

NOSSAMAN LLP
ROBERT D. THORNTON (CA 72934)
Admitted *Pro Hac Vice*
rthornton@nossaman.com
Special Deputy Corporation Counsel
City and County of Honolulu
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612
Telephone: 949.833.7800
Facsimile: 949.833.7878

EDWARD V.A. KUSSY (DC 982417)
Admitted *Pro Hac Vice*
ekussy@nossaman.com
Special Deputy Corporation Counsel
City and County of Honolulu
1666 K. Street, NW, Suite 500
Washington, DC 20006
Telephone: 202.887.1400
Facsimile: 202.466.3215

CARLSMITH BALL LLP
JOHN P. MANAUT (HI 3989)
jpm@carlsmith.com
LINDSAY N. MCANEELEY (HI 8810)
lmcaneeley@carlsmith.com
Special Deputies Corporation Counsel
City and County of Honolulu
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, HI 96813
Telephone: 808.523.2500
Facsimile: 808.523.0842

ROBERT C. GODBEY (HI 4685)
Corporation Counsel
DON S. KITAOKA (HI 2967)
dkitaoka@honolulu.gov
GARY Y. TAKEUCHI (HI 3261)
gtakeuchi@honolulu.gov
Deputies Corporation Counsel

City and County of Honolulu
530 S. King Street, Room 110
Honolulu, HI 96813
Telephone: 808.768.5248/808.768.5240
Facsimile: 808.768.5105

Attorneys for Defendants

THE CITY AND COUNTY OF HONOLULU and
WAYNE YOSHIOKA, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

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

Defendants.

Civil No: 11-00307 AWT

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING WAIVER OF
SECTION 4(F) CLAIMS**

(Presiding: The Honorable A. Wallace
Tashima, United States Circuit Judge
Sitting by Designation)

Date Action Filed: May 12, 2011
Trial Date: None Set

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. PROCEDURAL SETTING OF THIS MOTION.....	3
III. STATEMENT OF FACTS.....	5
A. The Project.....	5
B. The Administrative Process.....	6
C. Plaintiffs’ Section 4(f) Claims.....	10
IV. STATUTORY BACKGROUND.....	10
V. SUMMARY JUDGMENT STANDARD.....	13
VI. ARGUMENT.....	14
A. Plaintiffs’ Waived Their Section 4(f) Claims for Those Sites They Failed to Identify During the Administrative Process.	14
1. <i>Plaintiffs Were Obligated To Raise Their Section 4(f) Claims in the FTA Administrative Process</i>	14
2. <i>Plaintiffs Failed to Identify Several Section 4(f) Sites or Raise Claims for Those Sites During the Administrative Process</i>	18
VII. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Biodiversity Conservation Alliance v. United States Bureau of Land Mgmt.</i> 404 F.Supp.2d 212 (D.D.C. 2005)	16
<i>Ctr. for Biological Diversity v. Fed. Highway Admin.</i> 290 F. Supp. 2d 1175 (S.D. Cal. 2003)	12
<i>Dep’t of Transp. v. Pub. Citizen</i> 541 U.S. 752 (2004)	passim
<i>Friends of Congaree Swamp v. Fed. Highway Admin.</i> 786 F. Supp. 2d 1054 (D.S.C. 2011)	12
<i>Great Basin Mine Watch v. Hankins</i> 456 F.3d 955 (9th Cir. 2006)	14
<i>High Sierra Hikers Ass’n v. United States Forest Serv.</i> 436 F.Supp.2d 1117 (E.D. Cal. 2006)	16
<i>Holy Cross Wilderness Fund v. Madigan</i> 960 F.2d 1515 (10th Cir. 1992)	16
<i>N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.</i> 545 F.3d 1147 (9th Cir. 2008)	11, 14
<i>Natural Res. Def. Council v. Fed. Aviation Admin.</i> 564 F.3d 549 (2d Cir. 2009)	16
<i>Quechoan Indian Tribe v. United States Dep’t of the Interior</i> 547 F.Supp.2d 1033 (D. Ariz. 2008)	16
<i>Soremekun v. Thrifty Payless, Inc.</i> 509 F.3d 978 (9th Cir. 2007)	13

