims with specificity during the administrative process, the Supreme Court has

deemed those claims waived. *Pub. Citizen*, 541 U.S. at 764-65.

Numerous courts have followed *Public Citizen* and *Vermont Yankee* to dismiss environmental claims that plaintiffs failed to raise with sufficient specificity during the NEPA process to alert the agency to the parties' contentions. *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 549, 559 (2d Cir. 2009) (rejecting claims concerning impacts of a new airport that plaintiffs failed to raise during the NEPA process); *State of Nevada v. Dep't of Energy*, 457 F.3d 78, 88-89 (D.C. Cir. 2006) (plaintiffs waived argument that Department of Energy was required to consult with the Surface Transportation Board regarding transportation of nuclear waste); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) (rejecting claim that the federal agencies failed to consider an alternative to water project, in part, because plaintiffs failed to raise the claim in the administrative process); *Quechoan Indian Tribe v. United States Dep't of the Interior*, 547 F. Supp. 2d 1033, 1040-41 (D. Ariz. 2008) ("The Court finds that Plaintiff waived its right to challenge [the Bureau of Reclamation's] choice of action alternatives when it failed to raise the third alternative during the NEPA process."); *High Sierra Hikers Ass'n v. United States Forest Serv.,* 436 F. Supp. 2d 1117, 1148 (E.D. Cal. 2006) (NEPA claim that Forest Service was required to evaluate dam removal alternative barred because plaintiffs did not propose alternative in comments on EIS); *Biodiversity Conservation Alliance v. United*

*States Bureau of Land Mgmt.,* 404 F. Supp. 2d 212, 219 n.4 (D.D.C. 2005) (barring claim that agency failed to consider alternative that plaintiffs did not urge agency to consider in comments on EIS).

Although *Public Citizen* involved the failure of plaintiffs to raise NEPA issues in the administrative process, it applies with equal force to challenges under Section 4(f). First, the FTA accomplishes compliance with Section 4(f) through the NEPA process. Second, the Ninth Circuit has expressly applied *Public Citizen* to the review of environmentally related decisions under statutes other than NEPA. *See The Lands Council v. McNair*, 629 F. 3d 1070, 1081 (9th Cir. 2010).

As required by the NEPA regulations, the FTA integrated the public review and comment of NEPA and Section 4(f) issues in a single administrative process. 23 C.F.R. §§ 771.105(a); 771.113(a). Under the FTA regulations interested parties are provided an opportunity to raise Section 4(f) claims through comments on draft and final EISs. The draft Section 4(f) statement is contained in the Draft EIS. Comments on the draft Section 4(f) statement are an essential part of the process leading to the final Section 4(f) statement and the Section 4(f) determination. This is not a new requirement; it extends back at least to the time that the FTA and the Federal Highway Administration first issued joint regulations implementing NEPA and Section 4(f). *See* 45 Fed Reg. 71698 (October 30, 1980).

**2. *With the Exception of Ke'ehi Lagoon Beach Park, Plaintiffs Failed to Raise Any Section 4(f) Claims in the Administrative Process.***

The City and the FTA provided multiple opportunities for the Plaintiffs to raise issues concerning the Project's potential impacts on property subject to Section 4(f). Notices of availability of the Draft EIS and the Final EIS to allow for review and comment were published in the *Federal Register*. (*See* RJN ¶¶ 16, 24; Exhibits N, T.) The Draft EIS and the Final EIS analyzed the potential impact of the Project on properties subject to Section 4(f). The Draft EIS identified eighty-four historic resources within the Project area that were subject to evaluation under Section 4(f). (RJN ¶ 1; Exhibit A at pp. 5-3 to 5-9.) The Final EIS included the final evaluation of the potential impacts of the Project on sites and other properties subject to Section 4(f). (RJN ¶ 2; Exhibit B at pp. 5-1 to 5-73.) The City and the FTA conducted five public hearings on the Draft EIS for the Project. (RJN ¶ 17; Exhibit O; RJN ¶ 2; Exhibit B at p. 8-9, Appendix G.)

