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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

MEGAN WONG, <i>et al.</i> ,	)	Case No. CV07-00484 HG LEK
	)	
Plaintiffs,	)	
vs.	)	
	)	Date: October 5, 2007
GEORGE W. BUSH, President	)	Time: 11:00 a.m.
of the United States, <i>et al.</i> ,	)	Ctrm: Aha Nonoi
	)	
Defendants.	)	Hon. Helen Gillmor
_____	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR TEMPORARY RESTRAINING ORDER

DECLARATIONS OF JAY S. SILBERMAN,  
DR. DENNIS J. MEAD, KATHLEEN MOORE ; ATTACHMENT "1";  
AND CPT CHARLES W. RAY; EXHIBITS "A" - "B"

CERTIFICATE OF SERVICE

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## INTRODUCTION

On August 31, 2007, the United States Coast Guard adopted a temporary rule on an emergency basis that creates a limited security zone in certain waters of Nawiliwili Harbor, Kauai, and on adjacent lands around the harbor, during the passage of the Hawaii Superferry. The temporary security zone is designed to allow the Coast Guard to protect public safety and property by preventing accidents which may cause personal injuries and damage to the harbor, the Superferry and other vessels.

Plaintiffs seek to invalidate and temporarily restrain the enforcement of the Coast Guard's temporary security zone on three primary grounds. First, they argue the Coast Guard violated provisions of the Administrative Procedure Act by bypassing the normal notice and comment process ordinarily required for agency rulemaking. Second, they argue the Coast Guard's National Environmental Policy Act categorical exclusion determination was invalid and that the Coast Guard should have first prepared an environmental assessment of the impact of the temporary security zone. Finally, Plaintiffs appear to contend that the temporary security zone impermissibly infringes on their First Amendment rights.<sup>1</sup>

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<sup>1</sup> Plaintiffs have sued George W. Bush, president of the United States and Commander in Chief of the Armed Forces of the United States, Michael Chertoff, Secretary of the United States Department of Homeland Security, Thad W. Allen, Commandant, United States Coast Guard, and Sally Brice-O'Hara, Rear Admiral, Commandant of the 14<sup>th</sup> District, United States Coast Guard, all in their official

Plaintiffs, as an initial matter, lack the standing necessary to proceed with their claims. Nor can Plaintiffs carry their heavy burden of showing any likelihood of success on the merits. The Coast Guard validly enacted the Nawiliwili Harbor temporary security zone on an emergent basis through well-established procedures that require only a showing of good cause - a showing that the Coast Guard has amply made in this case. No environmental assessment of the zone was necessary because the zone fell squarely within a valid categorical exclusion, and the Coast Guard documented that determination, consistent with NEPA regulations and Coast Guard implementing rules. Finally, because the Coast Guard's security zone-creating rule is content-neutral, and sets aside specific, visible areas for expressive activity, there is no First Amendment violation. Plaintiffs' Motion for a Temporary Restraining Order should be denied.

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## I. STATEMENT OF THE CASE

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capacities. Though the United States Attorney's Office has been served with process, confirmation of proper service on each Defendant pursuant to Fed.R.Civ.P. 4(i)(2)(A) has not been received, in part, because no certificate of service accompanied Plaintiffs' filing. Given the immediacy of these proceedings, the United States Attorney's Office is appearing specially for each Defendant, reserving all procedural and substantive defenses, including insufficiency of process.

A. Factual Background

The Hawaii Superferry (HSF) is a 349-foot long passenger vessel documented by the U.S. Coast Guard with an endorsement for coastwise trade, and certified for large passenger vessel service in the United States. *See* Declaration of Charles W. Ray, Captain, USCG ("Ray Decl."), ¶2. The HSF can carry 866 passengers and as many as 282 cars (or a combination of 28 40-ft trucks and 65 cars), and reaches speeds up to 40 knots.

Billed as Hawaii's first inter-island vehicle-passenger service, and as an alternative to local airline travel, the HSF is intended to serve Oahu, Maui and Kauai with plans for expansion to other islands. The operation is reported to have cost its owners approximately \$200 million, with another \$40 million in taxpayer dollars spent on harbor improvements to accommodate the HSF.

On August 23, 2007, as a result of legal action filed by the Sierra Club and others, the Hawaii Supreme Court ruled that the State of Hawaii Department of Transportation (HDOT) erred in granting the HSF an exemption from environmental review under the Hawaii Environmental Policy Act. The HDOT determined, however, that the ruling did not prohibit ferry operations from occurring prior to the environmental review. Accordingly, on August 26, 2007,

HSF began inter-island service between Oahu and Maui, and between Oahu and Kauai.

HSF enters Kauai at Nawiliwili Harbor, a federally maintained waterway. Ray Decl., ¶3. During HSF's inaugural trip to Kauai on August 26, 2007, nearly 40 swimmers and persons on kayaks and surfboards blocked Nawiliwili Harbor's navigable channel entrance to obstruct the lawful entry of the HSF into Kauai. *Id.* Many of these individuals entered the water from the jetty that is south of Nawiliwili Park, which is adjacent to the Matson shipping facility in Nawiliwili Harbor. Others ashore at the jetty threw rocks and bottles at Coast Guard personnel who were conveying detainees to shore. Coast Guard Station Kauai resources were eventually able to clear the channel for HSF's arrival while also ensuring the personal safety of those in the water, enabling the HSF to dock on August 26, 2007. *Id.*

On August 27, 2007, the following day, approximately 70 individuals entered the water, again to block the channel entrance, thereby preventing HSF from arriving in port. *Id.* at ¶4. Due to the difficulty of maneuvering in the small area of Nawiliwili, and in the interest of ensuring the safety of those in the water, the HSF's master chose not to enter the channel until the Coast Guard had cleared the channel. However, because the vessel remained outside the harbor, and

because individuals did not approach to within 100 yards of the vessel, the existing security zone (*see* 33 C.F.R. § 165.1410) did not provide the Coast Guard with the authority to control entry into Nawiliwili Harbor or clear the channel of individuals before the HSF commenced its transit into the harbor. After waiting for three hours, and with nearly 20 persons still in the water and actively resisting efforts at removal, the HSF was forced to return to Oahu without mooring in Kauai. On August 28, 2007, HSF voluntarily suspended operations to Kauai. *Id.* at ¶¶4-5.

On August 31, 2007, with the prospect of the resumption of HSF service at any time, the Coast Guard's Fourteenth District Commander established a fixed temporary security zone in Nawiliwili Harbor through emergency rulemaking. *See* 33 C.F.R. § 165.T14-160, "Security Zone; Nawiliwili Harbor, Kauai, HI." The rule was published in the Federal Register on September 5, 2007 and is in effect until October 31, 2007. *See* Ray Decl., ¶6 and Exhibit A thereto.