TABLE OF AUTHORITIES

	Page
<i>State of Nevada v. Dep’t of Energy</i>	
457 F.3d 78 (D.C. Cir. 2006)	16
<i>The Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.</i>	
42 F.3d 517 (9th Cir. 1995).....	11
<i>The Lands Council v. McNair</i>	
629 F. 3d 1070 (9th Cir. 2010).....	17
<i>Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.</i>	
435 U.S. 519 (1978)	1, 14, 16
<i>Wang Laboratories v. Mitsubishi Elecs.</i>	
860 F. Supp. 1448 (C.D. Cal. 1993).....	13
 Statutes	
23 United States Code Section 138.....	11
49 United States Code Section 303.....	1
49 United States Code Section 303.....	10
49 United States Code Section 303(c)	11
49 United States Code Section 303(d).....	11
49 United States Code Section 5309.....	6
 Rules	
Federal Rules of Civil Procedure 56(a)-(d)	13
Federal Rules of Civil Procedure 56(b)	13
 Regulations	
23 Code of Federal Regulations Section 774.5(b) and (c).....	11

TABLE OF AUTHORITIES

	Page
23 Code of Federal Regulations Section 771.105(a).....	17
23 Code of Federal Regulations Section 771.113(a).....	17
23 Code of Federal Regulations Section 774.9(a).....	12
23 Code of Federal Regulations Section 774.9(b).....	13
40 Code of Federal Regulations Section 1500.1(c).....	14
45 Federal Register 71,698 (October 30, 1980).....	17
70 Federal Register 72,871 (Dec. 7, 2005).....	6
72 Federal Register 12,254 (Mar. 15, 2007).....	7
73 Federal Register 70,640 (Nov. 21, 2008).....	7
73 Federal Register 70,640 (Nov. 21, 2008).....	18
75 Federal Register 36,386 (June 25, 2010).....	18

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

DEFENDANTS THE CITY AND COUNTY OF HONOLULU and WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services (collectively, “City Defendants”) move for summary judgment on certain of Plaintiffs’ claims brought pursuant to Section 4(f) of the Department of Transportation Act (“Section 4(f)”), 49 U.S.C. § 303, challenging the Federal Transit Administration’s (“FTA”) approval of the Honolulu High-Capacity Transit Corridor Project (otherwise known as the Rail Project (“Project”)). Plaintiffs failed to raise a number of their Section 4(f) claims during the lengthy administrative process regarding the Project. Thus, under controlling Supreme Court precedent, Plaintiffs have waived these claims. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). As the Supreme Court has made clear:

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

Vt. Yankee Nuclear Power Corp., 435 U.S. at 553-54. Here, Plaintiffs made only “cryptic” references to several Section 4(f) claims in the Complaint, and

failed to comment on, or even identify, several of the Section 4(f) claims during the administrative process.

City Defendants request that the Court enter summary judgment in Defendants' favor and find that Plaintiffs waived any Section 4(f) claims regarding the following sites subject to Section 4(f) evaluation ("Section 4(f) Sites")

identified in the Complaint:

- U.S. Naval Base Pearl Harbor National Historic Landmark;
- Merchant Street Historic District;
- DOT Harbors Division Building;
- Pacific War Memorial Site;
- Makalapa Navy Housing Historic District;
- Hawai'i Employers Council; and
- Tamura Building.

Additionally, Defendants also request that the Court enter summary judgment in Defendants' favor and find that Plaintiffs waived any Section 4(f) claims involving Section 4(f) Sites not specifically identified by Plaintiffs during the lengthy administrative proceedings.¹

¹ Plaintiffs' pending Motion for Leave to File First Amended Complaint seeks to expand their Section 4(f) claims. Plaintiffs' proposed amended complaint, however, does not specifically identify which Section 4(f) Sites Plaintiffs seek to challenge. (Pls. Mot. For Leave to File First. Am. Compl., Dec. 29, 2011, ECF No. 59.)

