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Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

MEGAN WONG,)	
)	
NOELLE WONG,)	
)	
KAI'ULANI EDENS,	)	Civil No. CV07-00484
)	
JESSE BROWN-CLAY,	)	FIRST AMENDED
	)	COMPLAINT FOR
MARCIA SACCO,	)	DECLARATORY RELIEF,
	)	TEMPORARY
	)	RESTRAINING
WENDY RAEBECK,	)	ORDER, PRELIMINARY
	)	INJUNCTION, PERMANENT
JEFF SACHER,	)	INJUNCTION
)	
LEA TADDONIO,)	
	)	FIRST AMENDMENT,
RICHARD COON,	)	CONSTITUTION OF THE
	)	UNITED STATES OF
ANDREA BROWER,	)	AMERICA,
)	
FABIENNE CHRISTE,	)	NATIONAL
	)	ENVIRONMENTAL
KAMEI TRINQUE,	)	POLICY ACT
	)	ADMINISTRATIVE
FERN ANUENUE HOLLAND,	)	PROCEDURES ACT
)	
JAY H. TAYLOR,)	
)	
STAR NEWLAND,)	

BARBARA WIEDNER,)
)
LEE TEPLEY,)
)
PAUL DOUBLEDAY MASSEY,)
)
DAVID RICHARD MIRELES)
)
MICHAL FREIGANG)
)
JONATHAN JAY)
)
CORY (MARTHA) HARDEN)
)
Plaintiffs)
)
v.)
)
GEORGE W. BUSH, President of the)
United States of America and)
Commander in Chief, Armed)
Forces of the United States)
)
MICHAEL CHERTOFF, Secretary of)
United States Department)
of Homeland Security,)
)
THAD W. ALLEN, Commandant,)
United States Coast Guard,)
)
and)
)
SALLY BRICE-OHARA,)
Rear Admiral, United States)
Coast Guard, Command of the)
14th District,)
)
Defendants.)

I. INTRODUCTION

1. The Hawaii Superferry (hereinafter “Superferry”) is a large ship capable of moving at high speeds and carrying up to 800 people and 200 cars within the Hawaiian Islands.

2. The Superferry presents itself a private business operation.

3. The Superferry did receive government loan guarantees.

4. The State of Hawaii made improvements to harbors to accommodate Superferry.

5. The Superferry is the subject of extensive litigation and public opposition centering on the failure of the State of Hawaii Department of Transportation to require the preparation of an environmental assessment to evaluate potential environmental impacts resulting from the operation of the Superferry.

6. The Hawaii Supreme Court found that the Hawaii Department of Transportation violated state law by not requiring the Hawaii Superferry to prepare an Environmental Assessment (EA).

7. There are state suits pending in two different Hawaiian jurisdictions seeking to enjoin the operation of Superferry until such time as an environmental assessment is prepared.

8. A state judge on the Island of Mau'i has entered an injunction preventing the Superferry from using the Mau'i harbor.
9. The order is in place while the court conducts a hearing on whether the operation of Superferry will have adverse environmental consequences, if allowed to operate while preparing an environmental assessment.
10. A second suit is pending in state court on the Island of Kaua'i seeking a preliminary injunction to prevent Superferry from using Nawiliwili Harbor until an environmental assessment is prepared.
11. The Kaua'i court denied a temporary restraining order.
12. With the issuance of the Supreme Court ruling, the controversy over the Superferry became even more intense.
13. State officials rushed to salvage Superferry economically by arguing that the Supreme Court ruling applied only to the Mau'i court as far as limitations on Superferry's operations.
14. At the same time, State officials did agree to prepare a statewide environmental assessment of Superferry impacts.
15. State officials also argued that Superferry could continue to operate using state harbors while an environmental assessment is prepared, despite the clear intent of state law making completion and acceptance of such an assessment a condition precedent for the implementation of a state

action.

16. Immediately after Supreme Court ruling, Superferry moved up the date for launching its service.

17. Superferry also lowered its fares for vehicles and people from more than \$100 to \$5.

18. These responses of State officials and Superferry to the Supreme Court decision only exacerbated the public discontent.

19. After the Supreme Court decision and with cases pending in two lower courts, Superferry loaded passengers and vehicles destined for the Island of Kaua'i.

20. The Governor and the Department of Transportation refused to intervene to prevent Superferry from accelerating the date of operation.

21. The Governor and the Department of Transportation refused to intervene to prevent Superferry from making the trip to Kaua'i.

22. When Superferry reached Kaua'i on August 26, 2007, hundreds of people on the island turned out to protest.

23. Some of those protesting entered the waters of Nawiliwili Harbor and blocked Superferry from entering the harbor.

24. The United States Coast Guard attempted to open a passage for Superferry without success.

25. The Coast Guard was surprised by the passion and determination of the people in the water seeking to prevent Superferry's entrance.

26. Coast Guard personnel at one point took the tarp off a large caliber machine gun and personnel assumed an operational position on the gun.

