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**UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII**

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN 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; and WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation,

Defendants.

Civ. No. 11-00307 AWT

**ORDER ON MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

1 Pending before the Court is Defendants’ Motion for Partial Judgment on the  
2 Pleadings (Doc. 37). For the reasons stated below, Defendants’ Motion is denied.

3 **I. Background**

4 Plaintiffs filed this action on May 12, 2011, alleging that federal Defendants’ Final  
5 Environmental Impact Statement/Section 4(f) Evaluation (“FEIS”) and Record of  
6 Decision (“ROD”), both of which concern the Honolulu High-Capacity Transit Corridor  
7 Project, do not comply with the requirements of the National Environmental Policy Act  
8 (“NEPA”), Section 4(f) of the Department of Transportation Act (“Section 4(f)”), the  
9 National Historic Preservation Act (“NHPA”), and the regulations implementing those  
10 statutes. (Compl., Doc. 1). In response, Defendants filed a Motion for Partial Judgment  
11 on the Pleadings. (Doc. 37). In that Motion, Defendants sought to dismiss claims  
12 concerning particular Section 4(f) sites as waived because Plaintiffs allegedly failed to  
13 raise those claims during the administrative process leading up to the issuance of the  
14 ROD. Defendants also moved for dismissal of the claims of Plaintiffs Cayetano, Heen,  
15 Roth, and the Small Business Hawaii Entrepreneurial Education Foundation (collectively  
16 referred to in the Motion as “Certain Plaintiffs”), because those certain Plaintiffs  
17 allegedly failed to participate in the notice-and-comment administrative proceeding.

18 In addition, Defendants submitted a Request for Judicial Notice of twenty-three  
19 exhibits and various other “public record facts.” (Docs. 37-2).<sup>1</sup> On October 31, 2011, the  
20 Court issued an order granting in part and denying in part Defendants’ Request for  
21 Judicial Notice. (Doc. 50). On November 30, 2011, a hearing was held on Defendants’  
22 Motion, at which the Motion was fully argued.

23 **II. Defendants’ Motion for Partial Judgment on the Pleadings**

24 **A. Legal Standard**

25 “Judgment on the pleadings is proper when the moving party clearly establishes on  
26 the face of the pleadings that no material issue of fact remains to be resolved and that it is  
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28 <sup>1</sup> The to-be-noticed facts were integral to the Motion

1 entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner &*  
2 *Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). For purposes of ruling on such a motion,  
3 allegations made by the non-moving party must be accepted as true and the allegations of  
4 the moving party which have been denied are assumed to be false. *Id.* The complaint  
5 must be construed, and all doubts resolved, in the light most favorable to the plaintiff.  
6 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

7 As a general rule, the court may not consider materials outside of the pleadings  
8 when ruling on a motion for judgment on the pleadings. Fed. R. Civ. P. 12(d). It may,  
9 however, consider facts that are contained in materials of which the court may take  
10 judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir.  
11 1999). Accordingly, the court may consider materials incorporated by reference into the  
12 complaint or matters of public record appropriate for judicial notice. *Coto Settlement v.*  
13 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

#### 14 **B. Need for The Administrative Record**

15 “Persons challenging an agency’s compliance with NEPA must ‘structure their  
16 participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in  
17 order to allow the agency to give the issue meaningful consideration.” *Dep’t of Transp. v.*  
18 *Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp.*  
19 *v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). Accordingly, “belatedly  
20 raised issues may not form a basis for reversal of an agency decision” in a NEPA  
21 challenge. *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). Although the  
22 exhaustion rule laid out in *Public Citizen* has not previously been applied in the Ninth  
23 Circuit to a challenge made pursuant to Section 4(f), it has been used to review other,  
24 non-NEPA agency decision-making. See *Lands Council v. McNair*, 629 F.3d 1070, 1076  
25 (9th Cir. 2010) (applying *Public Citizen* to review of an administrative decision made  
26 under the National Forest Management Act).

27 Defendants argue that Certain Plaintiffs made no comment on the Draft  
28 Environmental Impact Statement/Section 4(f) Evaluation (“DEIS”), the FEIS, or the

1 ROD, and that no comments were made regarding certain Section 4(f) sites specified in  
2 Plaintiffs' Complaint. As evidence, Defendants rely on exhibits the DEIS and FEIS,  
3 which list the witnesses and summarize the public comments made at various stages of  
4 the notice-and-comment process, and the ROD, which includes a summary, by subject  
5 matter, of comments submitted on the FEIS. (*See* Ex. A, App. E; Ex. B, App. A; Ex. C,  
6 Attach. C).

7 Resolving all doubts in favor of Plaintiffs, the Court is unable to conclude, on this  
8 record at this stage that Certain Plaintiffs did not comment on the FEIS or that specific  
9 comments were not made regarding the Section 4(f) sites at issue. This is because the  
10 ROD includes only a *summary* of the comments made in response to the FEIS; it does not  
11 detail the contents of those comments or list the names of the individuals who submitted  
12 those comments. (*See* Ex. C., Attach. C.). It would be impossible to conclude from such  
13 evidence that Certain Plaintiffs never commented on the FEIS or that particular sites were  
14 never mentioned during the FEIS comment period.

15 Moreover, even if Defendants had demonstrated an absence of comments by  
16 Certain Plaintiffs or regarding specified sites in the DEIS, FEIS, and ROD, the Supreme  
17 Court has recognized an exception to the exhaustion requirement where an environmental  
18 impact statement's flaws are "so obvious that there is no need for a commentator to point  
19 them out specifically in order to preserve its ability to challenge a proposed action."  
20 *Public Citizen*, 541 U.S. at 765. The Ninth Circuit has applied this exception where the  
21 agency "has independent knowledge of the issues that concerned Plaintiffs."  
22 *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

23 Under the circumstances, the Court cannot assess whether the "so obvious"  
24 exception applies in this case, since the full administrative record is not yet available. *See*  
25 *id.* ("The *record* in this case is replete with evidence that the Army recognizes the specific  
26 shortfall of the PEIS raised by Plaintiffs here.") (emphasis added); *Barnes v. U.S. Dep't of*  
27 *Transp.*, 655 F.3d 1124, 1133 (9th Cir. 2011) (looking to documents in the administrative  
28 record, such as an internal Federal Aviation Administration official's review of a draft

1 document and an attachment to an email, in finding independent agency knowledge of  
2 plaintiffs' claims). Until the full administrative record is available, then, the Court lacks  
3 the context and information necessary to conclude whether the *Public Citizen* exhaustion  
4 requirement bars any claims or Plaintiffs in this case. Defendants' Motion is therefore  
5 premature.

6  
7 **III. Conclusion**

8 For the reasons set forth above, **IT IS ORDERED** that Defendants' Motion for  
9 Partial Judgment on the Pleadings (Doc. 37) is **DENIED**.

10 DATED this 12th day of December, 2011.

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14 A. Wallace Tashima  
15 United States Circuit Judge  
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