II. PROCEDURAL SETTING OF THIS MOTION.

On December 9, 2011, Defendants filed a Motion for Partial Judgment on the Pleadings seeking dismissal of Plaintiffs' Section 4(f) claims that they failed to raise during the administrative process for the Project. (Def.'s Mot. for Partial J. on the Pleadings at 4, Sep. 9, 2011, ECF No. 37.) Defendants' Motion also sought to dismiss the claims of those Plaintiffs who wholly failed to participate in the Project's administrative process. (*Id.*)

The Court denied Defendants' Motion, stating that it was premature in light of the unavailability of the Administrative Record at that time. (Order on Mot. for Partial J. On the Pleadings, Dec. 12, 2011, ECF No. 57.) On February 24, 2012, Defendants served and filed the Administrative Record. (Notice of Lodging the Administrative R., Mar. 1, 2012, ECF No. 88.) On February 28, 2012, Defendants served Plaintiff with replacement hard drives containing the revised Administrative Record. Notice of this service was filed on March 1, 2012, along with the Notice of Lodging the Revised Administrative Record (ECF No. 92).

The Administrative Record demonstrates that Plaintiffs failed to submit comments or raise Section 4(f) claims with regard to seven Section 4(f) Sites.²

² Administrative Record ("AR") 00000855 at 1369-70 (Letter from Eve Anderson to DTS re Draft EIS), AR00000855 at 1434-35 (John Brizdle Letter to FTA), AR00000855 at 1506-09 (Dale Evans Comments re Draft EIS), AR0000085 at 1907-30 (HTF Letter to DTS re Draft EIS and Final EIS), AR00000855 at 2015-81 (HonoluluTraffic.com Letter to DTS re Draft EIS), AR00000855 at 2490-91 (Dec.

8, 2008 Michelle Matson Letter to DTS re Draft EIS), AR00000855 at 2495-500 (Feb. 3, 2009 Michelle Matson Letter to DTS re Draft EIS), AR00000855 at 2618-21 (Daisy Murai Letter to DTS), 00002644-46 (Nancy Nagamine Email to DTS re Draft EIS), AR00000855 at 2649-52 (Nancy Nagamine Email to FTA re Draft EIS), AR00000855 at 2667-68 (Comment Letter from R. Nakasone re Draft EIS), AR00000855 at 2762-65 (The Outdoor Circle Letter to DTS re Draft EIS), AR00000855 at 3258-90 (Dennis Callan Letter Comments re Draft EIS), AR00000855 at 3367-68 (Suzanne Teller Email to City re Rail), AR00000855 at 3454-58 (Michael Uechi Letter to DTS re Draft EIS), AR00000855 at 3712-15 (The Outdoor Circle Public Hearing Comments re Draft EIS), AR00000855 at 3747 (Charles Carole Testimony re Draft EIS), AR00000855 at 3755-57 (Michael Uechi Testimony re Draft EIS), AR00000855 at 3757-60 (Michelle Matson Testimony re Draft EIS), AR00000855 at 3772-73 (Eve Anderson Testimony re Draft EIS), AR00000855 at 3774-76 (Robert Crone Testimony re Draft EIS), AR00000855 at 3931-33 (Dec. 9, 2008 Michael Uechi Testimony re Draft EIS), AR00005600 at 5971-72 (Charles Carole Letter re Scope of Alternatives Analysis), AR00005600 at 5992-93 (Darci Evans Letter to DTS), AR00005600 at 6004-16 (HonoluluTraffic.com/Cliff Slater Letter to DTS re Scoping Meetings), AR00005600 at 6047-48 (Daisy Murai Letter to DTS and FTA), AR00005600 at 6050-51 (The Outdoor Circle Letter to DTS re Scoping), AR00005600 at 6081-87 (Dennis Callan Web Scoping Comments), AR00005600 at 6107 (Gerhard Hamm Web Scoping Comments), AR00005600 at 6119 (Pearl Johnson Web Scoping Comments), AR00005600 at 6147 (Nancy Nagamine Web Scoping Comments), AR00005600 at 6368-70 (Eve Anderson Oral Comments at Scoping Meeting), AR00005600 at 6380-82 (Dale Evans Oral Comments at Scoping Meeting), AR00005600 at 6478 (Michelle Matson Comment Letter re Scoping Process), AR00005600 at 6484 (Richard Rowland Email to City re Scoping), AR00005600 at 6491-519 (HonoluluTraffic.com/Cliff Slater re Notice of Intent), AR00005600 at 6520-92 (HonoluluTraffic.com/Cliff Slater Letter to DTS re Notice of Intent and Scoping Package), AR00005600 at 6606 (Comment Letter from PHT, Inc. dba Polynesian Hospitality), AR00005600 at 6611 (Bobbie Slater Email to DTS Opposing Project), AR00005600 at 6613-17 (Michelle Matson Letter to DTS re Scoping), AR00005600 at 6641 (Comment Letter from Ruth Nakasone), AR00008108 at 8320-21 (The Outdoor Circle's Web Scoping Comments), AR00008108 at 8857-62 (Dale Evans Comment Letter to DTS), AR00008108 at 8866 (Dale Evans Supplemental Comment Letter), AR00008108 at 8909-10 (Charles Carole Letter to DTS re Scoping), AR00016601 at 16995 (Michael Uechi Comment Sheet re Scoping), AR00051289-300 (HonoluluTraffic.com/Cliff Slater Letter to FTA re Final EIS), AR00051305-13 (HTF Letter to FTA and DTS re Final EIS), AR00051327-29 (The Outdoor Circle Letter to FTA and DTS re Final