The purpose of the Coast Guard's emergency rule is several-fold. First, by designating certain waters of Nawiliwili Harbor as a security zone activated for enforcement 60 minutes before the HSF's arrival into the zone through 10 minutes after its departure from the zone, the regulation provides the Coast Guard with the authority to prevent persons and vessels from endangering themselves and HSF passengers and crew by attempting to impede the vessel's passage after it

commences the difficult transit into the harbor. Extending the temporary security zone to Nawiliwili Jetty and its access road provides law enforcement personnel with the authority necessary to control access into the water so the HSF may enter and depart the harbor safely and unimpeded by those seeking to obstruct transit. Additionally, the temporary security zone makes land adjacent to the harbor available for law enforcement purposes, an area that in fact will be used by the Patrol Commander as the incident command post during any HSF protests. Ray Decl., ¶7.<sup>2</sup>

Excluded from the temporary security zone are two sizeable areas within the harbor where demonstrators may lawfully assemble and convey their message in a safe manner to their intended audience. *See* 33 C.F.R. § 165.T14-160(a) (“excluding the waters west of a line running from the southeastern most point of the breakwater of Nawiliwili Small Boat Harbor due south to the south shore of the harbor” and “excluding the waters from Kalapaki Beach south to a line extending from the western most point of Kukii Point due west to the Harbor Jetty”). The

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<sup>2</sup> 33 C.F.R. § 165.33 prohibits persons or vessels from entering or remaining in the security zone unless authorized by the Captain of the Port (COTP), Honolulu. 33 C.F.R. § 165.33 also requires any person or vessel in the security zone to obey any order or directive of the COTP, and it permits the COTP to take possession or control of any vessel in the security zone.

excluded areas are visible to observers ashore, at the HSF mooring facility, aboard the HSF when transiting the harbor, and from the air. Ray Decl., ¶8.

In addition to the fixed temporary security zone in Nawiliwili Harbor described above, 33 C.F.R. § 165.1410 creates a 100-yard security zone around large passenger vessels (LPV), such as the HSF, whenever such vessels are in Nawiliwili Harbor. This security zone moves with a moving vessel and becomes a fixed zone when the vessel is moored, at anchor, or position-keeping. Both the moving security zone and fixed temporary security zone, when in effect, complement one another.

Though the HSF was scheduled to resume service to Kauai on September 26, 2007, the company issued a statement on September 21, 2007 that announced its intention to suspend operations to Kauai "indefinitely." Nonetheless, the company has not renounced its intent to resume sailing to Kauai as soon as it is feasible and practical to do so, and there is no legal prohibition that dictates otherwise.

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## B. Procedural History

On August 27, 2007, the Sierra Club of Maui, Maui Tomorrow and the Kahului Harbor Coalition sought relief in Hawaii State court in Maui requesting an injunction prohibiting HSF operations in Maui until completion of an environmental assessment (EA). The Second Circuit Court of the State of Hawaii issued a Temporary Restraining Order (TRO) prohibiting HSF commercial voyages from operating between Oahu and Maui and is now considering the issuance of a preliminary injunction. The Maui orders do not prohibit HSF operations between Oahu and Kauai.

On September 4, 2007, a local environmental group named People for the Preservation of Kauai filed an *ex parte* motion in the Fifth Circuit Court of the State of Hawaii seeking a TRO to block the HSF from Nawiliwili Harbor. The State court denied the TRO request and, on September 21, 2007, dismissed plaintiffs' environmental claims on timeliness grounds. On September 27, 2007, Plaintiffs dismissed their remaining claims to permit an appeal of the court's dismissal of the environmental claims.

On September 19, 2007, Plaintiffs filed their complaint in this case, seeking a declaratory judgment invalidating the security zone regulation, and a TRO and preliminary injunction preventing the Coast Guard from enforcing the emergency security zone. On the same day, Plaintiffs filed a motion for a TRO. On

September 20, 2007, Plaintiffs filed a first amended complaint seeking the same relief. On September 24, 2007, Plaintiffs withdrew their TRO request and lodged a second amended complaint, which principally seeks to add defendants, including Hawaii Superferry, Inc. (HSI) and the United States Department of Transportation (USDOT), and seeks to expand the scope of the allegations to include a challenge to USDOT's loan guarantees to HSI. On September 26, 2007, Plaintiffs re-filed their motion for a TRO challenging the Coast Guard's security zone for Nawiliwili Harbor, which this Court set for hearing on October 5, 2007.

## II. ARGUMENT

### A. In Order To Obtain A TRO, Plaintiffs Bear The Burden Of Proving A Likelihood Of Success On The Merits By Clear And Convincing Evidence.

Plaintiffs seek a TRO "preventing the Coast Guard from implementing the Superferry Security Zone Rule or any similar rule." *See* First Amended Complaint, ¶ 102. The issuance of a TRO, like that of a preliminary injunction, is an extraordinary remedy, the entitlement to which must be proven by clear and convincing evidence. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 442 (1974); *Arakaki v. Cayetano*, 198 F. Supp. 2d 1165, 1173 (D. Haw. 2002).

To obtain a TRO, “a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Ranchers Cattleman Action Legal Fund v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1092 (9th Cir. 2005).

Alternatively, a plaintiff must demonstrate “*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.” *Id.* The alternative test is formulated to “represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.” *Id.*

B. Plaintiffs Lack Standing To Challenge The Coast Guard's Security Zone Rule.

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In order to demonstrate standing, a party invoking the jurisdiction of a federal court must establish that he has suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the Constitution. *Cetacean Community v. Bush*, 386 F.3d 1169 (9<sup>th</sup> Cir. 2004). In order to meet the requirement for Article III standing, a plaintiff must establish that: (1) he has suffered an "injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or

hypothetical," (2) the injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court," and (3) it is "likely as opposed to merely speculative" the plaintiff's injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Whether a party has Article III standing is a requirement of subject matter jurisdiction which this court must address before considering the merits of the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96, 104 (1998).

Plaintiffs do not have standing to challenge the Coast Guard security zone at issue because many of Plaintiffs' allegations of harm are not judicially cognizable. Plaintiffs' alleged environmental harms, for instance, grow out of the operation of the HSF by a private entity and are not fairly traceable to any of the federal defendants before this Court.<sup>3</sup> Even if Plaintiffs' judicially cognizable harms, to the extent there are any, were sufficient to satisfy standing, Plaintiffs' failure to

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<sup>3</sup> As previously noted, the First Amended Complaint names President Bush, Secretary Chertoff, Commandant Allen, and Admiral Brice-O'Hara as Defendants. While Plaintiffs seek leave to file a Second Amended Complaint naming HSF and others as defendants, HSF is not presently a party to this suit.

demonstrate that they have availed themselves of a mechanism to avoid such potential harms means this case is not ripe for resolution.

1. The Security Zone Does And Will Not Cause Environmental Consequences To Kauai And Thus Plaintiffs Cannot Establish Standing Through Allegations Of Such "Harms."

Plaintiffs' Motion is founded on the assertion that "the security zone activation results in Superferry adversely impacting the environment of Kauai." Plfs' Motion at 12. It is therefore important to precisely define what the challenged federal government action (the temporary regulation creating the Coast Guard security zone) does, and what it does not do.

What the temporary regulation does is place certain portions of Nawiliwili Harbor and the Nawiliwili jetty briefly off-limits to those who have not received permission to be in or on the off-limits water or land areas. The regulation puts those waters and land areas off-limits to prevent injury or death to individuals who have demonstrated their willingness to put themselves in harm's way to block HSF's entry into the harbor; to protect passengers and crew aboard the HSF, who would be at risk of injury or death if the HSF were forced to undertake abrupt and emergency maneuvers to avoid protesters in the close confines of Nawiliwili Harbor; to protect the vessel itself and the harbor from channel blockage, oil spills, and the like which are possible consequences of the vessel running aground or

sinking as a result of being forced to undertake abrupt and emergency maneuvers in the close confines of Nawiliwili Harbor; and to protect the safety of law enforcement personnel, who are faced with a passionate crowd that has already demonstrated its capacity for violence by throwing rocks, bottles, and other dangerous objects at Coast Guard personnel performing their duties during previous HSF arrivals into Nawiliwili Harbor.