27. On August 27, 2007, the protestors again blocked Superferry's passage.

28. Subsequently, the Superferry left Kaua'i and announced a suspension of service to Kaua'i.

29. The protesters ceased any effort to close the harbor.

30. Subsequent to the events of August 26 and 27, the Coast Guard declared an emergency existed created by the "non-compliant protesters" in Nawiliwili Harbor on those dates.

31. In response to this perceived emergency, the Coast Guard adopted a temporary rule establishing a security zone that encompasses the waters of the harbor and lands bordering Nawiliwili Harbor.

32. This security zone will only be activated when the Superferry enters, is docked within, or leaves Nawiliwili Harbor.

33. Anyone entering the security zone without the permission of the Coast Guard is subject to arrest and prosecution for state and federal

offenses.

34. Anyone entering the security zone on a flotation device, such as a boat or surf board, is subject to have that device seized and forfeited.

35. Nothing in the rule precludes the use of lethal force if necessary to accomplish the purposes of the rule.

II. JURISDICTION

36. This Honorable Court has subject matter jurisdiction over the claims set forth in this Complaint pursuant to 28 U.S.C. §1331 (Federal Question Jurisdiction), 5 U.S.C. §702 (Administrative Procedures Act), and 28 U.S.C. §1361 (Mandamus). The relief sought is authorized by 28 U.S.C. §2201 (Declaratory Relief) and 28 U.S.C. §2202 (Injunctive Relief).

37. Venue is proper in this District pursuant to 28 U.S.C. §1391(e) as this civil action is brought against agencies of the United States and officers and employees of the United States acting in their official capacities and under color of legal authority and at least one of the plaintiffs resides in the District of Hawaii.

38. An actual and substantial controversy presently exists between Plaintiffs and Defendants. Plaintiffs assert that Defendants are violating federal law.

39. Plaintiffs have no plain, speedy, or adequate remedy in the

ordinary course of law. Unless this Honorable Court grants the relief requested, Defendants' actions will result in irreparable harm to the interests of the plaintiffs and their 'ohana and to the public in violation of federal and state law and contrary to the public interest. No monetary damages or other legal remedy could adequately compensate Plaintiffs, their 'ohana, or the public for this harm.

40. Plaintiffs are persons adversely affected and aggrieved by federal agency action and omission and are entitled to judicial review of those actions and omissions under the Administrative Procedures Act (APA). As more fully alleged below, the interests of Plaintiffs are being directly and significantly harmed by the illegal actions of Defendants. The relief requested will fully redress those injuries.

A. Plaintiffs

41. Plaintiff Megan Wong resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff offers the following statement to the court: Aloha, My name is Megan Wong. I am a local girl born and raised on the island of Kaua'i. I am a mother of a beautiful 7 year old daughter. My passion comes from wanting to protect this home as I know it for our future generations. This island has given me so much, and this is my way of giving back. We all have a part in the protection as well as perpetuating our culture. This is

where I draw my strength. I was in the water both nights the Superferry came into the Nawiliwili harbor (August 26, 2007 and August 27, 2007). I plan to be back in the water the day it decides to come back to Kauai. I will not be alone, as my brothers, sisters, and cousins who were not in the water August 26 and 27, plan to definitely be there to block Superferry at whatever the cost. We will not back down until the Supreferry does an EIS. We will be there morning, noon, or night daily if that's what it takes. Many of us are putting our life and jobs on the line. We are very passionate and are determined to see this to the end. Megan Wong

42. Plaintiff Noelle Wong on the Island of Kaua'i, Island of Hawai'i.

Plaintiff offers the following statement to the court: My name is Noelle Wong. I am the 6th child born to a local family of 7. We are a very close family. My sister was in the water blocking the Superferry on August 26 2007 and August 27 2007. I will be in the water to block the Superferry with the rest of my family the day it sails back to Kauai. I lost my job for not showing up to work due to my passion on this issue. I have no regrets and if given the chance, I would do it again. I am proud of my culture and for being part of such a tight knit community. Ua mau ke ea o ka'aina i ka pono ... The life of the land is perpetuated in righteousness. I will do whatever I have to, to be sure that an EIS is completed prior to the

Superferry resuming business. I was not aware of the petition of 6,000 signatures 2 years ago. Nor was I aware of the environmental facts. I believe I speak for my generation as well. I am thankful for being educated on this issue and am dedicated to see this through till the end. It is my generation that is seen actively in the water. We will do our part in the preservation of this 'Aina and it's people. Noelle Wong