Accordingly, City Defendants now renew portions of their earlier motion in this Motion for Partial Summary Judgment. As demonstrated more fully below, Plaintiffs have waived their Section 4(f) claims with respect to those seven Section 4(f) Sites, as well as any Section 4(f) Sites not specifically identified during the administrative process.

III. STATEMENT OF FACTS.

A. The Project.

This case involves a challenge to the approval by the FTA of the Project. The Project is a 20-mile fixed guideway rail transit project in the highly congested transportation corridor between Kapolei and downtown Honolulu. The Project will provide people living, working, and traveling in the corridor with reliable transportation to areas now largely dependent on automobiles.

The Project is the result of several decades of environmental, economic, and engineering study and analysis of many alternative solutions to the area's mobility challenges by the City, the State of Hawai'i, FTA, and other agencies. As detailed

EIS), AR00051377-78 (HTF Email to DTS re Final EIS), AR00051379-82 (Daisy Murai Letter to FTA re Final EIS), AR00051400 at 51402 (The Outdoor Circle City Council Testimony re Final EIS), AR00051400 at 51405-06 (Cliff Slater City Council Testimony re Final EIS), AR00057243-44 (Robert Crone Comment re Draft EIS), AR00056869 at 57611-12 (Grassroot Institute of Hawaii Letter to City and FTA re Draft EIS), AR00064929 at 65210 (Lawson Tashima Web Comment), AR00100854-55 (Cliff Slater Email re Final EIS), AR00110291-99 (Panos Prevedouros Comments on Draft EIS), AR00142115-17 (Lawson Tashima Comments on Draft EIS), AR00142168-70 (Bobbie Slater Email re Draft EIS), AR00147665 at 147716-18 (The Outdoor Circle Comments re Scoping), AR00149301-02 (Cliff Slater Objection to FTA's Notice of Intent), and

below, the City and FTA provided extensive opportunities for public review and comment on the Project during the lengthy administrative process leading to the FTA's January 2011 issuance of the Record of Decision ("ROD").

B. The Administrative Process.

In December 2005, FTA and the City published a Notice of Intent to prepare an Alternatives Analysis for the implementation of transit improvements that potentially included high-capacity transit service in a 25-mile travel corridor between Kapolei and the University of Hawai'i at Manoa and Waikiki. (AR00009700-9702; 70 Fed. Reg. 72,871 (Dec. 7, 2005).) This Alternatives Analysis is a required step in the development of a major ("New Starts"), federally funded, transit project. 49 U.S.C. §5309. The Notice of Intent asked the public to comment on the proposed alternatives, the purpose and need for the project, and the range of issues to be evaluated in a series of scoping meetings in December 2005. *Id.* The Alternatives Analysis culminated on November 1, 2006 when FTA and the City issued the "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report" ("Alternatives Report"). (Compl. ¶ 59; AR00009434.)