The challenged federal action does not bring the HSF to Kauai. In fact, there are no legal impediments to the HSF sailing to Kauai at this time. While it might be unsafe for the vessel to attempt to enter Nawiliwili harbor without the challenged temporary security zone being activated and in effect, there is nothing precluding the vessel from going to Kauai without the zone being activated, or even in existence at all. The zone does not spoil the island's beauty. It does not bring an influx of drugs, tourists, vagrants, invasive species, or anything else, of any nature, to the island. It does not pollute the island or change its character. It does not injure or kill whales or other marine creatures. All the zone does, as stated above, is put certain portions of Nawiliwili Harbor and the Nawiliwili jetty briefly off-limits, in the interest of safety, to those who have not received permission to be in or on the off-limits water or land areas.

In order to establish standing, a plaintiff must show, among other things, that his or her “injury” is fairly traceable to the challenged action of the defendant. *Cetacean*, 386 F.3d at 1174. Many of Plaintiffs’ stated concerns reflect anger at the HSF’s arrival into Nawiliwili Harbor on August 26 and 27, 2007, and events related to those arrivals; express passionate opposition to the HSF because of its supposed effects on the island and marine life in and around the Hawaiian Islands; express a desire to continue opposition to the HSF; and express other related sympathies and convictions. Such statements are entirely irrelevant to establishing any judicially cognizable “harm” related to possible activation of the Coast Guard security zone, since the alleged harm, even if it occurs, is not “fairly traceable” to the challenged federal government action. Since the statements of Plaintiffs Megan Wong, Noelle Wong, Eden, Brown, Sacco, Raeback, Sacher, Christe, Trinque, Newland, Tepley, Massey, Jay and Harden relate to harms that cannot possibly be caused by the security zone’s activation, were it to ever be activated, those Plaintiffs have not established actual or potential harms that are sufficient to establish standing. To the extent that harms of that nature are also alleged in the statements of Plaintiffs Tadonnio, Coon, Bower, Holland, Taylor, Wiedner, Mireles, and Freigang – all of whom have alleged that they are recreational users of Nawiliwili Harbor, which, in the absence of any other considerations, might be

sufficient to confer standing to them (*see* discussion in B.3., *infra*) – those allegations must also be deemed irrelevant and incapable of establishing standing in this matter.

2. Plaintiffs Have Not Shown Any Real Or Immediate Threat Of First Amendment Injuries Sufficient To Confer Standing Over Such Claims.

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Plaintiffs lack standing to assert any First Amendment claims arising out of the enactment and enforcement of the temporary security zone. "[W]hen plaintiffs seek to establish standing to challenge a law or regulation that is not presently being enforced against them, they must demonstrate 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9<sup>th</sup> Cir. 2000), *quoting Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). When there is a "credible threat" that the provision will be invoked, and the enforcement implicates First Amendment rights, the Ninth Circuit takes a generous view towards standing. *Id.* at 1154-55.

Nonetheless, Plaintiffs' allegations here fail to demonstrate the "credible threat" from the activation and enforcement of the temporary security zone sufficient to implicate their First Amendment rights. While the cover page of the First Amended Complaint references the First Amendment, only Plaintiff Jeff

Sacher alleges a potential violation of his expressive rights. Sacher alleges his belief that the Coast Guard security zone "severely restricts, if not completely voids, his First Amendment right to free speech." First Amended Complaint, ¶ 47.

The motion for TRO offers little more, making vague allegations that the temporary zone will suppress free speech, without indicating the time, place or manner in which such speech would otherwise be made. Such vague allegations are insufficient to establish concrete injuries for purposes of the standing inquiry, or that this matter is ripe for adjudication.

In *Elend v. Basham*, 471 F.3d 1199 (11<sup>th</sup> Cir. 2006), the Eleventh Circuit held that similar claims were too speculative to be justiciable. The *Elend* plaintiffs were arrested after refusing to confine their activities at a political rally attended by President Bush to a "protest zone" set up by law enforcement authorities. Plaintiffs later brought suit in federal court against the Secret Service and a local sheriff, seeking declaratory relief and an injunction against "any further constitutional violations," without giving "further explication of the time, location, audience, or nature of protest activity contemplated." *Id.* at 1203-1204. The district court dismissed the complaint because these claims were "too speculative to satisfy the requirements of both standing and ripeness." *Id.*

On appeal, the Eleventh Circuit affirmed. The court held that, in the absence of a description of "when or where or how such a protest might occur," plaintiffs' claims remained "wholly inchoate." *Id.* at 1209. The court reasoned that the "putative injury" also lacked redressability, as the vagueness of the claim provided "an insurmountable obstacle for a court to fashion an injunction that accomplishes anything beyond abstractly commanding the [government] to obey the First Amendment." *Id.* The court concluded:

When a case involving prospective relief provides a court with no factual assurance that future injury is likely and no clues about its contours should such an injury arise, we are left with only the faintest picture of a possible constitutional transgression occurring someday, somewhere in this country. Such a claim is not fit for adjudication by this Court.

*Id.* at 1211-12.

Plaintiffs' claims here are similarly not fit for adjudication. Plaintiffs may wish to float in the harbor and obstruct the HSF's passage while expressing their views. The First Amendment does not, however, protect speech that harms the health, safety or welfare of persons. *See Hill v. Colorado*, 530 U.S. 703 (2000). Plaintiffs have failed to allege how their desired expressive activities will be curtailed in any cognizable way by the security zone. They have neither shown a concrete injury or redressability, or that their First Amendment challenge to the security zone is ripe. Such claims thus are not justiciable.

3. Although Plaintiffs Allege Potential Recreational Harm Typically Sufficient To Confer Standing, They Have Failed To Avail Themselves Of An Available Mechanism To Avoid Such Harm, And Thus Cannot Establish Ripeness Or Standing.

Ninth Circuit case law indicates that plaintiffs alleging agency interference with future recreational use of the environment generally have standing under NEPA. *Nuclear Information & Resource Service v. Nuclear Regulatory Commission*, 457 F.3d 941, 949-50 (9<sup>th</sup> Cir. 2006)(citing *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961, 969-970 (9<sup>th</sup> Cir. 2003)). Such allegations involve establishing “the ‘reasonable probability’ of the challenged action's threat to [his or her] concrete interest.” *Hall v. Norton*, 266 F.3d 969, 977 (9<sup>th</sup> Cir. 2001).

As discussed in B.1. *supra*, however, many of the Plaintiffs have not established any reasonable probability of the challenged government action threatening the environment, aesthetics or anything else of that nature, and many, indeed, have not even alleged it. The only possible NEPA-related threat posed by the security zone is to recreational users of Nawiliwili Harbor, who might be restricted in their ability to engage in recreation in the off-limits areas designated by the temporary zone upon the zone’s activation. Only Plaintiffs Tadonnio, Coon, Bower, Holland, Taylor, Wiedner, Mireles, and Freigang allege that they are

legitimate recreational users of Nawiliwili Harbor.<sup>4</sup> Nonetheless, there are additional factors that overcome this generalized NEPA standing analysis, which indicate that *none* of the Plaintiffs has established standing.

The regulation at issue makes it clear that even when the temporary zone is activated, and thus the off-limits water and land areas are in effect, persons who desire to enter the zone may do so if they obtain permission from the Captain of the Port of Nawiliwili Harbor ("COTP").<sup>5</sup> A telephone number has been established and publicized, by which persons who desire to use off-limits areas for legitimate recreational pursuits while the zone is activated can request such permission.

Declaration of Katherine Moore ("Moore Decl."), ¶3. As of September 28, 2007, no requests to utilize the zone while it is activated have been received.<sup>6</sup> *Id.* None of the Plaintiffs allege that they have attempted to obtain such permission.