43. Plaintiff Ka'iulani Edens resides on the Island of Kaua'i, Island of Hawai'i. Plaintiff is an indigenous person from the Island of Kaua'i. Plaintiff's family has been on Kaua'I for at least 10 generations. Plaintiff offers the Court the following statement of interest in this case: Aloha, I have the world's only all sovereignty music show at KKCR in Hanalei. I have fought for Sovereignty and been involved in many protests. I was on the sea wall on August 27th. At about 1630, I picked up my Hawaiian Flag, and asked another person to walk in through the barricaded jetty road, also carrying a Hawaiian Flag. As I approached the Gate there were 4 armed officers, all with their hands on their gun straps, as if they were going to pull their weapons for any slight movement! Scary. I took a deep breath, told the kid with me to be quiet and follow me, and approached the Police. They were at the time herding Rich Hoepner and his wife out of the gate, threatening to arrest them. As I approached with the flags, the officers said

things like, "Come'on, Ka'iulani, you know we can't let you in." I said loudly, "I am NOT under the Jurisdiction of the U.S. step aside!" Held my breath. They stepped aside!! We walked in. At some point I turned around and saw a few hundred people had followed me in. The cops were on their radios, asking "What should we do?" As the protest went on I was on the wall; stayed in the same place most of the night. The violence I witnessed has caused horrible Post Traumatic Stress Disorder. I've had to double up on my meds under my doctor's orders, as well as take something to help me sleep. I have nightmares about the kids I saw being run over in the water, about law enforcement hunting people in the ocean. I was almost maced by an overzealous rookie when I objected to his handling of an arrestee; this policeman slammed the guy against the wall as hard as he could although the surfer WAS NOT RESISTING! The violent images will never leave my memory; I can only hope they fade over time, and with therapy. As a human being my sense of well being, and freedom is gone. I cannot trust Government nor law enforcement ever again. As a Native Hawaiian, a Polynesian, I feel extremely violated as if I am being raped over and over (and I speak from actual experience). My gathering rights (PASH) are being stripped away by the same government who "gave" us those rights. My stress is so bad I can barely leave my home. I am extremely depressed

about the desecration of our island.

Mahalo, Ka'iulani

44. Plaintiff Jesse Brown – Clay resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff is 18 years old and a student at Island School. Plaintiff entered the water on August 17, 2007 to join the non-violent civil disobedience to protect the security of his homeland against the illegal entry of Superferry into Nawiliwili Harbor. Plaintiff was arrested. Plaintiff does not consider paddling out on a surfboard similar to sabotage and other subversive acts. Plaintiff believes that the closing of Nawiliwili Harbor by the Homeland Security Coast Guard shows that business interests and homeland security are being treated as one and the same. Plaintiff believes that declaring an "Emergency Rule" was only meant to protect the lawless pursuits of the Superferry. Plaintiff intends to return to the water to defend the security of his homeland, if Superferry returns to Nawiliwili Harbor.

45. Plaintiff Marcia Sacco resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff operates a business on the Island of Kaua'i and is concerned about the impact of Superferry on already highly congested traffic. Plaintiff is also a mother, whose son attends Island School. Plaintiff is concerned that her son and his friends are determined to stop the Superferry from reaching port in Kaua'i and that their commitment puts

them at risk of arrest, prosecution, imprisonment, injury, or other harm.

46. Plaintiff Wendy Raebeck resides on the Island of Kaua'i, Islands of Hawai'i. On August 26 and 27, 2007, Plaintiff was present on the Nawiliwili Jetty supporting the protesters in the water, and alerting the Superferry that a large number of Kaua'i residents strongly support the Supreme Court ruling that an environmental assessment is required before the Superferry can conduct business in Kaua'i. Plaintiff contends that those preventing Superferry from entering the Nawiliwili Harbor are within the law, and that it is the Superferry, the Governor, the Department of Transportation, and the United States Coast Guard that are operating outside the law by protecting an illegal enterprise. Plaintiff further contends that the intent of the United States Coast Guard to implement a "Superferry Security Zone" granting unobstructed passage to the Superferry is outside the authority of the U.S. Coast Guard, which is an entity established to protect the people and the territory of the United States, not private business interests in violation of Supreme Court rulings. Plaintiff contends that local residents, defending the law and their environment, should not be forcibly banned from the area nor threatened with hefty fines and prison terms, while an illegal enterprise is ushered into Nawiliwili Harbor by the United States military and State law enforcement personnel. Plaintiff believes this heavy-handed approach by

the State, Federal Government, and Superferry sets an ominous tone. And Plaintiff, therefore, joins this litigation with the intention of upholding the Supreme Court ruling to cease Superferry operation until an Environmental Impact Statement has been issued.

47. Plaintiff Jeff Sacher resides on the Island of Hawai'i. Plaintiff is concerned about the operation of Hawaii Superferry without having a full EIS conducted prior to the start of service anywhere in the state of Hawaii because of the many environmental concerns (traffic, endangering marine mammals, invasive species, stolen goods, drug trafficking, etc) for which strict and tested remedies have not been instituted. As a result, Plaintiff considers operation of Hawaii Superferry to be illegal until such a study is completed. Plaintiff is also concerned about the new Coast Guard Security Zone for Nawiliwili Harbor, which severely restricts, if not completely voids, his First Amendment right to free speech. Plaintiff is aware that the people planning to prevent the Superferry from entering Nawiliwili Harbor have been trained in non-violent resistance to illegitimate authority. There is, however, always the risk that law enforcement officials will not be so restrained in their actions, that passions will be running high, and that the situation could get out of control resulting in serious injuries. Such a result would be harmful to the entire community and to the state's

reputation nationally and internationally.

