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

MEGAN WONG, et al. )  
 )  
v. )  
 )  
GEORGE W. BUSH )  
 )  
\_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF MOTION FOR  
DECLARATORY RELIEF AND TEMPORARY RESTRAINING ORDER**

**I. JURISDICTIONAL STATEMENTS**

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction), 5 U.S.C. § 701 (Administrative Procedures Act), and 28 U.S.C. § 1362 (Mandamus). The relief sought is authorized by 28 U.S.C. §2201 (Declaratory Relief) and 28 U.S.C. §2202 (Injunctive Relief).

Defendants are all officials of the United States Government sued in their official capacities.

The Plaintiffs allege the Defendants violated the Administrative Procedures Act and the National Environmental Policy Act.

**II. STATEMENT OF FACTS**

Faced with the potential collapse of a business enterprise after an adverse court ruling and a highly motivated public opposition to the continued operation of the enterprise, the Defendants adopted a rule outside the scope of their authority whose purpose was to facilitate crushing opposition to the business enterprise. Details of the facts are discussed in the next section, where appropriate.

These current situation surrounding this case offers a great opportunity and great necessity for healing. See Exhibit 1.

### III. ARGUMENT

#### A. THE ENTIRE RULE MAKING PROCESS AND THE RULE ITSELF ARE VOID AND WITHOUT EFFECT

##### 1. The Rule at issue in this case never went into effect.

The rule does not contain the standard section on effective dates. Federal Register / Vol. 72, No. 171 / Wednesday, September 5, 2007 / Rules and Regulations 50877) (“Hereinafter Fed. Reg. Rule”). See Exhibit 2 for examples of such sections and amending of such sections.

The Preamble states: “**DATES:** This rule is effective from September 1, 2007, through October 31, 2007.” Fed. Reg. Rule at 50877. This information does not appear in the rule itself. Ibid. at 50879.

The exclusion of the date means that the rule is not in effect.

##### 2. If the Court finds that the rule never went into effect,

this case is still not moot.

When a challenged action is not in effect, “a case generally become moot.” Students for a Conservative American v. Greenwood, 392 F.3d 1129, 1131 (9<sup>th</sup> Cir. 2004) [citation omitted].

Generally, “[t]he court lacks jurisdiction to hear moot cases.” Tarter v. U.S., 911 F.2d 739 (9<sup>th</sup> Cir. 1990).

A case is not moot, however, if there is a reasonable expectation that the Defendant’s actions causing the alleged injury will recur. Students for a Conservative American, supra. [citation omitted].

The “party asserting mootness has a ‘heavy burden’.” to show reoccurrence is unlikely. Students, supra.

In this case, the only act necessary to make the rule effective is to amend the rule to insert the effective dates.

Despite the nature of the rule as a final rule, Defendant Bryce-OHara is taking comments. Fed. Reg. Rule, supra at 50877.

After the close of the comment period, Defendant Bryce-OHara’s can correct the final rule, thereby making the rule effective.

Defendant Bryce-OHara is committed to this rule and will certainly act immediately to instate the rule, should the Court find the missing effective dates to void the effectiveness of the rule.

This case does not involve “‘real’ or constitutional (Article III) mootness, [footnote omitted],” which exists when an intervening event “makes it impossible for the court to grant ‘any effectual relief.’” National Mass Media v. Stanley, 152 F.3<sup>rd</sup> 1178, 1180 (9<sup>th</sup> Cir. 1998) quoting Church of Scientology v. United States, 506 U.S. 9, 12 (1992)

Only a clerical error and the expiration of the time set aside for comments prevents the rule at issue from becoming effective.

These circumstances compel the Court to retain jurisdiction because this case is hardly moot.

3. The agency plans to put the defective rule into effect.

The comment period runs through September 26, 2007, so that changes cannot be made until September 27, 2007. Id.

Yet Defendant Bryce-OHara fully intends to activate the rule on September 26, 2007, the day before the comment period expires. Exhibits 3 and 4. The purpose of Defendant Bryce-OHara’s activation of the rule will be to provide the full law enforcement powers of the United States and the State of Hawaii to ensure Superferry conducts business on September 26, 2007 in Kaua’i. Id., see also Exhibit 5 (the Federal and State components of the Unified Command at Superferry’s disposal).

Plaintiffs through their counsel informed Defendants Allen and Bryce

-OHara, through counsel, of the defect in the rule. Exhibit 6.