Plaintiffs Honolulutraffic.com, Cliff Slater, and Dr. Michael Uechi submitted comments during the 2005 scoping meetings. (AR00005600 at 6004-6016; AR00016601 at 16995.) Plaintiffs Hawai'i's Thousand Friends, the Small

AR00151087-96 (Dale Evans Comment Letter to DTS re Scoping Process).

Business Hawai‘i Entrepreneurial Education Foundation, Benjamin Cayetano, Walter Heen, and Randall Roth did not submit any comments.³

In 2007, FTA and the City issued a “Notice of Intent to Prepare an Environmental Impact Statement.” (Compl. ¶ 62; AR00009696-9699; 72 Fed. Reg. 12,254 (Mar. 15, 2007).) Only Plaintiff Honolulutraffic.com and its Chair, Plaintiff Cliff Slater, submitted comments on the Notice of Intent. (Compl. ¶ 63; AR00005600 at 6491-6519)

The FTA and the City issued the Draft Environmental Impact Statement (“Draft EIS”) for the Project in October 2008. (Compl. ¶ 66; AR00007233-9318.) On November 21, 2008, the FTA published a notice of availability of the Draft EIS in the *Federal Register* notifying the public of a 45-day comment period on the Draft EIS. (AR00009694-9695; 73 Fed. Reg. 70,640 (Nov. 21, 2008).) The FTA subsequently extended the comment period to February 6, 2009. (AR00009690-9691; 73 Fed. Reg. 77,688 (Dec. 19, 2008).) The City and FTA conducted five noticed public hearings on the Draft EIS in December 2008. (AR00005600 at 5712.) In addition, the City and the FTA conducted an extensive public outreach program to inform the public of the Project’s environmental impacts and to solicit public comments on the Draft EIS. (AR00005600-7060.)

³ See Footnote 2 herein.

The Draft EIS identified ten publicly owned parks and recreation sites in the area of the Project that were subject to evaluation under Section 4(f).

(AR00007223 at 7558.) The Draft EIS evaluated eighty-four historic resources under Section 4(f) within the “Area of Potential Effect” (“APE”) of the Project.

(AR00007223 at 7560-63.) All of the parks, recreation areas, and historic sites identified in the Complaint were analyzed in the Draft EIS. (AR00007223 at 7555-94.)

Plaintiffs Honolulutraffic.com, Cliff Slater, Hawai‘i’s Thousand Friends, and Dr. Michael Uechi submitted comments on the Draft EIS.⁴ (Compl. ¶¶ 67; AR00000855 at 1907-1930, 2015-2081, 3755-3757, 3931-3933, and 3454-3458.) Hawai‘i’s Thousand Friends, however, was the only plaintiff to allege that the Project would use a Section 4(f) Site in violation of Section 4(f), and limited this comment to one Section 4(f) Site – Ke‘ehi Lagoon Beach Park. (AR00000855 at 1929-1930.) The other plaintiffs did not submit any comments on the Draft EIS.⁵ (See Compl. ¶¶ 67)

In June 2010, the FTA and the City issued the Final EIS. (Compl. ¶¶ 70; AR00000247-7222.) On June 25, 2010, a notice of availability of the Final EIS was published in the *Federal Register*. (AR00009689; 75 Fed. Reg. 36,386 (June 25, 2010).) The Final EIS included a revised evaluation of the impacts of the

⁴ See Footnote 2 herein.

Project on Section 4(f) Sites. (AR00000247 at 680-82.) The Final EIS documents the extensive consultation by FTA and the City with the Hawai‘i State Historic Preservation Officer, the United States Navy, the Advisory Council on Historic Preservation, and numerous other parties with regard to potential impacts to resources subject to Section 4(f). (AR00004460-5599; AR00005600-7060.)