Many members of the public, including some of the Plaintiffs, submitted comments on the Draft EIS and the Final EIS. (RJN ¶¶ 2-3; Exhibit B, Appendix A; Exhibit C, Attachment C.) But at no time during the lengthy administrative process did any of the Plaintiffs claim that the Project violated Section 4(f) with respect to the following properties identified in the Plaintiffs' Complaint:

- Walker Park;

- Irwin Park;
- Mother Waldron Park;
- Queen Street Park;
- U.S. Naval Base Pearl Harbor National Historic Landmark;
- Merchant Street Historic District;
- DOT Harbors Division Building;
- Pier 10/11;
- Aloha Tower;
- Pacific War Memorial Site;
- Makalapa Navy Housing Historic District;
- Hawai‘i Employers Council; and
- Tamura Building.

(RJN ¶¶ 9-11, 13-15, 19-23, 25-28; Exhibits I, J, L, M, P, Q, R, S, U, V, W.)

The FTA evaluated the potential impacts of the Project on Section 4(f) Sites in the chapter of the Draft EIS dealing with potential impacts to parks and historic sites. (RJN ¶ 1; Exhibit A at pp. 5-1 to 5-40.) The Draft EIS also evaluates whether the Project will use Section 4(f) Sites and the extent of any impact on the Section 4(f) Sites, and it also identifies measures to minimize impacts to each Section 4(f) Site. (*Id.* at pp. 5-1 to 5-40.) Chapter 5 of the Final EIS, containing the Section 4(f) Statement, indicates the agencies' final conclusions regarding

compliance with Section 4(f). (RJN ¶ 2; Exhibit B at pp. 5-1 to 5-73.) The FTA's ROD includes the findings required by Section 4(f) for each Section 4(f) Site. (RJN ¶ 3; Exhibit C at pp. 10-11.) Nevertheless, Plaintiffs failed to submit any comments regarding the EISs' and Section 4(f) Statement's conclusion that the Project will not constitute a constructive use under Section 4(f) of Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, United States Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, Pier 10/11, and Aloha Tower. (RJN ¶¶ 9-11, 13-15, 19-23, 25-28; Exhibits I, J, L, M, P, Q, R, S, U, V, W ; *see also* RJN ¶¶ 1-3; Exhibit A, Appendix E; Exhibit B, Appendix A; Exhibit C, Attachment C.)

Plaintiffs also failed to submit comments regarding the determination that Project's use will be "*de minimis*" or "no use" with respect to the Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawaii Employers Council, and the Tamura building. (RJN ¶¶ 9-11, 13-15, 19-23, 25-28; Exhibits I, J, L, M, P, Q, R, S, U, V, W; *see also* RJN ¶¶ 1-3; Exhibit A, Appendix E; Exhibit B, Appendix A; Exhibit C, Attachment C.)

Finally, Plaintiffs failed to submit comments regarding the determination that the Project will not constitute a direct use of the Merchant Street Historic District. (RJN ¶¶ 9-11, 13-15, 19-23, 25-28; Exhibits I, J, L, M, P, Q, R, S, U, V, W; *see also* RJN ¶¶ 1-3; Exhibit A, Appendix E; Exhibit B, Appendix A; Exhibit

C, Attachment C.) In fact, the only site-specific comments submitted by any of the Plaintiffs were submitted by Hawai‘i’s Thousand Friends raising concerns related to Section 4(f) for the Ke‘ehi Lagoon Beach Park. (RJN ¶¶ 20, 26; Exhibits Q, W; *cf.* RJN ¶¶ 9-11, 13-15, 19, 21-23, 25, 27-28; Exhibits I, J, L, M, P, R, S, U, V; *see also* RJN ¶¶ 1-3; Exhibit A, Appendix E; Exhibit B, Appendix A; Exhibit C, Attachment C.)