Furthermore, none of the Plaintiffs allege that they have been denied permission by the COTP to utilize the land and water areas of the security zone, were it to be

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<sup>4</sup> Plaintiff Holland is overseas, and thus could not possibly be affected in her ability to pursue recreational activities in Nawiliwili Harbor, even if the zone were to be activated.

<sup>5</sup> The COTP is Captain Vince Atkins, Commander, Coast Guard Sector, Honolulu.

<sup>6</sup> The Coast Guard has been in close touch with representatives of several Kauai canoe clubs and has advised them that requests to enter the security zone during periods of activation would be entertained on a case-by-case basis and in consultation with the State Department of Land and Natural Resources. Moore Decl., ¶4.

activated. This failure by Plaintiffs to allege and establish that they have attempted to utilize an established and well-publicized mechanism that affords them the opportunity to avoid the harm they claim they face should lead this Court to conclude that the controversy is not ripe, and that the Plaintiffs do not have standing to challenge the temporary security zone based upon alleged recreational harms they might suffer upon the zone's activation. *Madsen v. Boise State University*, 976 F.2d 1219, 1220 (9<sup>th</sup> Cir. 1992) ("plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit"); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 56 (D.C. Cir. 1991) (same).

In short, Plaintiffs' allegations that a speculative event might cause them harm without first exploring whether the established permission process might alleviate or eliminate that possible harm "leave(s) the dispute between the parties too nebulous for judicial resolution." *Madsen*, 976 F.2d at 1221; *see also Porter v. Jones*, 319 F.3d 483, 490 (9<sup>th</sup> Cir. 2003)(*quoting Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9<sup>th</sup> Cir. 1996)(a "case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur")); *DBSI/TRI IV Limited Partnership v. United States*, 465 F.3d 1031, 1039 (9<sup>th</sup> Cir. 2006)(where "injunctive relief and a declaratory judgment are sought with regard to an

administrative determination, the courts traditionally have been reluctant to grant such relief unless there is a controversy ripe for judicial resolution").

C. Plaintiffs' APA Claims Lack Any Merit And Raise No Serious Questions Regarding The Coast Guard's Regulatory Authority Or Actions.<sup>7</sup>

Invoking the APA, Plaintiffs assert three challenges to the Coast Guard's emergency rulemaking activities relating to the establishment of the Nawiliwili Harbor security zone. First, they contend that the Coast Guard had no reason to enact a rule on an emergency basis and without a public notice and comment period. Plf's Motion at 5-9. Second, they contend that the Coast Guard lacks the authority to create the type of security zone at issue in this case. Plf's Motion at 9-12. Third, they contend that the rule here is invalid because it prescribes the effective date and duration of the security zone in the preamble to, and not in the body of, the rule. Plf's Motion at 3-4. None of these claims has merit.

1. The Coast Guard Has The Authority To Create The Security Zone At Issue Here Without The Delay Accompanying Ordinary APA Rulemaking.

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<sup>7</sup> Plaintiffs' claims under the APA and NEPA must be dismissed at least as against President Bush, because the President's actions are not reviewable under the APA. See *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Guerrero v. Clinton*, 157 F.3d 1190, 1191 n.2 (9th Cir. 1998).

The Nawiliwili Harbor security zone was established by a temporary final rule, issued without prior public notice and comment, and made effective on September 1, 2007. *See* Exh. A to Ray Decl. 5 U.S.C. Section 553(b)(B) provides that the APA's normal rulemaking procedures do not apply “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The Ninth Circuit has held that an “inquiry into whether the Secretary properly invoked ‘good cause’ proceeds case-by-case, sensitive to the totality of the factors at play.” *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212 (9th Cir. 1995), citing *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984). Normally, notice and comment procedures may be waived only when “delay would do real harm.” *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982), quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979), *reh'g granted*, 598 F.2d 915 (1979).

Plaintiffs allege that the Coast Guard "declared an emergency and rushed to adopt the rule at issue" without cause. Plf's Motion at 7. According to Plaintiffs, any emergency existed only on August 26 and 27 when the HSF attempted to enter Nawiliwili Harbor, not four days later when the Coast Guard enacted its security zone rule. *Id.* at 6-7.

Plaintiffs' zeal to find fault with the Coast Guard's actions has apparently caused the loss of perspective. The Coast Guard based its Section 553(b) good cause findings on the knowledge that HSF operations could resume "at any time." There was and today is no legal impediment to the resumption of HSF service to Kauai and, as Plaintiffs here have made abundantly clear, such a resumption of operations *will* be accompanied by the immediate resumption of protest activities.<sup>8</sup> Indeed, the Coast Guard anticipated that renewed protest activities could involve "mass protests" in which protesters would attempt to impede the HSF's entry into Nawiliwili Harbor on a scale similar to, or worse than, the incidents of August 26 and 27, 2007. 72 FR at 50877. Under these circumstances, the Coast Guard legitimately found that adherence to normal APA procedures would be both "impracticable" and "contrary to the public interest." *Kellam v. Burnly*, 673 F.Supp. 71, 72 (D.R.I. 1987)(giving deference to the Coast Guard in determining whether good cause exists under 5 U.S.C. §§ 553(b)(B) and (d)(3)).

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<sup>8</sup> For instance, Plaintiff Megan Wong asserts that if HSF returns, she plans "to definitely be there to block [it] at whatever the cost. We will not back down...Many of us are putting our life...on the line." First Amended Complaint, ¶41. Plaintiff Jeff Sacher expresses similar sentiment. Though "people planning to prevent the Superferry from entering Nawiliwili Harbor have been trained in non-violent resistance," "passions will be running high" and the "situation could get out of control resulting in serious injuries." *Id.* at ¶47.

One of the Coast Guard's "primary duties," and hence one of its most important functions, is to protect the safety of lives and property at sea. 14 U.S.C. § 2. The normal APA procedural requirements of prior notice and opportunity for public comment, and a 30-day period between the date of a rule's publication and the date of its effectiveness, necessarily make immediate regulatory action impossible. Given that the Coast Guard anticipated the resumption of HSF operations "at any time," and the consequent resumption of protests that even Plaintiffs admit could jeopardize the safety of lives and property at sea, the Coast Guard plainly had good cause to find that following normal APA procedures would impede the timely execution of its safety-protecting functions. The issuance of a temporary rule, only two months in duration, to ensure safety in the short term, coupled with the active enforcement of security zone restrictions only during short periods when the HSF is actually approaching, visiting, or exiting Nawiliwili Harbor, and offering a subsequent opportunity for public comment to shape the contours of any final regulation (*see* Ray Decl., Exh. A), constitutes a measured response that addresses an immediate need while preserving the public's right to participate in permanent rulemaking. *U.S. v. Gavrilovic*, 551 F.2d 1099, 1104 (8<sup>th</sup> Cir. 1977)(Normal APA procedures are "contrary to the public interest" when there

is an “urgency of conditions coupled with demonstrated and unavoidable limitations of time”).

2. The Coast Guard Has Proper Authority To Establish And Enforce The Subject Security Zone Under The Magnuson Act, 50 U.S.C. §191.

In challenging the Coast Guard’s authority to establish the security zone at issue, Plaintiffs ignore the scope of the Coast Guard’s authority under the Magnuson Act. *See* 50 U.S.C. § 191. Under 50 U.S.C. § 191, the President of the United States has the authority “to institute such measures and issue such rules and regulations ...to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States.” The Act authorized President Truman in Executive Order 10173 (October 18, 1950) to proclaim that the security of the United States was threatened and to issue regulations at 33 C.F.R. Part 6 to “safeguard vessels, harbors, ports, and waterfront facilities.” These regulations have been amended by Executive Order 10277 (August 1, 1951), Executive Order 10352 (May 19, 1952), Executive Order 11249 (October 10, 1965), Executive Order 13143 (December 6, 1999), and Executive Order 13273 (September 3, 2002).