48. Plaintiff Lea Taddonio resides on the Island of Kaua'i in Islands of Hawai'i. Plaintiff participated in the non-violent, First Amendment protected protest against the illegal entry of the Superferry into Nawiliwili Harbor on August 26th and/or 27th from the pier. Plaintiff saw teenage boys trying to swim to the land being met by SWAT teams on the rocks beneath Nawiliwili Pier. Plaintiff saw law enforcement officers wielding heavy flashlights and clubs and making threatening gestures which drove the boys back into the water. Plaintiff watch these obviously tired children paddle around the bay for a further 15 to 20 minutes before they disappeared into the darkness on the other side of the bay. Plaintiff witnessed surfers giving themselves up peacefully as the Superferry left, only to have their heads slammed to the concrete as handcuffs were placed on them. Plaintiff witnessed a K-9 officer getting his dog aggressive with peaceful, sign carrying protesters and then laughing at how he had frightened them. Plaintiff is very concerned that aggressive law enforcement personnel will once again threaten, abuse, and terrorize peaceful protesters, should the Superferry return to Kaua'i. Plaintiff considers any further operations of the Superferry to be illegal and a threat to the environment of Kaua'i, Hawai'i. Plaintiff uses Nawiliwili Harbor for kayaking and surfing. Plaintiff is

involved in a number of conservation organizations based on Kaua‘i and is greatly concerned about Superferry establishing a new way for invasive species to enter the island and about social/cultural impacts.

49. Plaintiff Richard Coon resides on the Island of Kaua‘i, Islands of Hawai‘i. Plaintiff kayaks regularly in Nawiliwili Harbor with the Nawiliwili Yacht Club. Plaintiff bodyboards Ammonias, which is within the Department of Homeland Security Coast Guard Superferry Security Zone. Plaintiff participated peacefully in the second blockade of the Superferry on August 27th. Plaintiff intends to return to the water on his body board, should Superferry return to Kaua‘i. Plaintiff is concerned that the Coast Guard boats traveling at high speeds will seriously injure people in the water who are not highly visible to them. Plaintiff is concerned that there is no environmental impact statement prepared regarding the environmental impacts of Superferry on his home island of Kaua‘i. Plaintiff is willing to be arrested, if necessary, to keep Superferry out of Nawiliwili Harbor. Plaintiff considers Superferry a threat to marine life, fishing boats, fishing nets, and humans in the water. Plaintiff will continue his opposition until the State of Hawai‘i prepares an environmental impact statement for the operation of Superferry.

50. Plaintiff Andrea Brower resides on the Island of Kaua‘i, Islands of

Hawai'i. Plaintiff was born and raised on the Island of Kaua'i in the Islands of Hawai'i.

Plaintiff entered the water on August 27, 2007 to block the Hawai'i Superferry from docking. Plaintiff offers the Court the following statement:

My action of entering the water was legal because I was protecting my homeland and upholding the Hawai'i Supreme Court's order to conduct an Environmental Assessment (which, by law, must be completed before an action is begun). Simply from reading the newspaper coverage of the court proceedings in Mau'i, I can tell that the EA will have to find potentially significant environmental impacts requiring an Environmental Impact Statement. If the Hawai'i Superferry returns prior to completing an independent Environmental Impact Statement, I intend to reenter the water in order to block it from docking. I use Nawiliwili Harbor on a regular basis to surf and swim.

51. Plaintiff Fabienne Christe resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff participated in the non-violent, First Amendment protected protest against the illegal entry of the superferry into Nawiliwili Harbor on August 26. Plaintiff is concerned about the impact of the ferry and its passengers on the water and animal health and well being, and on island life and lifestyle, safety and security. On August 26, Plaintiff stood on

the dock and at the gate and observed that the Coast Guard was violent and very rough to the surfers. Plaintiff observed the Coast Guard forcibly taking several surfboards away. Plaintiff observed a Coast Guard boat circling around a group of 12 surfers and quickly driving their boat up to one surfer and threatening him as Superferry came into the harbor. Plaintiff observed the police shoot mace into the faces of two demonstrators at the harbor gate. Overall, Plaintiff observed serious violent energy directed against peaceful protest. To Plaintiff, the message seemed to be: “If you don’t do what I want, I will bring in the military to protect this business.” Plaintiff subsequently observed that the events of August had a strong impact on the people. Plaintiff has found the common view is that the Superferry and its supposed rights are protected, while the residents of Kaua’i and their rights, guests who use the harbor, and the natural environment and lifestyle for rest, health improvements, and recreation are not. Plaintiff is concerned the her freedom to communicate her concerns and the needs of the island is being taken away by bullies who intend to force their views on the people they don’t even know. Plaintiff is concerned that the animals who live in Hawai’i or visit our waters for part of the year are not protected from the Superferry’s trip from Oahu to the Kaua’i harbor and back. Plaintiff wishes to be a voice for those animals, who are not given a voice. Environmental impact studies

should be conducted for the health and wellbeing of all the beings residing and vacationing here.