As minimal relief, Plaintiffs ask this court to find that there is no authority to activate the security zone on September 26.

4. To invoke the exceptions to the Administrative Procedures Act requirements for rule making, an agency must show that compliance would cause real harm.

Under the Administrative Procedures Act, (APA) an agency initiating a rule making is required to publish a notice of proposed rule making and accept comments thirty days before the rule's effective date, unless the agency has good cause for not complying with these requirements. 5 U.S.C. § 553(d)(3).

Normally, the APA process would involve

- 1) publish[ing] a general notice of proposed rulemaking in the Federal Register;
- 2) giv[ing] interested parties an opportunity to participate in the rulemaking through submission of data, views, and arguments;
- and 3) after consideration of the relevant matter presented, incorporate[ing] in the rules a concise general statement of the rules' basis and purpose. 5 U.S.C. S 553(b)-(c).

Ober v. EPA, 84 F.3d 304, 312 (9<sup>th</sup> Cir. 1996).

In order to invoke the exception, the agency must demonstrate that compliance with the requirements is “either impracticable unnecessary or contrary to the public interest.” Buschmann v. Schweiker, 676 F.2d 352, 356 (9th Cir. 1982) (quoting Kelly v. United States Dep't of the Interior, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972))

The purpose of the requirement is to “promote public input into agency rulemaking” and, therefore, the exception should be sparingly used. Buschmann, 676 F.2d at 357.

The finding needed to support use of the exception is ““delay would do real harm.”” Hawaii Helicopter Operators Ass'n v. Federal Aviation Admin., 51 F.3d 212, 214 (9th Cir. 1995)

- a. The Department of Homeland Security Coast Guard declared an emergency when there was no emergency.

On August 26 and 27, some people got in the waters of Nawiliwili Harbor and prevented Superferry from entering.

Superferry went away and did not intend to come back. Exhibit 7.

The people in the water returned to their normal daily lives.

If there was ever an emergency, the emergency was over.

Four days later, the Department of Homeland Security Coast Guard (DHSCG) declared an emergency and rushed to adopt the rule at issue. Fed. Reg. Rule, supra. The reason given for the rush was that some people had entered the water four days earlier. Id.

The real problem for the Coast Guard was that they found themselves unable to control the “non-compliant protesters.” Id.

In response to that perceived lack of authority, the DHSCG rushed out a rule specifically to increase the DHSCG power during the entrance,

docking, and leaving of the Superferry in Nawiliwili Harbor. Ibid. at 50879.

By the time the DHSCG initiated adoption of this rule, however, the conditions producing the confrontation in the harbor had already ceased, a status quo that DHSCG recognized. Id. (Superferry suspended service to Kaua'i.) Faced with the concerted opposition of Kaua'i citizens, the operators of Superferry suspended operations to Kaua'i and had no intention of returning to Nawiliwili Harbor unless the DHSCG guaranteed the passage of the boat within the harbor boundaries. Fed. Reg. Rule, supra. at 50877 Exhibit 7.

Under that status quo, the decisions in pending court cases would determine whether Superferry had a right to enter Nawiliwili Harbor or not.

The only consequence of the stand off was reduced income for Superferry. A private company's potential loss of profits is not a condition sufficient for a federal agency to declare an emergency and violate the requirements of federal law for rule making.

This linkage of official action being illegally taken to further the profits of a private corporation is a theme that will resonate throughout this case.

b. DHSCG used the falsely declared emergency to bypass the statutory requirements for rule making.

Having incorrectly and improperly declared an emergency, DHSCG,

in violation of the Administrative Procedures Act, used that declaration to bypass the requirements for rule making. Fed. Reg. Rule, supra. at 50877.

The agency explanation for the failure to abide by the requirements is contrary to the facts before the agency. Oregon Natural Resources Council Fund v. Brong, WL 2104180 \*3 (9<sup>th</sup> Cir. 2007) citing Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1170 (9<sup>th</sup> Cir. 2004)

The remedy is for the Court to set aside the final action as arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A).

When the issue involves agency non-compliance, the exceptions will be narrowly drawn. Natural Resources Defense Council v. Evans, 326 F.3d 904, 911 (9<sup>th</sup> Cir. 2003) [citations omitted].