Plaintiff Hawai‘i’s Thousand Friends generally commented that the Draft EIS did not contain adequate information regarding secondary and cumulative impacts on Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, and Aloha Tower. (RJN ¶ 20; Exhibit Q.) None of Hawai‘i’s Thousand Friends’ comments on the Draft and Final EISs, however, included the claim that the Project’s impacts to the above sites would violate Section 4(f) and none of these comments provided any basis whatsoever to conclude that the Project could constitute a direct or constructive use of these properties under Section 4(f). (RJN ¶¶ 20, 26; Exhibits Q, W.)

Section 4(f) imposes obligations on the FTA with regard to specific properties subject to Section 4(f). Section 4(f) imposes limitations on the “use” of a park or an historic site. 49 U.S.C. § 303(b). *See generally Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 530-33 (9th Cir. 1995) (reviewing the DOT’s Section 4(f) evaluation of 1.7 acres of reserve and 23 individual park

properties on a site-specific basis). Comments by some of the Plaintiffs that only raised generic issues regarding compliance with Section 4(f), but that failed to identify the nature of the violation with regard to a specific Section 4(f) site are not adequate to bring these issues to the attention of the decision maker/agency. The few plaintiffs who submitted general comments failed to structure their participation in a manner that alerted the FTA "to the [parties'] position and contentions, in order to allow the agency to give the issue meaningful consideration." *Pub. Citizen*, 541 U.S. at 764.

Plaintiffs have therefore waived their Section 4(f) claims with regard to all Section 4(f) sites with the exception of the single claim concerning Ke'ehi Lagoon Beach Park.

### B. The Claims of Certain Plaintiffs Who Failed to Participate in the Administrative Process At All Must Be Dismissed.

#### 1. *Participation in the Administrative Process is a Prerequisite to Challenging the FTA's Approval of the Project.*

It is axiomatic under *Public Citizen* that a person who fails to participate at all in a federal agency administrative process may not file a lawsuit to challenge the agency decision as a violation of the APA. The requirement established by *Public Citizen* that a party must structure their participation so that an agency can give meaningful consideration to their ideas and concerns necessarily means that a

party must participate in the agency's public review process – as a prerequisite to challenging the resulting environmental document in court.

Just as a party who submits comments but fails to raise certain concerns during the NEPA public review process cannot later resort to challenging the environmental documents in court, a party who fails entirely to participate in the public comment and review process cannot later bring claims challenging the NEPA review. Those Certain Plaintiffs who failed to raise their concerns before the FTA and the City at any time during the NEPA process forfeited their right to later challenge the Final EIS and ROD. *See also. McNair,* 629 F. 3d at 1076 (rejecting some claims and allowing others based on plaintiffs' participation in the administrative process); and *Quechan Indian Tribe v. Dep't of the Interior*, 547 F. Supp. 2d 1033 (D. Ariz. 2008).

The Ninth Circuit's majority opinion in '*Ilio*'*ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) does not alter this conclusion. There, the court held that *Public Citizen* followed the Supreme Court's observation that a plaintiff would not be barred in the narrow circumstance where an "EIS's flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Id.* at 1092 (quoting *Pub. Citizen*, 541 U.S. at 765). The '*Ilio*'*ulaokalani Coalition* majority concluded that, because the record contained ample evidence that the

Army had independent knowledge of the plaintiffs' concerns over the flaws in its EIS, "there is no need for a commentator to point them out specifically in order to preserve its ability to challenge the proposed action." *Id.* at 1093 (quoting *Pub. Citizen*, 541 U.S. at 765). On that basis, the court held that plaintiffs had not waived their right to challenge the sufficiency of the Army's consideration of alternatives. *Id.*

In his dissenting opinion, Judge Bea noted that the decision did not mean that a party failing to provide any comments during the NEPA process was in a better position than a party who had made some comments, but failed to comment on a specific element of the NEPA document. Indeed, it would make little sense to allow plaintiffs who wholly fail to participate in the public process required by NEPA to assert claims while plaintiffs who have participated in the agency's proceedings are barred from asserting claims related to issues that they failed to raise in the administrative proceedings. *Id.* at 1102-03.