52. Plaintiff Kamei Trinque resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff was present at Nawiliwili Harbor on August 27, 2007. Plaintiff went to the harbor wall to discuss the safety of the protesters and others in the community. Plaintiff was pulled away from the wall by people she believed to be Kaua'i police, National Guard, and SWAT. Plaintiff was constantly threatened with arrest, while doing nothing more than trying to look out for the welfare of the people. Plaintiff repeatedly attempted to help young people out of the water. Plaintiff tried to assist one exhausted man out of the water who had been in the water for five hours with no board. Plaintiff witnessed the police and National Guard moving in to arrest him and the man going back into the water. Plaintiff witnessed the man having a hard time keeping his head above water. Plaintiff's friend, another Plaintiff in this case, jumped into the water to rescue the man because the police and National Guard did not care whether the man drowned or not. Plaintiff helped to guide the man and her friend to shore without anyone getting arrested. Plaintiff came away from this event saddened by what she had seen and determined not to have that scene repeated. Plaintiff shares in all the concerns about the environmental impacts of Superferry, the illegal

nature of Superferry continuing to operate, the violation of the people's constitutional rights, the threats to the Whales, and the damage that will be inflicted on Kaua'i generally, if the Superferry is allowed to continue operating.

53. Plaintiff Fern Anuenue Holland resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff is an environmental science student and has a direct interest in the impacts of the Superferry both to Kauai and her way of life. Plaintiff uses Nawiliwili harbor for swimming, boating activities, surfing, paddling, and scientific observation. Plaintiff is active in the community as a volunteer in removing invasive species (*Wedelia trilobata*) from the Island of Kaua'i as well as an active community member in the protection of Hawaiian endemic and indigenous flora and fauna. Plaintiff is distressed with the potential for harm from law enforcement enforcing the security zone and the potential for environmental harm from Superferry being allowed to unload its passengers and vehicles onto Kaua'i. Plaintiff would like to enter the water to enforce the law and to prevent Superferry from re-entering Nawiliwili Harbor on September 26, 2007, but is currently overseas. Plaintiff is distressed with the Superferry security zone and is concerned for the safety of her younger brothers, as they intend to enforce the law and prevent the Superferry from reentering Nawiliwili Harbor on

September 26, 2007. Plaintiff considers the threat of the security zone to constitute intentional infliction of distress and physiologically abusive as it takes away her and her community's given First Amendment rights to protest the return of the Superferry on September 26, 2007 and places the State and Federal Government on the side of a lawless bully. Plaintiff feels this is of dire urgency as, once Superferry trips begin to Kauai, there will be no way to control the effects. Plaintiff considers any further operations of the Superferry to be illegal and a threat to the environment and biodiversity of Kaua'i, Hawai'i. Plaintiff seeks the protection for the environment from the multiple potential environmental harms Superferry can bring.

54. Plaintiff Jay H. Taylor resides on the Island of Kaua'i, Islands of Hawai'i. The Plaintiff intended to participate in the non-violent, First Amendment protected protest against the illegal entry of the Superferry into Nawiliwili Harbor. However, when the maiden voyage to Kaua'i was changed to an earlier date by two days, he was not able to join the protest. The Plaintiff considers any further operations of the Superferry to be illegal and a threat to the environment of Kaua'i, Hawai'i. Plaintiff expects to enter the water to enforce the law and to prevent Superferry from re-entering Nawiliwili Harbor, illegally, on September 26, 2007. Plaintiff uses Nawiliwili Harbor for surfing, and general ocean recreation. Plaintiff has

been a very involved member of the People for the Preservation of Kaua'i for the past 16 months, is a permanent resident of Kaua'i, Hawaii and votes in every election.

55. Plaintiff Star Newland, in the Spirit of Aloha, comes before this Honorable Court on behalf of the Cetacean Commonwealth. Plaintiff resides on the Island of Hawai'i, Islands of Hawai'i. Plaintiff understands that if Superferry is allowed to continue operating, Superferry will one day come to the Island of Hawai'i. Plaintiff requests the Court to order the Defendants to adhere to the laws of this land and cease operations of the quasi military vessel, Hawai'i Superferry Alakai and others of her type, operating in the waters of our birthing Humpback mothers and their babies and others of our kind; including the Turtles, Monk Seals, Sharks and others.

Plaintiff notes that the design of this type of ferry was responsible for at least 1 to 3 deaths of Humpbacks in 1998, note of which was largely covered up. Plaintiff further notes that the design of this type led to increased whale deaths in Azores and Singapore. Plaintiff contends that their speed is a dangerous factor and well in excess of what other boats in our waters traverse. Plaintiff further contends that a reduction in their speed, to a maximum of 12 knots, is essential to their presence here under any

conditions.