The entire administrative proceeding by which the DHSCG adopted the rule at issue in this case is void *ab initio*.

c. The adoption of the rule creates an emergency.

The DHSCG rule changed the peaceful status quo. Once the rule was adopted and a law enforcement plan prepared to implement the rule, Superferry announced the resumption of service to Kaua'i. Exhibits 4.

The State and Federal governments issued warnings to potential protestors regarding potential arrest, prosecution, imprisonment, and fines. Exhibit 8.

The opponents of Superferry responded with pledges to resume their blockade, if Superferry returned to Kaua'i. Exhibit 9. Counsel for Plaintiffs prepared an analysis of the potential liability that could attach to any public officer acting *ultra vires* by cooperating in the implementation of the security zone. Exhibit 1, Attachment E,(2).

As a direct result of the DHSCG rush to adopt the security zone rule, the potential for a confrontation now exists. That potential creates an emergency warranting intervention by this court.

d. The DHSCG acted *ultra vires* because the rule adopted is not a permissive construction of the regulation governing such zones.

(1) The adoption of a rule is circumscribed by the regulation under which the rule is adopted.

Any rule adopted based on a regulation must fall within the confines of the regulation. Cf. United States v. Dang, 488 F.3d 1135, 1140 (9<sup>th</sup> Cir 2007) (whether a regulation is *ultra vires* depends on whether the regulation is a permissive construction of the statute). By analogy, a rule must be supported by its enabling regulation.

If an official enacts a rule that is not a permissive construction of the regulation, the official is acting outside the scope of the official's authority. Taylor v. Westley, 402 F.3d 924, 935 (9<sup>th</sup> Cir. 2005). (actions falling outside the scope of authority are *ultra vires*).

(2) The Superferry Security Zone Rule is not a permissive construction of the regulation used to establish security zones.

Security zones are meant for security threats and as a response to 9/11. 14328 Federal Register / Vol. 68, No. 57 / Tuesday, March 25, 2003 / Rules and Regulations.

Security zones are established for Presidential or Vice Presidential visits, high profile events such as the Olympics, controversial events such as transport of spent nuclear fuel, and in response to the threat of terrorist attacks.

Dept of Homeland Security Delegation No.0170.1, 1406 Security Zone Regulations ... 1625-AA87, 73338 Federal Register / Vol. 71, No. 237 /Monday, December 11, 2006 / Unified Agenda.

The regulation establishing security zones states the following:

“(b) The purpose of a security zone is to safeguard from destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature: (1) Vessels, (2) Harbors, (3) Ports, and (4) Waterfront facilities: in the United States and all territory and water, continental or insular, that is subject to the jurisdiction of the United States.”

33 CFR § 165.30 Subpart D Security zones.

The Superferry Security Zone, on the other hand,

“is intended to enable the Coast Guard and its law enforcement partners to better protect people, vessels, and facilities in and around Nawiliwili Harbor in the face of non-compliant protesters who have impeded passage of the Hawaii Superferry to its dock in the harbor.”

Fed. Reg. Rule at 50877. (emphasis added).

The “non-compliant protesters” have demonstrated no intent to destroy, cause the loss of, or cause injury to the Superferry or to any other vessel, harbor, port, or waterfront facility. The “non-compliant protesters” have not demonstrated any intent to commit sabotage or other subversive acts, cause an accident, or otherwise cause any harm at all. Paddling out on a surf board to a place in the path of the Superferry is not “similar” to “sabotage or other subversive acts.” The “non-compliant protesters” were engaging in non-violent civil disobedience to protect the security of their homeland.

As Defendant Bryce-OHara stated: “These weren't terrorists.” Exhibit 3 at 2, 4 at 3. As Defendant Bryce-OHara further stated, the protestors are “people who want to make a statement.” Id.

The sole impact of the actions taken by citizens in Nawiliwili Harbor was that the Superferry could not return to the harbor and, therefore, lost revenues. The imposition of the rule is meant solely to prevent a private corporation from losing profits.

Superferry was a speculative investment made at a time when conditions existed that could foreclose the Superferry from ever going into operation, such as pending litigation. The investors now stand to lose their investment. That kind of speculation and risk-taking is garden variety

business practice. Some lose. Some win.

It is not up to the State or Federal Government to now use force to make a winner out of a business, whose risk assessment turned out to have been wrong.<sup>1</sup>

Nothing in 33 CFR § 165.30 Subpart D authorizes the creation of a security zone to stop non-violent civil disobedience or to ensure a private enterprise realizes its profit-making goals.