In Executive Order 10173, President Truman stated, "I hereby find that the security of the United States is endangered by subversive activity...", a finding that has never been repealed. Implicit in subsequent Presidential amendments to 33 C.F.R. Part 6 is that the security of the United States continues to be endangered. In Executive Order 11249, President Johnson amended 33 C.F.R. § 6.04-6 to permit the COTP "to establish security zones subject to the terms and conditions specified in (33 C.F.R.) § 6.01-5." Section 6.01-5, also amended by this Order, restricts this authority to establish a security zone to cases in which the COTP deems it necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.

Federal courts have consistently recognized the validity and scope of 33 C.F.R. Part 6 powers to create security zones. *See U.S. v. Aarons*, 310 F.2d 341 (2d Cir. 1962); *Kellam v. Burnley*, 673 F.Supp. 71 (D.R.I. 1987); *U.S. v. Allen*, 924 F.2d 29 (2d Cir. 1991). In *Aarons*, addressing the issue of Coast Guard authority to issue regulations under the Magnuson Act, the court stated:

It is immaterial whether the execution of the CNVA's announced intention "to block the launching of the Ethan Allen" would constitute "subversive activity," although we do not understand why it would not. The statute says that so long as the President has found that the security of the United States is threatened generally by subversive activity, he may

promulgate regulations to safeguard vessels not only from "sabotage or other subversive acts" but also from accidents.

*Aarons*, 310 F.2d at 344.

The Coast Guard has the authority to create and enforce a security zone in Nawiliwili Harbor and the Captain of the Port has exercised his rule-making authority pursuant to 33 C.F.R. §§ 6.01-5 and 6.04-6 to establish a security zone. *See* 72 Fed. Reg. at 50879 (Sept. 5, 2007) (citing as “Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.”). As described in 33 C.F.R. §165.T-14-160, the security zone is activated 60 minutes prior to the arrival of the HSF into Nawiliwili Harbor, and remains activated for 10 minutes after the departure from the zone. 72 Fed. Reg. at 50877 (Sept. 5, 2007). Persons and vessels in the security zone without COTP approval face possible civil penalties and criminal charges. 50 U.S.C. §§192(a), 192(c)(2007).

Two predicates are necessary before the COTP may promulgate rules and regulations pursuant to §§ 6.01-5 and 6.04-6. First, the threatened harm must stem “from sabotage or other subversive acts, accidents, or other causes of similar nature.” 50 U.S.C. § 191. Second, the Captain of the Port must deem it necessary “to prevent damage or injury to any vessel or waterfront facility, to safeguard

ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.” 33 C.F.R. § 6.01-5. With respect to the first predicate, the security zone in Nawiliwili Harbor is designed to protect commercial and private vessels and a United States-controlled waterway from both intentional and unintentional acts stemming from individuals, including some of Plaintiffs here, who have outwardly expressed little regard for authority or order, and some of whom have already exhibited a penchant for violence. Nothing more is required. *Aarons*, 310 F.2d at 344.

With respect to the second predicate, the COTP deemed the Nawiliwili Harbor security zone necessary to prevent damage or injury to vessels and facilities, and to safeguard ports, harbors, territories, and waters of the United States, especially in light of the numerous explicit threats to obstruct the safe passage of the HSF, including those made by some of the Plaintiffs here. Courts are hesitant to “second-guess the executive...when there is no indication that the action taken was anything but a good faith effort to protect property deemed essential to interests of United States.” *See Aarons*, 310 F.2d at 344-45 (upholding a security zone established under the Magnuson Act based on the government’s legitimate interest in protecting naval vessels); *Allen*, 924 F.2d at 31 (upholding a security zone in waters adjacent to U.S. naval installation).

Plaintiffs' failure to acknowledge the Coast Guard's authority to establish the Nawiliwili Harbor temporary security zone under the Magnuson Act evidences their inability to support their claim that the security zone-creating rule "has no basis in law and is void." Plfs' Motion at 12. There is therefore no merit to Plaintiffs' authority-based APA challenge.

3. Plaintiffs' Objection To The Location Of  
The Rule's Effective Dates Elevates Form  
Over Substance.

Plaintiffs contend the rule creating the Nawiliwili Harbor security zone is defective because it does not contain a "standard section on effective dates." Plfs' Motion at 2-3. Whatever Plaintiffs mean by "standard section," they nowhere contend that they lack notice or knowledge of the rule's effective dates. In fact, the "Dates" section, a required part of a rule's preamble, states, "This rule is effective from September 1, 2007, through October 31, 2007." *See* 72 Fed. Reg. 50877 (September 5, 2007), Exh. A to Ray Decl.

The placement of the effective period of a temporary final rule in the "Dates" section of the preamble to the rule, and not in the body of the regulatory text portion of the rule, is a common Coast Guard practice that is not prohibited by any reference or citation offered by Plaintiffs. This practice does not violate regulations of the Administrative Committee of the Federal Register concerning

the submission of rulemaking documents for publication in the Federal Register. *See* 1 C.F.R. § 18.17 (no requirement that effective dates be placed in regulatory text). Nor does it violate the regulations for temporary or other rulemaking documents subject to codification in the Code of Federal Regulations. *See* 1 C.F.R. § 21.30 (effective date or dates must only be within document).

In short, the dates referenced in the Coast Guard's rule comply with all applicable requirements. Equally important, Plaintiffs have actual and constructive notice of the Rule's effective dates, and they have asserted nothing to the contrary. Their complaints therefore have no merit.

D. Plaintiffs' NEPA Claims Do Not Present A Serious Challenge To The Coast Guard's Actions

Plaintiffs invoke NEPA and seek a declaration that the “analysis used to support the [September 5, 2007 temporary rule] is legally erroneous.” First Amended Complaint, ¶ 94. Because Plaintiffs' Complaint does not raise serious questions about the merits of the Coast Guard's compliance with NEPA, it cannot

serve as the basis for a temporary restraining order.<sup>9</sup> *See Ranchers Cattleman Action Legal Fund*, 415 F.3d at 1092.

NEPA does not prescribe any specific process an agency must follow in determining that a CE applies. The agency must simply explain its decision in a reasoned manner. *See California v. Norton*, 311 F.3d 1162, 1175-76 (9<sup>th</sup> Cir. 2002) (noting that in many instances, a “brief statement that a categorical exclusion is being invoked will suffice”). “Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference.” *Alaska Ctr. for the Env’ v. U.S. Forest Service*, 189 F.3d 851, 859 (9<sup>th</sup> Cir. 1999).

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<sup>9</sup> As a preliminary matter, Plaintiffs’ Complaint fails to state a cause of action under NEPA. Though some Plaintiffs state that they use Nawiliwili Harbor for recreational purposes, none of them allege that the security zone at issue would harm their ability to use the harbor for recreational purposes in any way. Further, the Complaint merely lists Plaintiffs’ interpretation of what NEPA requires. There is no indication of what provisions of NEPA or its implementing regulations Plaintiffs believe were violated. *See* First Amended Complaint, ¶¶ 67-90. At best, the Complaint makes a general plea for a declaratory judgment ruling that “the analysis used to support the adoption of the rule is legally erroneous,” and that “the findings used to support the rule are invalid because the analysis underlying the findings is legally erroneous.” *Id.* at ¶¶ 94, 95. Even giving Plaintiffs the benefit of taking the factual allegations as true, nothing in the Complaint supports a claim that the categorical exclusion (CE) that the Coast Guard issued for the temporary rule was legally deficient under NEPA. Plaintiffs’ NEPA “claim” therefore should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

In this case, the Coast Guard relied upon a CE which squarely encompasses “[r]egulations establishing . . . security or safety zones.” 59 Fed. Reg. at 38658 (codified as Commandant Instruction M16475.1, Fig. 2-1, para. 34(g)). Using a standard checklist of environmental factors, the Coast Guard determined that there were no extraordinary circumstances present that would require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Because the Coast Guard’s determination was not arbitrary or capricious, Plaintiffs’ claims must be rejected. *See Bicycle Trails Council v. Marin*, 82 F.3d 1445, 1456 n. 5 (9th Cir. 1996) (“An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious”).