Plaintiff offers the following statement to the Court:

As representatives of a sentient species, we note with interest the intention of your highest elected officials of this land to be willing to completely overlook and circumvent the laws passed by duly elected public servants to reflect the will of WE, the People, and to make use of FORCE and threat of dire reprisals against the People who are doing what their constitutional rights entitle and require them to: Voice their opinions.

In the first place, there was a failure to complete the legally required environmental studies – these requirements were systematically overlooked and bypassed, while the serious concerns the Neighbour Islanders have regarding invasive species being transported, including: the brown snakes currently on Kauai, the sea algae from O’ahu being transported on O’ ahians boats to our relatively intact waters; to the newly discovered toxic spiders on O’ahu, recently arrived from China, the viroa bee mite (remember this we are on islands in the middle of the ocean. Kill off our bees and we are in very serious trouble should the day come when our boats stop coming with food), the Coqui frogs from our islands to O’ahu, and other legitimate concerns.

The impacts on our already overburdened infrastructures on the

Neighbour Islands is another concern. Should the Super Ferry be allowed to operate the transport of bicycles should be the only other type of transport allowed (except baby strollers/wheelchairs and other personal mobility devices). Zero other types of vehicles due to strained infrastructure and traffic congestion on all the islands.

The recent attempt to harvest trucks full of luau rocks from Maui is typical of the legitimate concerns the Neighbour Islanders have with free and easy access to vehicles from other islands coming here.

We wonder, do you know of the idea of consensus - of there being a highest best outcome for ALL, yours and our kind, in which ALL would feel good about the outcome.

We ask you to look within and ask yourselves what is the highest best way to resolve this; for us to come together to create a workable, equitable, respectful outcome.

Is this what you want to show the world?

"... They should realize that due to directions from ex-Navy Secretary John Lehman, rogue agents of the Homeland Security Department have declared martial law in Nawiliwili Harbor. Lehman has instructed his representative Governor Lingle, and her mayoral puppet Bryan Baptiste to utilize local police teams as terroristic agents. The public should beware of

heavily armed corporate security squads masquerading as the Coast Guard and local police."

Or this: There was a breakthrough in this stalemate wherein the People who were in opposition to the Superferry and the State Legislators and those who facilitated this enterprise in the absence of appropriate requirements and in violation of state law, apologized to Hawai'i Superferry and set their intentions to make use of ho'oponopono to facilitate an appropriate resolution, a consensus resolve to the matter.

And, we all got along after that and the public servants remembered that they were here to serve the People and duly uphold the law of the land and ocean too. And, that the Coast Guard was here to protect and preserve the oceans and her kind.

At the least WE request that the operation of Hawai'i Superferry be terminated pending the legal determination of its standing to operate legally in Hawaiian waters.

We can choose ...

Mahalo,

Star Newland on Behalf of the
Cetacean Commonwealth

56. Plaintiff Barbara Wiedner resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff participated in the non-violent, First Amendment protected protest against the illegal entry of the Superferry into Nawiliwili Harbor on August 26. Plaintiff considers any further operations of the Superferry to be illegal and a threat to the environment of Kaua'i, Hawai'i. Plaintiff expects to return to the water to enforce the law and to prevent Superferry from re-entering Nawiliwili Harbor on September 26, 2007. Plaintiff uses Nawiliwili Harbor for surfing and swimming. Plaintiff serves on the Executive Committee of Surfrider Foundation, a Kaua'i organization that works to protect and preserve our ocean, waves and beaches. Plaintiff is also a member of People for the Preservation of Kauai and HUI-R. Plaintiff is very concerned about the environmental and cultural impacts of the Superferry!

57. Plaintiff Lee Tepley resides on the Island of Hawai'i, Islands of Hawai'i. Plaintiff did not participate in the non-violent First Amendment protected protest against the illegal entry of the Superferry into Nawiliwili Harbor on August 26 and 27. However, Plaintiff did participate in planning for the protests at two meetings when he visited Kauai on August 17 and 18. Also on August 17 and 18, Plaintiff presented data at these meetings relating

to the threat to marine mammals posed by the Hawaii Superferry. Plaintiff has been involved in the protest against the superferry for several years and has been collecting and analyzing scientific data related to the threat of the Superferry to marine mammals. Some of this data and results of analyses are presented on Plaintiff's web site at <http://web.mac.com/leetepley/iweb>. Plaintiff considers any further operations of the Superferry to be illegal; a threat to marine mammals; and a threat to the environment of Kaua'i, Hawai'i.

58. Plaintiff Paul Doubleday Massey resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff entered the waters of Nawiliwili Harbor on the evening of August 27, 2007 at around 9pm, to deliver drinking water to a group of swimmers stranded on a rock in the harbor. Plaintiff responded because the swimmers, who appeared dangerously fatigued and cold, had taken refuge from a patrol boat and law enforcement officers on the beach who were pursuing them. Plaintiff is concerned that, if Hawaii Superferry returns to Nawiliwili Harbor before the court-ordered environmental review process is completed, there will be more circumstances in which lawful observers on the shoreline will spontaneously respond to distressed protesters by swimming to their aid, thus placing the rescuers in serious risk of injury or death, and of severe criminal penalties.