To the extent that the security zone activation results in Superferry adversely impacting the environment of Kaua'i, the activation is counter to “protection of natural resources.” Dept of Homeland Security Delegation No.0170.1, supra. To the extent the activation erodes people’s faith in their government, the goal of “national security” is defeated. Id.

The regulation does not permit the creation of a security zone for the circumstances described in the preamble to the rule at issue. Defendant Bryce-OHara acted *ultra vires* when she adopted the rule. The rule itself has no basis in law and is void.

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<sup>1</sup> If the DHSCG is going to get involved in business disputes, where will it end? If jet ski manufacturers schedule a contest with a \$1,000 prize in a harbor area where canoes usually paddle and the canoes get so upset that they block the jet ski competition, is the Coast Guard going to rush in to create a security zone for the jet skiers and threaten to arrest and prosecute any canoe paddlers that enter the zone?

5. The DHSCG is improperly motivated to adopt a rule for an inappropriate purpose.

a. DHSCG is motivated by loss of face.

What really led DHSCG to adopt the rule was the non-compliance of the protesters. Fed. Reg. Rule, supra. at 50877. People simply refused to obey Coast Guard orders to stop what they were doing. The Coast Guard could not control a group of people on surf boards and blamed lack of authority. Id.

To compensate for that sense of humiliation by declaring a false emergency and exerting illegal authority, however, is not the cure for the dis-ease.<sup>2</sup>

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or members thereof.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

U.S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 565 ( 1973)

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<sup>2</sup> Ho'oponopono is the true cure. See Exhibit 1 at ¶¶ 77-80

The Coast Guard blames the people in the water for creating the situation, rather than objectively examining the roots of the conflict. The Coast Guard demonstrates bias and favoritism. The bias against the protesters reveals an improper motive on the part of the decision-maker that calls for invalidating the rule. Nagrampa v. MailCoups, Inc, 496 F. 3d 1257, 1285.

Certainly the confidence of the public on Kaua'i in their government is being eroded drastically. See e.g. Complaint at ¶¶ 41-62.

The shock of the 911 attacks is still working its way through the United States political system. The War on Terrorism can easily be extended to include all forms of dissent and protest. The dark night of the soul for the United States is expressing itself in the current situation in the Islands of Hawai'i.

Institutions such as this Court are called upon in such times to bring back the light shining from the foundation document of the nation – the Declaration of Independence.

- b. The DHSCG openly acknowledges that the purpose of the rule is to suppress the exercise of First Amendment rights.

Defendant Bryce-OHara acknowledged that the people in the water and on the land were there to “to make a statement.” How simple and eloquent a perception of the First Amendment at work.

The sad part is that the people had already made their statement on August 26 and 27. Superferry left and did not intend to return. The people of Kaua'i returned to their normal daily lives.

Defendant Bryce-OHara then created the situation all over again.

The Judiciary must step in when the record supports a claim that an agency has adopted a rule aimed at suppressing people who “want to make a statement.” Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910, 923 (9<sup>th</sup> Cir. 2006) citing Taxpayers for Vincent, 466 U.S. at 804 (ordinance designed to suppress certain ideas that the City found distasteful.)

The purpose of the rule is to suppress First Amendment rights and reflects a bias against those attempting to exercise those rights. As such the purpose is unconstitutional. The rule is void and without effect.

6. The analysis of impacts resulting from implementation of the emergency rule is based on an improperly narrow, legally erroneous definition of those impacts.

The DHSCG looked only at the direct impacts created by imposition of the rule and did not look at the secondary impacts of facilitating Superferry's operation. Fed. Reg. Rule, supra.

But for the creation of the Superferry Security Zone, the potential confrontation between law enforcement and citizens would not take place

and Superferry would not come to Kaua'i to offload hundreds of people and cars. These secondary impacts are studiously ignored by DHSCG.

Agency action will be overturned when the agency has “entirely failed to consider an important aspect of the problem” Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001) [citation omitted]

- a. No where is the narrowness error more apparent or relevant than in the environmental analysis offered by DHSCG which resulted in a categorical exclusion.

The DHSCG's Commandant Instruction M16475.1D guides the DHSCG in complying with the NEPA. Fed. Reg. Rule, supra at 50879.