Plaintiffs Honolulutraffic.com, Cliff Slater, and Hawai‘i’s Thousand Friends submitted additional comments on the Final EIS prior to the FTA’s issuance of the ROD for the Project. (AR00051400 at 51405-51406; AR0051289-51300; AR0051377-51378; AR00051305-51313.) The comments submitted by Plaintiffs either failed to identify or failed to describe how the Project would use the U.S. Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, the Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawai‘i Employer’s Council, or the Tamura Building.⁶ The other Plaintiffs did not submit any comments on the Final EIS at all.⁷

On January 18, 2011, the FTA issued the ROD approving the Project. (Compl. ¶ 73; AR00000030-43.) The ROD includes the FTA’s responses to comments submitted on the FEIS. (AR00000030 at 229-41.)

⁵ See Footnote 2 herein.

⁶ See Footnote 2 herein.

⁷ See Footnote 2 herein.

C. Plaintiffs' Section 4(f) Claims.

Plaintiffs filed their Complaint on May 12, 2011. Plaintiffs claim that the FTA violated Section 4(f) with regard to fourteen Section 4(f) Sites. (Compl. ¶ 107.) More specifically, Plaintiffs allege that the Final EIS arbitrarily and capriciously concludes that the Project will not use nine Section 4(f) Sites (Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, United States Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, Pier 10/11, and Aloha Tower). (Compl. ¶ 107.) Plaintiffs also allege that the Final EIS arbitrarily and capriciously concludes that the Project will have a *de minimis* impact on five Section 4(f) Sites (Ke'ehi Lagoon Beach Park, Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawai'i Employers Council, and the Tamura Building). (*Id.*)

IV. STATUTORY BACKGROUND.

Section 4(f) of the Department of Transportation Act, codified at 49 U.S.C. § 303, provides in pertinent part:

Subject to subsection (d), the Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, of national, State or local significance, or land of an historic site of national, State or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge or site), only if --

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c); *accord* 23 U.S.C. § 138. Subsection (d) provides that the requirements of Section 4(f) “shall be considered to be satisfied” if the FTA determines that the Project will have a *de minimis* impact on the area. 49 U.S.C. § 303(d). Thus, if the FTA concludes that a project will use a Section 4(f) Site, it is required to either make the findings required by Section 4(f) *or* determine that the project will have a *de minimis* impact on the applicable Section 4(f) Site. In order to make a *de minimis* finding, the Secretary must have the concurrence of the official with jurisdiction over the site, or, in the case of historic sites, the State Historic Preservation Officer. The procedures for obtaining such concurrence are described at 23 C.F.R §774.5(b) and (c).

For this reason, Section 4(f) claims are site specific, as the plain language of the statute refers to “any land from *a* park . . .” or “*an* historic site”: 49 U.S.C. § 303(c) (emphasis added). In accordance with Section 4(f), Courts therefore evaluate the “use” of Section 4(f) Sites on a site-specific basis. *See, e.g., N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1158-60 (9th Cir. 2008) (holding that, where the DOT failed to investigate all Section 4(f) properties for all phases of the project, it nevertheless did not act arbitrarily or capriciously in determining that no “use” of a particular Section 4(f) Site would occur); *The Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 530-33 (9th Cir. 1995) (reviewing DOT’s Section 4(f) evaluation of 1.7 acres of reserve and 23 individual park properties on a site-specific basis); *Friends of Congaree*

Swamp v. Fed. Highway Admin., 786 F. Supp. 2d 1054, 1075 n.21 (D.S.C. 2011) (“Plaintiffs do not challenge the adequacy of the evaluation prepared with regard to the Bates Bridge Landing; instead, Plaintiffs argue that the evaluation should have also addressed the potential impact of the Project on Congaree National Park lands.”); *Ctr. for Biological Diversity v. Fed. Highway Admin.*, 290 F. Supp. 2d 1175, 1191-93 (S.D. Cal. 2003) (finding that the Federal Highway Administration’s (“FHWA”) alternatives analysis adequately evaluated the impacts of the proposed alternatives on various Section 4(f) Sites). Plaintiffs’ failure to identify these seven specific Section 4(f) Sites therefore constitutes a failure to exhaust their administrative remedies with respect to those sites. Plaintiffs failed to structure their participation in a manner that alerted the FTA “to the [parties’] position and contentions, in order to allow the agency to give the issue meaningful consideration.” *Public Citizen*, 541 U.S. at 764.