59. Plaintiff David Richard Mireles resides on the Island of Kaua'i, Island of Hawai'i. Plaintiff considers any further operations of the Superferry to be illegal and a threat to the environment of Kaua'i, Hawai'i. Plaintiff uses Nawiliwili Harbor for surfing, sailing, fishing, swimming, and outrigger canoe paddling. Plaintiff belongs to the Surfrider Foundation. Plaintiff believes that the Coast Guard is using its security zone to illegally facilitate illegal activity on the part of Superferry and that such an alliance of state and corporate power sets a dangerous precedent for illegal activities in the Kauai county and state of Hawaii jurisdictions.

60. Plaintiff Michial Freigang resides on the Island of Kaua'i, Islands of Hawai'i. Plaintiff contends that any further operations of the Superferry are illegal and a threat to the environment of Kaua'i. Plaintiff expects to enter the water to protest Superferry re-entering Nawiliwili Harbor on September 26, 2007. Plaintiff uses Nawiliwili Harbor for surfing.

61. Plaintiff Jonathan Jay resides at on the Island of Kaua'i, Islands of Hawai'i. Plaintiff is an independent photographic journalist whose work has been published in a number of on-line journals, blogs, and print commercial publications. Plaintiff seeks to maintain his access to covering any encounter between the people of Kaua'i and the Superferry with its attendant law enforcement escort. Plaintiff was present during the encounter in

Nawiliwili Harbor on Sunday, August 26, 2007 and captured visual images of the Department of Homeland Security Coast Guard displaying a threat of lethal force. Closing the Nawiliwili Jetty by including the jetty within the security zone will seriously limit Plaintiff's ability to exercise his First Amendment right to cover any such a future encounter. Plaintiff was present on Monday, August 27, 2007 in the water to observe and document interactions between Coast Guard personnel and surfers blocking the Superferry.

62. Plaintiff Cory (Martha) Harden resides on the Island of Hawai'i, Islands of Hawai'i. Plaintiff considers any further operations of the Superferry before an Environmental Assessment, and Environmental Impact Statement if necessary, are completed, to be illegal, and a threat to the environment of Kaua'i, Hawai'i. Plaintiff believes the Coast Guard is using its security zone to illegally facilitate illegal activity on the part of Superferry and that such an alliance of state and corporate power sets a precedent for illegal activities in my jurisdiction. Plaintiff serves on the board of Sierra Club, Moku Loa group, although she is not appearing in this suit in her official capacity. Sierra Club is an organization that works to protect the environment statewide. Plaintiff grew up in Hawai'i and has lived about 30 years in Hawai'i.

B. Defendants

63. George W. Bush is named in his official capacity as President of the United States and Commander in Chief of the Armed Forces of the United States.

64. Michael Chertoff is named in his official capacity as Secretary of the Department of Homeland Security

65. Thad W. Allen, Admiral is named in his official capacity as Commandant of the United States Coast Guard.

66. Sally Brice-OHara, Rear Admiral, is named in her official capacity as Commander of the United States Coast Guard 14th District.

III. STATUTORY AND REGULATORY BACKGROUND

A. National Environmental Policy Act

67. The National Environmental Policy Act (NEPA) is a broad national commitment to protect the environment and promote environmental quality. 42 U.S.C. § 4321. This commitment embodies “a national policy which will encourage productive and enjoyable harmony between man and his environment,” “promotes efforts which will prevent or eliminate damage to the environment and the biosphere,” and “enrich the understanding of the ecological systems and natural resources important to the Nation.” Id.

77. NEPA recognizes the impact that Human activity can have on the

viability of ecological systems and establishes a goal of creating and maintaining “conditions under which man and nature can exist in productive harmony.” Ibid. § 4331(a). The policy and goals of the law create “the continuing responsibility of the Federal Government to use all practicable means ... [to] fulfill the responsibility of each generation as trustee of the environment for succeeding generations.”

68. Federal agencies are required to include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long term productivity, and

(v) any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implanted.

Ibid. at § 4332(C).

69. In their NEPA process, federal agencies are obligated “to the fullest extent possible .. [to] [e]ncourage and facilitate public involvement” in decision-making. 40 C.F.R. §1500.2.

70. Federal agencies are also required to have administrative procedures that facilitate “full compliance with the purposes and provisions” of NEPA. 41 U.S.C. §1500.2(d).

71. Federal agencies are also required to have administrative procedures that facilitate “full compliance with the purposes and provisions of NEPA.” 42 U.S.C. §4333.