The first tier is a determination whether the proposed action qualifies for a "categorical exclusion" from the general requirement to evaluate environmental impacts because 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)

The second NEPA tier is an environmental assessment (EA). Regulatory rules require preparation of an EA, if the rule "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).

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.

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

- a. the “[d]egree to which the effects are likely to be highly controversial,” ibid., ¶131(3)(d);
- b. the [d]egree to which effects are highly uncertain or involve unique or unknown risks,” ibid., ¶ (e);
- 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),\;
- d. “cumulative significant impacts,” ibid., ¶ (g);
- e. the “[d]egree to which endangered or threatened species, or their habitat, are adversely affected,” ibid., ¶ (i);
- f. “[w]hether a violation of Federal, State, or local law for environmental protection is threatened.” Ibid., (j).

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.

The DHSCG used a categorical exclusion for the Superferry Security Zone Rule. Fed. Reg. Rule at 50879, see also Exhibit 16.

Yet, The rule creates a security zone specifically to permit the Superferry to enter, dock, unload its cargo of vehicles and its passengers at Nawiliwili Harbor, take on people and vehicles, and depart. Fed. Reg. Rule at 50877.

The environmental impacts of Superferry on Kaua'i are at the heart of the controversy.

The DHSCG makes that same mistake that the Hawaii Department of Transportation (DOT) made as regards Superferry.

The DOT determined that there was no requirement for Superferry to prepare an environmental assessment (EA). The Supreme Court disagreed. <http://www.state.hi.us/jud/opinions/sct/2007/27407.pdf>.

DOT's error was looking only at the impacts of the harbor improvements not at the environmental effects that such improvements would create by permitting the Superferry to operate. Id.

That error is precisely why the Hawaii Supreme Court found the categorical exclusion granted by DOT to be illegal. Id.

**Stated simply, the record in this case shows that DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment.**

Therefore, based on this record, we can only conclude that DOT's determination that the improvements to Kahului Harbor are exempt from the requirements of HEPA was **erroneous as a matter of law**. The exemption being invalid, the EA requirement of HRS § 342-5 is applicable. **This issue being dispositive, we need not consider Appellants' other arguments.**"

Ibid. at 99-101 (emphasis added).

The Coast Guard similarly failed to evaluate the secondary impact of facilitating the Superferry project.

The failure of the rule to consider secondary impacts is legally fatal. The rule should be declared void on this basis alone.

Commandant Instruction M16475.1D, section B.2.b, taking its guidance from the National Environmental Policy Act, provides a number of considerations that would make a categorical exclusion inappropriate, including:

" (3) The quality of the human environment that is likely to be highly controversial in terms of scientific validity or public opinion.(4) An effect on the human environment that is highly uncertain or involves unique or unknown risks.(5) Future precedent setting actions with significant effects or a decision in principle about a future consideration.(6) An individually insignificant, but cumulatively significant, impact when considered along with other past, present, and reasonably foreseeable future actions. ... (8) Species or habitats protected by the Endangered Species Act. (9) A potential or threatened violation of a Federal, state, or local law or requirement imposed for the protection of the environment."

A categorical exclusion would require the DHSCG to find, among

other things, that there is no controversy related to Superferry entering Nawiliwili Harbor; that the environmental impacts on Kaua'i of Superferry are not unique and are clearly known; that permitting Superferry to enter Nawiliwili Harbor would not set any precedents; that Superferry would have no cumulative effects on Kaua'i, considering the current conditions on Kaua'i; that there would be no potentially significant impacts on endangered species or their habitat; and that state environmental laws would be respected.

Obviously, the current circumstances would not permit the DHSCG to reach any of these conclusions.

The last item is critical. The Hawaii Supreme Court said: "the EA requirement of HRS § 343-5 is applicable." Supreme Court Opinion at 101. When section 343-5 is applicable, the law makes completion and acceptance of the EA a "condition precedent" to the agency taking the action. HRS 343-5(c). The Supreme Court ruling means that the EA must be finished and accepted by the appropriate authority before the project is allowed to go forward. No other interpretation of the law makes sense.

This argument is not presented as a matter to be determined by this court. The argument is presented to demonstrate that a reasonable person can conclude that the ruling by the Hawaii Supreme Court makes any further

operation of the Superferry in Hawaiian harbors unlawful.

There is a further question of whether the environmental assessment now to be prepared by the State of Hawai'i will be objective.