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

approval be integrated with the analysis in a final EIS or ROD. 23 C.F.R. § 774.9(b).

V. SUMMARY JUDGMENT STANDARD.

“A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” Fed. R. Civ. P. 56(b). A motion for partial summary judgment, like a motion for summary judgment, is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)-(d); *see also Wang Laboratories v. Mitsubishi Elecs.*, 860 F. Supp. 1448, 1450-51 (C.D. Cal. 1993) (citing text of rule and noting that the standards and procedures for partial summary judgment are the same as for summary judgment). “A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

As demonstrated below, there are no material facts in dispute, and Plaintiffs are entitled to summary judgment on these issues as a matter of law.

VI. ARGUMENT.

A. Plaintiffs' Waived Their Section 4(f) Claims for Those Sites They Failed to Identify During the Administrative Process.

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

Judicial review of agency decisions under NEPA and Section 4(f), is governed by the APA. *See N. Idaho Cmty. Action Network*, 545 F.3d at 1152 (Section 4(f)); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 961 (9th Cir. 2006) (NEPA). The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. *Id.* at 965. “Persons challenging an agency’s compliance with NEPA must structure their participation so that it . . . alerts the agency to the parties’ position and contentions, in order to allow the agency to give the issue meaningful consideration.” *Pub. Citizen*, 541 U.S. at 764 (internal punctuation omitted) (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553).

As the Supreme Court noted, an EIS serves two purposes:

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

Pub. Citizen, 541 U.S. at 768. The “informational role” of an EIS ensures that the public can provide input as necessary to the agency making the relevant decisions.

See 40 C.F.R. § 1500.1(c); *Pub. Citizen*, 541 U.S. at 768.

In *Public Citizen*, unions and environmental groups challenged the Federal Motor Carrier Safety Administration's ("FMCSA") decision not to prepare an EIS when it promulgated rules allowing Mexican trucks to operate in the United States and instead issue an Environmental Assessment ("EA") concluding that the proposed rules would have no significant impact on the environment. 541 U.S. at 762. After the agency issued the rules, the groups filed petitions arguing that the approval of the rules violated NEPA. *Id.*

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

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

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

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

Numerous courts have followed *Public Citizen* and *Vermont Yankee* to dismiss environmental claims that plaintiffs failed to raise with sufficient specificity during the NEPA process to alert the agency to the parties' contentions. *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 549, 559 (2d Cir. 2009) (rejecting claims concerning impacts of a new airport that plaintiffs failed to raise during the NEPA process); *State of Nevada v. Dep't of Energy*, 457 F.3d 78, 88-89 (D.C. Cir. 2006) (Plaintiffs waived argument that Department of Energy was required to consult with the Surface Transportation Board regarding transportation of nuclear waste); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 n.18 (10th Cir. 1992) (rejecting claim that the federal agencies failed to consider an alternative to water project, in part, because plaintiffs failed to raise the claim in the administrative process); *Quechoan Indian Tribe v. United States Dep't of the Interior*, 547 F.Supp.2d 1033, 1040-41 (D. Ariz. 2008) ("The Court finds that Plaintiff waived its right to challenge [the Bureau of Reclamation's] choice of action alternatives when it failed to raise the third alternative during the NEPA process."); *High Sierra Hikers Ass'n v. United States Forest Serv.*, 436 F.Supp.2d 1117, 1148 (E.D. Cal. 2006) (NEPA claim that Forest Service was required to evaluate dam removal alternative barred because plaintiffs did not propose alternative in comments on EIS); *Biodiversity Conservation Alliance v. United States Bureau of Land Mgmt.*, 404 F.Supp.2d 212, 219 n.4 (D.D.C. 2005) (barring

claim that agency failed to consider alternative that plaintiffs did not urge agency to consider in comments on EIS).