72. Defendant Coast Guard’s Commandant Instruction M16475.1D guides the Coast Guard in complying with the NEPA.

73. The first tier is a determination whether the proposed action qualifies for a “categorical exclusion.” from the general requirement to evaluate environmental impacts. A categorical exclusion is granted when the proposed actions are of the type “which individually or cumulatively do not have the potential to pose significant threats to the human environment.” 49 Fed. Reg. 29647, ¶2c (July 23, 1984)

74. The second NEPA tier is an environmental assessment (EA). Regulatory rules require preparation of an EA if the regulation “may have significant environmental impacts” Ibid, ¶5(c)(1)(iv). (emphasis added).

The determination of “significant” involves “considerations of both context and intensity.” Ibid. at 29656, ¶13a(3).

75. Context includes an analysis of short-term and long-term effects with respect to human society as a whole, the region affected, and the locality affected. Id.

76. Intensity “refers to the severity of the impact,” id., and includes the following considerations relevant to this case:

77. a. the “[d]egree to which the effects are likely to be highly controversial,” ibid., ¶131(3)(d);

78. b. the [d]egree to which effects are highly uncertain or involve unique or unknown risks,” ibid., ¶ (e);

79. c. the [d]egree to which the action establishes a precedent for future actions with significant effects or represents a decision in principle about a future consideration,” ibid. ¶(f),\;

80. d. “cumulative significant impacts,” ibid., ¶ (g);

81. e. the “[d]egree to which endangered or threatened species, or their habitat, are adversely affected,” ibid., ¶ (i);

82. f. “[w]hether a violation of Federal, State, or local law for environmental protection is threatened.” Ibid., (j).

83. If any one of these factors is found to potentially be a

substantive concern, an EA is necessary, even if the project would normally qualify for a categorical exclusion. 40 C.F.R. §1501.4.

84. An EA includes sufficient evidence and analysis to support an agency's determination whether a proposed action will significantly affect the environment, in which case the process moves to the third tier – an environmental impact statements (EIS). Ibid. ¶1508.9

85. If the determination is that an EIS is not required, the agency must prepare a Finding of No Significant Impact that includes the agency's reasons for the determination. Ibid.

86. An EIS is required for projects that may result in “substantial amounts of wildlife habitat [being] disturbed.” 49 Fed. Reg. 29647, 29652 (July 23, 1984).

87. The EIS discussion of potential environmental impacts must include the “impact on the environment which results from incremental impacts of the action when added to other past, present, and reasonably foreseeable future significant action.” 40 C.F.R. 1508.7.

88. NEPA's purpose is to ensure that before a decision is made to take significant action by the U.S. government, the potential environmental impacts of that action are at least considered.

B. The Administrative Procedures Act

89. The Administrative Procedures Act (APA), 5 U.S.C. §701 et seq. provides for filing suit to respond to agency action that inflicts harm.

90. An agency decision will be declared invalid, if the agency acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706.

IV. RELIEF SOUGHT

91. Plaintiffs herein seek a declaratory judgment that the Superferry Security Zone Rule is not currently effective because there is no section within the rule setting forth the date upon which the rule becomes effective.

92. The plaintiffs herein seek a declaratory judgment that the emergency process used for adopting the Superferry Security Zone Rule was illegal because there was no emergency.

93. The plaintiffs further seek a declaratory judgment that the regulation used to create the rule is not applicable to the fact situation presented by the events used to justify the rule.

94. The plaintiffs further seek a declaratory judgment that the analysis used to support the adoption of the rule is legally erroneous.

95. The plaintiffs further seek a declaratory judgment that the findings used to support the rule are invalid because the analysis underlying the findings is legally erroneous.

96. The plaintiffs further seek a declaratory judgment that the Coast Guard acted *ultra vires* when adopting the rule because no legal authority existed for adoption of the rule.

97. The plaintiffs further seek a declaratory judgment that the rule at issue is void *ab initio* and without any legal effect whatsoever.

98. The plaintiffs further seek a declaratory judgment that all changes, improvements, or other alterations to the lands around Nawiliwili Harbor, made by any federal or state agency or entity, in preparation for or to facilitate the imposition of the security zone defined by the rule at issue in this case, constitutes a use of public funds without authority.

99. The plaintiffs further seek a declaratory judgment that the adoption of the rule changed the status quo and creates an emergency.

100. The plaintiffs further seek a declaratory judgment that the nature of the emergency is that implementation of the rule will likely lead to destruction of the peace and infliction of grievous bodily harm on innocent people, produce long term economic and environmental damage to the people and islands of Hawaii, and legitimize a profoundly undemocratic utilization of state and federal resources and power.

101. The plaintiffs further seek a declaratory judgment that the results identified in paragraph 43 may materialize as early as September 26, 2007.

102. The plaintiffs seek a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction preventing the Coast Guard from implementing the Superferry Security Zone Rule or any similar rule.

103. The plaintiffs seek whatever other relief in law or equity the Court sees fit to grant.

104. The Plaintiffs finally seek attorney's fees and costs for this litigation.

Respectfully submitted,

LANNY ALAN SINKIN
Attorney for Plaintiffs

DATED: September 20, 2007