The Director of the Hawaii DOT is requesting authority to award the contract to prepare the EA on a non-bid basis. His reasons are reported as follows:

"The ferry service is highly desired and environmental review is needed to enable its operation, the DOT must accomplish the EA (environmental assessment) in the shortest time possible to avoid the loss of the ferry operator," Barry Fukunaga, director of the state Department of Transportation, said in the request for an exemption to procurement law.

Exhibit 11. (emphasis added)

An EA is an objective study to determine whether there are potentially significant environmental impacts, not a formality prepared to permit a predetermined outcome.

Clearly, the Director feels badly about the wrong decision having been made years ago regarding the need for an EA and would like to undo the results of that error. Unfortunately, the Director now reveals he has a disqualifying bias towards finding no significant impacts and a predetermined outcome he desires from the EA.

Again, this question is not being presented for this court to decide. This information is being presented to demonstrate that a reasonable person

can conclude that the State government is determined to allow Superferry to operate, no matter what the Supreme Court has said and no matter what the law requires.

Elsewhere, the topsy turvy nature of the situation created by the State is apparent in the Maui courtroom. Despite the “condition precedent” wording of the law, the judge is actually holding an evidentiary hearing on whether Superferry can be allowed to operate while an EA is prepared. Exhibits 12, 13.

HRS 343-5 is clear that the completion of the EA is a condition precedent to operation.

Superferry operating while preparing the environmental assessment turns the law on its head. What if an environmental assessment were to show that Superferry should prepare an EIS? Will Superferry then continue to operate while the EIS is prepared? What if the EIS finds that the environmental impacts are indeed very serious? Will Superferry or the State then be able to make a reasoned and objective judgment about continuing the project after it has been operating for four or five years? Those scenarios are contrary to the fundamental rationale and application of environmental laws.

This court is not asked to make a determination regarding the

appropriateness of the Mau'i hearing. This argument is being presented to demonstrate that a reasonable person can believe that even fundamental principles of environmental law are being undermined to try to salvage Superferry from its own mistakes and the mistakes of government decision-makers.

The shock of the Supreme Court decision has propelled State officials into an alternate reality where sheer power is now appropriate to open the way for Superferry regardless of any oaths taken to uphold the constitution and laws of the State of Hawai'i.

The failure of State officials to properly enforce the laws forced the citizens to take action to do so. Those actions included the filing of multiple law suits to correct administrative illegality on the part of the State. Exhibit 14. Those actions included the blockade of the Superferry in Nawiliwili Harbor.

The implementation of the Superferry Security Zone Rule will set a precedent that the power of the State and Federal governments will be called upon to protect the interests of a private corporation that has been found to be in violation of the laws of the state and that will quite likely be forbidden to operate in the very near future. Placing state power behind lawless corporations sets a precedent for anti-democratic rule.

The second precedent that will be set is that the power of the State and Federal governments will be called upon to crush a citizens' protest that is reasonably characterized as motivated by necessity in the face of official lawlessness. Such an effort directed against peaceful actions seeking to enforce the law sets a precedent for dictatorship.

**A reasonable person can conclude:**

- (1) there is a potential for significant adverse environmental effects if Superferry continues to operate and again attempts to enter Nawiliwili Harbor (see evidence in Mau'i case);**
- (2) the Supreme Court ruling requiring an environmental assessment means Superferry is legally required to cease operation until an EA is prepared [see HRS 343-5(c) (“Acceptance of a required final [environmental] statement shall be a condition precedent to approval of the request and commencement of the proposed action.”)];**
- (3) the elected and appointed officials at the State and Federal level responsible for upholding the State and/or Federal Constitution and enforcing the law are, instead, conspiring with Superferry to violate the law (see press conference held by Governor, Coast Guard, and Superferry re return to Kaua'i on Septmeber 26);**
- (4) environmental laws, procedures, and principles are being subverted to facilitate Superferry making a profit and staying in business (see statement of Director of Department of Transportation regarding need to rush EA so that Superferry can operate);**
- (5) State and Federal officials are prepared to use force, up to and including lethal force, to facilitate Superferry violating the law (see video of de-tarped and manned heavy caliber machine gun during August confrontation in the harbor), and**
- (6) to facilitate the use of force, the Department of Homeland Security Coast Guard illegally adopted a rule creating a security zone [see Petition filed as a comment at <http://dms.dot.gov/> (Simple Search, Docket 29153) Comment by “Lanny Sinkin” dated September 12, 2007]**