1. The Coast Guard’s Decision That The Temporary Rule Falls Within CE #34(g) Was Reasonable

The CE that the Coast Guard found applicable to the temporary rule states as follows:

The following are actions that, unless consideration of the factors in section 2.B.2.b. trigger the need to conduct further analysis, are categorically excluded from further analysis and documentation requirements under NEPA...

\* \* \*

(34) Promulgation of the following regulations: . . .

\* \* \*

(g) Regulations establishing, disestablishing, or changing  
Regulated Navigation Areas and security or safety zones

.....

59 Fed. Reg. at 38658 (codified as Commandant Instruction M16475.1, Fig. 2-1, para. 34(g)).

The September 5, 2007 temporary rule for the Nawiliwili Harbor security zone fits squarely within CE # 34(g). *See Ray Decl., Exh. B.* As described in the regulatory preamble, the temporary rule “creates a security zone in most of the waters of Nawiliwili Harbor, and on Nawiliwili Jetty in Nawiliwili Harbor.” 72 Fed. Reg. at 50877. The security zone will be activated for enforcement 60 minutes prior to the Superferry’s arrival in the zone and will remain activated for 10 minutes after the Superferry’s departure. 72 Fed.Reg. at 50877-50879 (to be codified as 33 C.F.R. 165.T14-160(b)). The temporary rule also includes other restrictions and an authorization for Coast Guard officers to enforce the regulation.

The Ninth Circuit has stated that an agency’s interpretation of the meaning of its CE “should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulations.” *Alaska Ctr. for the Env’t.*, 189 F.3d at 857. In this case, there can be no serious dispute that the temporary rule is

a “Regulation[] establishing . . . security or safety zones . . . .” 59 Fed. Reg. at 38658. Because the application of CE #34(g) to the security zone created by the temporary rule is not plainly erroneous or inconsistent with the language of the CE, the Coast Guard’s decision to rely upon the CE deserves “controlling weight.” *Alaska Ctr. for the Env’t.*, 189 F.3d at 857. The Coast Guard has therefore satisfied its duty under NEPA to apply a CE that properly fits the facts of the proposed action. *See Bicycle Trails Council*, 82 F.3d at 1456 n.5.

2. Plaintiffs Have Not Demonstrated That There Were “Extraordinary Circumstances” That Require Additional Analysis

Once the Coast Guard has properly determined that the proposed action fits an existing CE, further environmental analysis is not required by NEPA unless “extraordinary circumstances” are present. *Alaska Ctr. for the Env’t.*, 189 F.3d at 858; *Nat’l Trust for Historic Preservation in U.S. v. Dole*, 828 F.2d 776, 781 (D.C. Cir. 1987). Extraordinary circumstances are those circumstances “in which a normally excluded action may have significant environmental effect.” 40 C.F.R. § 1508.4.

To document the absence of extraordinary circumstances related to the temporary rule, the Coast Guard completed a checklist analysis of ten factors that correspond to those found in Section 2.B.2.b of Commandant Instruction

M16475.1 and in 40 C.F.R. § 1508.27(b).<sup>10</sup> The Coast Guard properly found that nine of the ten factors were not present, including the following:

- no likely significant effect on public health or safety;
- no potential for highly controversial environmental effects;<sup>11</sup>
- no potential for highly uncertain or unique or unknown risks;
- no precedent would be set for future actions with significant effects;
- no cumulatively significant effects;
- no likely significant impact to sites on the National Register of Historic Places, or destruction of significant scientific, cultural, or historic resources;
- no significant effect on federally-protected species or habitats;

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<sup>10</sup> Plaintiffs' citations to 49 Fed. Reg. 29647 (July 21, 1984) reference NEPA procedures adopted by the National Oceanic and Atmospheric Administration, which are not applicable to the Coast Guard. *See* Plfs' Motion at 17.

<sup>11</sup> As the Court is aware, there is strong public sentiment regarding the operation of the HSF. The "controversy" referred to by NEPA regulations, however, is a term of art that refers only to whether there is scientific dispute over the "size, magnitude, or effect" of a proposed action, rather than "the existence of opposition to a use." *See Foundation for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172 (9th Cir. 1982). The fact that there may be public opposition to a proposed action does not make an action "controversial" for purposes of NEPA. *See Cold Mountain v. Garber*, 375 F.3d 884, 893 (9th Cir. 2004) (noting that the "existence of opposition does not automatically render a project controversial").

- no potential for violations of Federal, State, or local environmental laws;
- no likely effects on public health, safety, or other environmental resources.

The Coast Guard found only one factor present – namely, that the proposed security zone would be established on or near a "park land." Ray Decl., Exh. B. However, contrary to Plaintiffs' argument (Plfs' Motion at 17), both the Coast Guard's CE and the case law make clear that the simple presence of any of the ten factors in the checklist is "not necessarily" a reason to prepare an EA or EIS. *See* Commandant Instruction M16475.1, Section 2.B.2.b (page 2-5); *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (agency may invoke a CE even where threatened or endangered species are present if the agency determines that the project will not negatively impact the species). Rather, the Coast Guard must examine the context and intensity of all the factors, which it did here.<sup>12</sup> *See, e.g.,* Ray Decl., Exh. B (concluding that the action

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<sup>12</sup> Because it is only "extraordinary circumstances" that can remove a proposed action from a CE, Plaintiffs are incorrect in their statement that an EA is required if any one of the factors in Commandant Instruction M16475.1D (Section 2.B.2.b(1) to (10)) is "found to potentially be a substantive concern." Plfs' Motion at 18.

is “not expected to result in any significant adverse environmental impacts as described in the Environmental Checklist . . .”).

This documented examination of the factors that might otherwise take the temporary rule out of the CE shows that the Coast Guard took a hard look at the environmental impacts and reasonably concluded that there were no extraordinary circumstances that might require preparation of an EA or EIS. *See* Declaration of Jay Silberman, ¶¶4-6; Declaration of Dr. Dennis J. Mead, ¶¶4-7; *Alaska Ctr. for the Env’t.*, 189 F.3d at 859 (upholding agency’s use of a CE where court could determine that the agency “considered the relevant factors and determined that no extraordinary circumstances were present”).

3. The Hawaii Supreme Court’s Decision Regarding The Validity Of The Hawaii Department Of Transportation’s Compliance With State Law Has No Bearing On Whether The Coast Guard Complied With NEPA

Plaintiffs rely heavily upon the Hawaii Supreme Court’s ruling in *Sierra Club*, holding that HDOT erred by relying on an exemption under HEPA, a state statute, to argue by analogy that the Coast Guard is precluded from relying upon a CE under NEPA. *See* Plfs’ Motion at 18-22, 27-28. Plaintiffs’ argument is flawed in several respects.