This is not a case where the FTA's and the City's environmental documents contained flaws "so obvious" that they could be challenged even though a number of plaintiffs failed to submit comments. The Draft EIS and Final EIS conducted the requisite environmental review and disclosed information about all of the sites that the Project could potentially impact. (RJN ¶ 1-2; Exhibit A at pp. 3-1 to 3-54, 4-1 to 4-176, and 5-1 to 5-40; Exhibit B at pp. 3-1 to 3-76, 4-1 to 4-238, and 5-1 to

5-74.) These documents also discussed how the responsible agencies would address any impacts during the Project development process. (*Id.*) Plaintiffs' Complaint takes issue with the manner in which potential impacts are addressed, not the complete failure to address them. (*See* Complaint.) Thus, the limited exception to the exhaustion requirement recognized in '*Ilio*'*ulaokalani Coalition* does apply in this circumstance.

Moreover, the Court should decline to extend the "futility" exception to the exhaustion doctrine to allow Certain Plaintiffs to sue the Defendants when Certain Plaintiffs failed to participate in the administrative process. The Ninth Circuit has held that "[e]xhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious, where pursuit of administrative remedies would be a futile gesture, where irreparable injury will result unless immediate judicial review is permitted, or where the administrative proceeding would be void." *Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983).

Some district courts have held that, in the NEPA context, where at least one plaintiff has exhausted its administrative remedies, "it would be futile to require the remaining [plaintiffs] to do so as well," *Northcoast Envtl. Ctr. v. Glickman*, No. 95-00038, 1996 U.S. Dist. LEXIS 22845, at *10 (N.D. Cal. Aug. 16, 1996), *aff'd on other grounds*, 136 F.3d 660 (9th Cir. 1998); *see also Shasta Res. Council*

*v. U.S. Dept. of Interior*, 629 F. Supp. 2d 1045, 1052 (E.D. Cal. 2009) (holding that where two plaintiffs had exhausted all administrative remedies, and there is no dispute that all plaintiffs raise the same claims and arguments, "it would be futile to require a plaintiff to exhaust its administrative remedies where doing so would have no effect on the agency's response."); *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 937 (N.D. Cal 2006) (same). The Ninth Circuit has never extended the futility exception to the exhaustion of NEPA and Section 4(f) administrative remedies required by *Public Citizen*. It is inconsistent with *Public Citizen* and *Vermont Yankee* to allow Certain Plaintiffs to initiate a challenge to the agency decision when the Plaintiffs failed to participate at all in the administrative process.

**2. The Court Should Dismiss the Claims of Certain Plaintiffs.**

Certain Plaintiffs Benjamin J. Cayetano, Walter Heen, Randall Roth, and SBH failed to participate at any point during the public comment and review process for the Project. Thus, not only did they not alert the City and the FTA to their specific "concerns" regarding the Project, they failed to alert the FTA to any issues or concerns regarding the Project or compliance with federal law. These Certain Plaintiffs' complete failure to participate at all in the administrative process belies their standing allegations and their professed injury. Under *Public Citizen,* all of the claims of the above Certain Plaintiffs should be dismissed.

## VI. CONCLUSION

Plaintiffs' claimed violations of Section 4(f) with regard to Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, United States Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, Pier 10/11, Aloha Tower, the Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawai'i Employers Council, Merchant Street Historic District, and the Tamura Building should be dismissed because Plaintiffs failed to raise these claims in the administrative process.

Furthermore, all of the claims of Certain Plaintiffs Cayetano, Heen, Roth and SBH should be dismissed because these plaintiffs failed to participate in the lengthy administrative process for the Project in any manner whatsoever.

Dated: September 9, 2011.

/s/ Peter Whitfield

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