**Based on those conclusions, a reasonable person can further conclude that**

**(1) citizenship, necessity, and self defense call for taking direct action to uphold the Constitution and laws of the State and Nation,**

**(2) that those in power at the State and Federal level, who are operating outside the law, will potentially commit a host of crimes, including and not limited to racketeering (RICO), sedition, conspiracy to violate civil rights, assault, battery, false arrest, false imprisonment, wrongful death and a host of other criminal violations and civil torts unless they cease and desist from their illegal activities,**

**(3) that it will be those in power trying to facilitate Superferry's violation of the law that will be blockading the harbor to prevent its legal use by the residents of Kaua'i and their guests;**

**and (4) that those in power at the State and Federal level, who are massing force against those seeking to enforce the law and petition for redress of their grievances, meet the definition of terrorists because their actions are designed to make people afraid, to convince people to give up their rights, to force people to submit to an external authority, and to punish "non-believers."**

What these circumstances mean is that the people entering the water on August 26 and 27 and the people intending to enter the water, if Superferry returns to Kaua'i, have a reasonable argument that their activity is a necessity.

To present a necessity defense, a defendant must offer proof

“(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.”

U.S. v. Arellano-Rivera, 244 F.3d 1125, 1126 (9<sup>th</sup> Cir. 2001) quoting United

States v. Aguilar, 883 F.2d 662, 693 (9<sup>th</sup> Cir. 1989)

When the Unified Command is a group of traumatized public officials trying to salvage something from the mess their decisions have caused and willing to ignore the law, corrupt the law, and even change the law without democratic process, the people of necessity must resist or risk losing their form of government.

The third precedent that will be set is that the power of the State and Federal government will be used to permit the likely infliction of environmental damage in order to protect the profits of a private corporation. Putting the power of the government behind realization of short term profits at the expense of the long term vitality of the environment sets a precedent for environmental collapse.

The fourth precedent will be the transformation of the United States Coast Guard and the nature of its relationship with the general citizenry. In addressing the events in Nawiliwili Harbor in August, the Defendant Bryce-OHara said:

“quite honestly, the Coast Guard is used to reaching in the water and pulling the hand of someone who desperately wants to be rescued.

Exhibit 3 at 2, 4 at 3. That is the Coast Guard that the people of Hawai’i know and love.

To be transformed from a rescue organization into a free speech

suppression organization aligned with rogue public officials and an illegal business operation will set a terrible precedent for the Coast Guard and seriously damage their previously excellent relationship with the people.

There is a reasonable basis to conclude that the consideration of creating a precedent precludes a finding in support of a categorical exemption.

In the absence of at least an EA, the DHSCG has no basis for assessing past impacts and whether the contribution of Superferry to those past impacts will be significant. For the same reason, DHSCG cannot reasonably foresee future actions.

The requirement to determine that there will be no significant cumulative impact from the Superferry Security Zone Rule permitting Superferry to dock, unload, and reload in Nawiliwili Harbor cannot be fulfilled by DHSCG.

Endangered species unfortunately abound in Hawai'i, see e.g. <http://www.fws.gov/pacificislands/wesa/endspindex.html> and even the Federal Government is concerned about Superferry's potential impact on Humpback Whales. Exhibit 15.

When the highest court of the State has concluded that an environmental assessment is necessary before Superferry can operate, the

security zone facilitation of Superferry's continued operation clearly forecloses a categorical exclusion.

In conclusion, the current situation supports a finding that all six of the considerations examined exist.

As the Commandant Instruction states: "If a [Categorical Exclusion] is not appropriate, an EA or an EIS must be prepared." Section B.2.b. Based on the existence of multiple circumstances that make a categorical exclusion inappropriate, the DHSCG is required by its own regulations to prepare an Environmental Assessment for the Superferry Security Zone.

The adoption of the rule violated the National Environmental Policy Act, 41 U.S.C. § 4321 and Commandant Instruction M16475.1D.

A reasonable person can conclude that the DHSCG failing to consider the secondary impacts after the ruling by the Supreme Court in the Superferry matter is a deliberate attempt to evade the requirements of law. The purpose of the evasion is to pursue an agenda of getting even for humiliation by suppressing free speech, freedom of assembly, right to petition for redress of grievances, and committing a host of other crimes against the Constitution, the laws, and the people.