Plaintiffs rely upon the *Sierra Club* case to argue that the Coast Guard should have considered the environmental effects of the full operation of the HSF,

as opposed to the direct effects of establishing the security zone. Plfs' Motion at 18-19. Under NEPA, an agency may limit the scope of its environmental review to the activities authorized by the federal action if the "private and federal portions of the project could exist independently of each other." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000). In the absence of the Coast Guard's security zone, HSF operations would still be able to occur (albeit, less safely) on Kauai. Similarly, Coast Guard regulations would still provide for a moving, 100-yard security zone around the HSF even if a temporary, stationary security zone had not been created by temporary rule. 72 Fed. Reg. at 50877; *see also* 33 C.F.R. § 165.1410. Therefore, even though the HSF operation "would benefit from the [security zone's] presence," it is not sufficiently interrelated with the security zone to constitute a single "federal action" for NEPA purposes. *Wetlands Action Network*, 222 F.3d at 1116 (quoting *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400-01 (9th Cir. 1989)).

Moreover, the *Sierra Club* case does not involve the interpretation of NEPA. Rather, the court there examined HDOT's decision that the HSF had been exempted from HEPA, a state statute. As the text of the opinion demonstrates, the law regarding the use of an exemption under HEPA is different from the use of a CE under NEPA. In particular, the *Sierra Club* court explained that under HEPA,

an agency seeking to apply an exemption to a proposed action must make an individualized determination of whether the action would likely have significant effects on the environment.<sup>13</sup>

In contrast, the CEs that are promulgated under NEPA are, by definition, “categories of actions that have been predetermined not to involve significant environmental impacts, and *therefore require no further agency analysis absent extraordinary circumstances.*” *Nat’l Trust for Historic Preservation in U.S.*, 828 F.2d at 781 (emphasis added); *see also* 40 C.F.R. § 1508.4 (defining CE). In other words, once an agency invokes a CE, it is not required by NEPA to make an individualized determination of whether the action will probably have minimal or no significant effects; that decision has already been made through the promulgation of the CE in the first place. *See Utah Env’tl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006). Plaintiffs’ analogy to the *Sierra Club* case therefore fails. *Id.*; *see also Nat’l Trust for Historic Preservation in U.S.*, 828 F.2d at 781.<sup>14</sup>

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<sup>13</sup> *See Sierra Club v. Dep’t of Transp.*, 2007 WL 2472035, at \*11 (agency “must, at least implicitly, determine that the action will ‘probably have minimal or no significant effects on the environment’ . . .”).

<sup>14</sup> In addition to claiming that the federal government failed to properly consider the environmental impact of its actions under NEPA, Plaintiffs also argue that the Coast Guard's compliance with "numerous executive orders and statutes" was deficient, citing only a discussion of Executive Order 12988. Plfs' Motion at 29. That Executive Order, however, does not confer any enforceable rights upon

E. Plaintiffs' First Amendment Claims Do Not Raise Serious Questions On The Merits.

The cover page of the First Amended Complaint references the First Amendment, but the body of the document does not specifically allege that the security zone rule infringes on speech. Plaintiffs' Motion offers little more, suggesting that the Coast Guard rule is void because it was intended "to suppress First Amendment rights and reflects a bias against those attempting to exercise those rights." Plfs' Motion at 16. Such bare assertions do not raise serious questions on the merits.

It is well settled that, even in a public forum, the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided that the restrictions are (1) justified without regard to the content of the regulated speech, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels in which persons may communicate the subject information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1226-27 (9th Cir.

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Plaintiffs, nor does it provide for judicial review. *See* Exec. Order No. 12988, Sec. 7, 61 Fed. Reg. 4729, 4733 (Feb. 5, 1996) ("This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.").

1990). The security zone in this case passes this three-part test, and does not unconstitutionally restrict Plaintiffs' First Amendment rights.

1. The Security Zone Rule Is Content Neutral

It is axiomatic that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock*, 491 U.S. at 791 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)). Any government regulation or restriction on speech must be deemed "content neutral" as long as the restriction is justified "without reference to the content of the regulated speech." *Id.*

Here, to the extent that the Coast Guard security zone restricts any protected speech, such restriction is clearly "content neutral." The security zone does not target protesters, demonstrators or any particular message of any person. The security zone simply prohibits any person and/or vessel from entering the prohibited areas in Nawiliwili Harbor 60 minutes before HSF's arrival into the zone until 10 minutes after the vessel's departure from the zone. On its face, the security zone is a purpose-built regulation designed to ensure the safe navigation of the HSF and the safety of persons in the harbor. The security zone does not evidence a government attempt to regulate the content of any speech. Regardless

of whether demonstrators protest the environmental impact of HSF's operations -- or praise the addition of a new transportation option in the islands -- the subject security zone is utterly disinterested in *what* the protestors have to say and is solely focused on *where* people and vessels are permitted to be to ensure safe navigation and the safety of persons in and around the harbor.

Because the security zone is completely silent with respect to the content of any speech, it is content neutral. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1128-29 (9th Cir. 2005) (holding "[i]n assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive; rather, we look at the literal command of the restraint . . . whether a [restraint] is content neutral or content based is something that can be determined on the face of it; if the [restraint] describes speech by content then it is content based.") (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002)).

2. The Security Zone Rule Is Narrowly Tailored To Serve A Significant Government Interest.

The Ninth Circuit has specifically held that the government's interest in "marine safety" is a significant one. *See Bay Area Peace Navy*, 914 F.2d at 1227. There can be no dispute that the interest of the Coast Guard and of the government in promoting safe navigation, the safety of lives at sea and the safety of persons in

Nawiliwili Harbor are significant government interests within the meaning of the three-part test set forth in *Ward* and its progeny. Accordingly, the remaining question under the second part of the three-part test is whether the security zone is narrowly tailored to serve that interest.

The Supreme Court fully articulated the standard for assessing whether a restriction is narrowly tailored in *Ward*. There, the Court held:

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Community for Creative Non-Violence*, 468 U.S. at 297). To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of the [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government

interests" or the degree to which those interests should be promoted.

491 U.S. at 799-800 (quoting *United States v. Albertini*, 472 U.S. 675, 689); *see also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that even a complete ban on speech can be narrowly tailored if each activity within the proscription's scope is an "appropriately targeted evil").

Here, the "evil" (in the *Frisby* sense of the term) that the security zone targets is the effort of demonstrators and protestors to physically block the HSF from entering the Nawiliwili Harbor by placing their bodies and property directly in the path of the HSF. These actions place the lives and safety of the protestors and the safety of persons embarked in the HSF, and other persons in the vicinity, in direct peril. Having repeatedly expressed the specific intent to block the HSF from entering the harbor during prior periods of protest, Plaintiffs and other similarly motivated protestors have made it abundantly clear that they will place themselves and their vessels directly in the path of the HSF unless they are precluded from doing so. Likewise, the security zone affects those who may unwittingly find themselves in the Nawiliwili Harbor during transit of the HSF.

The security zone at issue does nothing more than clear a path for the HSF so that it may safely navigate Nawiliwili Harbor and enter and exit port there. By establishing a security zone which is activated only 60 minutes prior to HSF's

arrival and 10 minutes following its departure from the harbor, the regulation provides the Coast Guard and other law enforcement personnel with the authority to prevent persons and vessels from endangering themselves, the HSF, persons on board the HSF and other persons in the area by impeding the HSF's passage during the difficult transit in and out of the harbor. The effect on any speech of the Plaintiffs is incidental.

The ability of the Coast Guard and other government personnel to promote the legitimate government interest in safe navigation in the harbor and the safety of persons on vessels and in the vicinity of the harbor would be achieved much less effectively absent the security zone. Without the security zone in place, protestors could continue to place themselves in the path of the HSF or otherwise impede the safe navigation of that vessel into the harbor by bottling up the vessel's intended path to port. The security zone does not prohibit access to the harbor. Indeed, the security zone is only activated at times just prior to and following periods when the HSF is actively navigating in the harbor. Even during times when the HSF is transiting the harbor, Plaintiffs and other persons have access to portions of the harbor that are not protected by the security zone.