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

As required by the NEPA regulations, the FTA integrated the public review and comment of NEPA and Section 4(f) issues in a single administrative process. 23 C.F.R. §§ 771.105(a); 771.113(a). Under the FTA regulations interested parties are provided an opportunity to raise Section 4(f) claims through comments on draft and final EISs. The draft Section 4(f) statement is contained in the Draft EIS. Comments on the draft Section 4(f) statement are an essential part of the process leading to the final Section 4(f) statement and the Section 4(f) determination. This is not a new requirement; it has been in place since the FTA and the FHWA first issued joint regulations implementing NEPA and Section 4(f). *See* 45 Fed. Reg. 71,698 (October 30, 1980).

2. *Plaintiffs Failed to Identify Several Section 4(f) Sites or Raise Claims for Those Sites During the Administrative Process.*

The City and the FTA provided multiple opportunities to the Plaintiffs to raise issues concerning the Project's potential impacts on property subject to Section 4(f). The City and FTA published notices of availability of the Draft EIS and the Final EIS to allow for review and comment. 73 Fed. Reg. 70,640 (Nov. 21, 2008); 75 Fed. Reg. 36,386 (June 25, 2010). The public comment period on the Draft EIS was extended. 73 Fed. Reg. 77,688 (Dec. 19, 2008). The Draft EIS and the Final EIS analyzed the impact of the Project on properties subject to Section 4(f). The Draft EIS identified eighty-four historic resources within the Project area that were subject to evaluation under Section 4(f). The Final EIS included the final evaluation of the impacts of the Project on sites and other properties subject to Section 4(f). The City and the FTA conducted five public hearings on the Draft EIS for the Project.

Many members of the public, including some of the Plaintiffs, submitted comments on the Draft EIS and the Final EIS. But at *no time* during the lengthy administrative process did **any** of the Plaintiffs identify the following Section 4(f) Sites:

- Merchant Street Historic District;
- DOT Harbors Division Building;
- Pacific War Memorial Site;
- Hawai'i Employers Council; and

- Tamura Building.⁸

In addition, while Plaintiffs made cryptic references to the U.S. Naval Base Pearl Harbor National Historic Landmark and the Makalapa Navy Housing Historic District, they completely failed to describe how the Project would use these Section 4(f) Sites or otherwise violate Section 4(f).

All of the above sites were identified in the Draft EIS in the chapters dealing with impact to parks and historic sites. The Draft EIS also evaluates whether the Project will use each Section 4(f) Site, the extent of any impact on each Section 4(f) Site and identifies measures to minimize impacts to each Section 4(f) Site. Chapter 5 of the Final EIS, containing the Section 4(f) Statement, indicated the agencies' final conclusions regarding compliance with Section 4(f) for each site.

Because Plaintiffs failed to identify the above Section 4(f) Sites during the administrative process, and also failed to describe how the Project would use the Section 4(f) Sites in violation of Section 4(f), Plaintiffs have waived their Section 4(f) claims with regard to these seven Section 4(f) Sites.

VII. CONCLUSION.

For the above-stated reasons, City Defendants respectfully request that the Court find that Plaintiffs have waived their Section 4(f) claims with respect to the U.S. Naval Base Pearl Harbor National Historic Landmark, Merchant Street

⁸ See Footnote 2 herein.

Historic District, DOT Harbors Division Building, the Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawai‘i Employers Council, and the Tamura Building. City Defendants also request that the Court find that the Plaintiffs waived their Section 4(f) claims with regard to any other Section 4(f) Site not identified by Plaintiffs during the administrative proceedings.

DATED: March 5, 2012

/s/ Robert D. Thornton
ROBERT D. THORNTON
EDWARD V. A. KUSSY
JOHN P. MANAUT
LINDSAY N. MCANEELEY
ROBERT C. GODBEY
DON S. KITAOKA
GARY Y. TAKEUICHI

Attorneys for Defendants
CITY AND COUNTY OF HONOLULU AND
WAYNE Y. YOSHIOKA, IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF THE CITY
AND COUNTY OF HONOLULU
DEPARTMENT OF TRANSPORTATION
SERVICE