- b The narrowness flaw applies to practically every other analysis used to determine the impacts of the law.

The adoption of the rule required the agency to evaluate the impact of

the rule on numerous executive orders and statutes. Fed. Reg. Rule, supra.

None of the discussion of those impacts included the facilitation of Superferry docking on Kaua'i. Id. All of those evaluations are, therefore, also fatally deficient.

Plaintiffs direct the Court's attention to one such discussion as illustrative of the overall failure of the agency.

“Civil Justice Reform

This temporary rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.”

The likelihood is that the enforcement of the rule will produce many arrests and prosecutions. Both litigation and criminal arrests contribute to burdening the justice system.

While responding to the protest against Superferry's entrance into Nawiliwili Harbor, at least one Coast Guard boat de-tarped and manned what appeared to be a 50mm heavy caliber swivel-mounted machine gun. The de-tarped, manned machine gun is captured on video and available at [www.youtube.com](http://www.youtube.com), search “Superferry”. The video “Superferry Resistance” shows the detarped and manned machine gun beginning at 4:51 on the tape and clearly at 5:33. There are numerous other videos available on You Tube of that same event.

The removal of the tarp and the manning of the gun demonstrated that

the Homeland Security Coast Guard is prepared to use lethal force to gain admission for Superferry into Nawiliwili Harbor.

The use of lethal force would undoubtedly lead to numerous official investigations, possible prosecutions, wrongful death suits, and other legal proceedings against law enforcement personnel that would further burden the Judicial system.

B. The Superferry Security Zone violates the First Amendment rights of those who seek to communicate their opposition to the Superferry and its impacts.

The rule seeks to prevent those wishing to protest from entering the water or standing on the jetty visible to the people entering on the Superferry. That goal is pursued by making Nawiliwili Jetty and the access road to that jetty part of the security zone. Fed. Reg. Ibid. at 50877..

The conversion of this witnessing location into an internment camp only adds insult to injury. Id.

The DHSCG has chosen to place itself on the side of Superferry in this dispute, basically taking the position that business interests trump homeland security interests and that declaring martial law to protect the lawless pursuit of private profits is appropriate. By doing so, the DHSCG demonstrates a lack of respect for the law, brings itself into disrepute with the public, and sets the stage for a highly divisive confrontation with a

potential for injury and loss of life.

C. The circumstances warrant the issuance of a temporary restraining order.

The standard for granting a TRO is the same as the standard for granting a preliminary injunction:

A court may grant a preliminary injunction if a plaintiff shows (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. Alternatively, a court may grant a preliminary injunction if a plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable harm, or that serious questions are raised and the balance of hardships tips sharply in his favor.

Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1158 (9th Cir. 2006)

(reversing denial of injunction where court required more than “mere

possibility of irreparable harm.”) See also Caribbean Marine Services Co.,

Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988): “Thus, under the

“traditional test” typically used in cases involving the public interest, the

district court should consider (1) the likelihood that the moving party will

prevail on the merits, (2) whether the balance of irreparable harm favors the

plaintiff, and (3) whether the public interest favors the moving party.

Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th

Cir.1986). We have allowed the district court some latitude in assessing the first two factors as it fashions appropriate relief. In some cases, we have stated that a plaintiff may meet its burden by demonstrating a combination of probable success on the merits and a possibility of irreparable injury. *E.g.*, Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980) ( L.A. Coliseum ). At other times, we have stated that where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise "serious questions" on the merits. *Id.* at 1201, 1203 & n. 9. This latter formulation is known as the "alternative test." Under either test, however, the district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected. *See id.* at 1200; see also *American Motorcyclist Association v. Watt*, 714 F.2d 962, 967 (9th Cir.1983)"

The public interest in preserving the peace and restoring legality to all aspects of public official behavior weighs heavily in Plaintiffs favor.

The potential harm to Plaintiffs, particularly those Plaintiffs most committed to defending the Constitution and laws of the United States, mandates the issuance of a temporary restraining order.

The financial loss of a private business, which is a loss that does not affect Defendants, can hardly tilt the scales at all in the other direction.

### CONCLUSION

The facts and arguments set forth herein support granting the relief requested by Plaintiffs in their Complaint at pages 91-102.

Respectfully submitted,

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Dated: September 19, 2007