Here, the "means chosen" to promote safety and safe navigation in the harbor - - the security zone - - is not "substantially broader than necessary" to

achieve the government's legitimate goals. This is the *sine qua non* of the "narrowly tailored" standard under *Ward* and other applicable case law. Even if the court were to conclude that there is some less restrictive means to adequately achieve the government's end (and there is none for the reasons set forth above), the court cannot substitute its judgment under the Supreme Court's clear holding in *Ward*.

3. The Security Zone Leaves Open Ample Alternative Channels Of Communication

The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *See Bay Area Peace Navy*, 914 F.2d at 1229; *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1225 (10th Cir. 2007). The bar for striking down a government regulation on this basis is high. The Ninth Circuit has specifically noted "the Supreme Court generally will not strike down a governmental action...unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Menotti*, 409 F.3d at 1138 (citing *Ctr. For Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1170 (9th Cir. 2003)).

It is well settled that the First Amendment does not entitle the individual to "the most effective means of communication" – only the "ability to communicate effectively." *Menotti*, 409 F.3d at 1138; *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (upholding demonstration zone restricting access of protestors and demonstrators to facilities for Democratic National Convention in Boston because demonstration zone - although not as close in proximity to location of convention as protestors would have liked - provided ample alternative channels for communication).

Plaintiffs will have ample opportunity to communicate in verbal and non-verbal ways while remaining in the waters of Nawiliwili Harbor because the security zone at issue specifically provides for two separate areas of the harbor in which protestors and demonstrators may communicate any message they choose. As stated in the text of the regulation, the following regions are excluded from the scope of the security zone: “the waters west of a line running from the southeastern most point of the breakwater of Nawiliwili Small Boat Harbor due south to the south shore of the harbor;” and “the waters from Kalapaki Beach south to a line extending from the western most point of Kukii Point due west to the Harbor Jetty.” 33 C.F.R. § 165.T14-160(a).

These areas excluded from the security zone (and thus open to access by any person without violating the security zone and without the need for advanced Coast Guard permission) are clearly visible to observers ashore, to persons on board the HSF while it is navigating the harbor, to persons on the pier and at the HSF mooring facility, and to all other areas within line of sight. Ray Decl., ¶9. The fact that the areas of the harbor excluded from the security zone are not in as close proximity to the HSF as the Plaintiffs might like is immaterial under the Supreme Court's analysis. Indeed, as in *Bl(a)ck Tea Society*, the creation of a specific protest "zone" provides precisely the type of "ample alternative channels" for communication that satisfy the First Amendment. *Bl(a)ck Tea Society*, 378 F.3d at 14.

For the reasons set forth above, it is clear that the security zone at issue is consistent with the First Amendment. The security zone is content neutral, based on a significant interest of the government, narrowly tailored, and leaves a number of sufficient alternatives for protesters to convey their message to their intended audience. Plaintiffs' First Amendment claim is without merit.

F. The Balance Of Hardships And The Public Interest Weigh In Favor Of Denying Extraordinary Injunctive Relief.

In addition to alleging claims that are unlikely to succeed, Plaintiffs cannot show that the balance of harms and the public interest weigh in favor of the

extraordinary remedy of an emergency injunction. When a federal court considers the propriety of injunctive relief, it must balance the equities of the case, considering the potential harms of granting or denying relief to each party, in an effort to “mould each decree to the necessities of the particular case.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Violations of environmental statutes do not mandate issuance of an injunction. Rather, moving parties must show some tangible irreparable injury. *See Weinberger*, 456 U.S. at 312; *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). Unsupported or speculative assertions of injury do not suffice to show irreparable harm. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

1. Plaintiffs Have Not Shown Irreparable Harm

Plaintiffs have produced no evidence that they will suffer irreparable harm if the Coast Guard is not enjoined from enforcing the temporary security zone. Plaintiffs allege that "[t]he environmental impacts of Superferry on Kauai are at the heart of the controversy." Plfs' Motion at 18. It is well settled, however, that there is no presumption of irreparable injury in environmental cases. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. at 542; *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir.1995); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) ("Merely establishing a procedural violation of NEPA does not compel the issuance of a preliminary injunction."). Moreover, the legality or environmental impact of HSF's operations is being litigated in State court, and those issues are not before this court. What is before this court is the validity of the Coast Guard's temporary security zone, and whether Plaintiffs have shown that they will suffer irreparable harm if its enforcement is not enjoined. As Plaintiffs have not made such a showing, their motion should be denied.

2. The Balance Of Harms And The Public Interest Weigh Against An Injunction.

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The balance of harms and the public interest also favor denial of Plaintiffs' motion. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary

remedy of injunction.” *Weinberger*, 456 U.S. at 312. In balancing the relative hardships, there is no presumption that environmental harm should outweigh other harm to the public interest. *See Fund for Animals*, 962 F.2d at 1400.

The balancing of hardships extends beyond Plaintiffs' rights and the economic rights of Hawaii Superferry. It involves protecting the public from the consequences of HSF's attempt to conduct lawful operations in the face of impassioned protests. The Coast Guard's security zone was enacted not to vindicate HSF's economic rights (an issue in which the Coast Guard has no interest), but to protect the safety of the public in navigable waters. A balancing of equities must include a consideration of the safety of all who may be affected by accidents that could be caused by HSF's attempt to navigate through waters crowded with individuals opposed to its operations. Such individuals would include passengers aboard the HSF, passengers and operators of other vessels present in the harbor during HSF's transit, and those individuals who would choose to be in the harbor to express their opposition to HSF. In the absence of a security zone, the HSF might have to maneuver suddenly to avoid injuring or killing an individual expressing his views from a surfboard. As a result of these maneuvers, the HSF could well strike another vessel or run aground. In addition to damaging the HSF itself, the potential results could include waterborne individuals and

passengers and crew of the HSF being injured or killed. Individuals aboard the HSF (such as elderly or disabled passengers) could also be injured during the potential evacuation of the vessel.

The court should also consider the possibility of an environmental catastrophe resulting from an oil spill caused by an accident. A spill could damage the environment (including fish and marine mammals), affect recreational interests (swimming, surfing and boating), and damage local businesses due to fouling and potential harbor closures during cleanup. The rights and potential harm to innocent third parties vastly outweigh any potential interests of Plaintiffs, who have many ways of engaging in legitimate expressive activities without endangering the interests of others. The balancing of hardships, and the public interest, thus weigh against the grant of injunctive relief.

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## CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order should be denied.

DATED: Honolulu, Hawaii, October 1, 2007.

EDWARD H. KUBO, JR.  
United States Attorney  
District of Hawaii

/s/ Derrick K. Watson

By:

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

MEGAN WONG, et al.,	)	Case No. CV07-00484 HG LEK
	)	
Plaintiffs,	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
GEORGE W. BUSH, President	)	
of the United States, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted below, a true and correct copy of the foregoing documents noted below were served on the following at their last known address:

Foregoing Documents:

- 1) Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order
- 2) Declarations of Jay S. Silberman., Dr. Dennis J. Mead, Kathleen Moore; Attachment "1"; and Capt. Charles W. Ray; (Exhibits "A" - "B")

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Served by First Class Mail:

Lanny Alan Sinkin  
P.O. Box 944  
Hilo, Hawaii 96721

DATED: October 1, 2007, at Honolulu, Hawaii.

/s/ Jan Yoneda

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