

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MEGAN WONG, et al.,)
)
)
 Plaintiffs,)
)
 vs.)
)
 GEORGE W. BUSH, President of)
 the United States, et al.)
)
 Defendants.)
)
 _____)

**ORDER DENYING PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs challenge the validity of the United States Coast Guard's temporary rule establishing a limited security zone in Nawiliwili Harbor, Kauai, and adjacent lands around the Harbor. Plaintiffs seek to restrain the enforcement of the security zone.

On August 26 and 27, 2007, members of the public protested the sailing of the Super Ferry into Nawiliwili by placing themselves in the path of the ferryboat, while others threw rocks and bottles at members of the Coast Guard. These incidents generated a concern for public safety that includes the persons and their vessels who wish to prevent the Super Ferry from utilizing the Harbor as well as the Super Ferry passengers and

crew. In response, on August 31, 2007, the U.S. Coast Guard adopted a temporary rule establishing a security zone.

Plaintiffs allege that the U.S. Coast Guard violated provisions of the Administrative Procedures Act ("APA") as it issued the regulation establishing the security zone without prior public notice and comment. Plaintiffs also allege the U.S. Coast Guard is required to conduct an environmental assessment before it can establish a security zone, pursuant to the National Environmental Policy Act ("NEPA"). Finally, Plaintiffs allege the establishment of the temporary security zone infringes upon their First Amendment right to free speech. Plaintiffs seek a temporary restraining order that would prevent the U.S. Coast Guard from setting up and enforcing a security zone when the Super Ferry sails into and out of Nawiliwili harbor.

For the reasons set forth below, Plaintiffs' motion for temporary restraining order is **DENIED**. Plaintiffs lack standing to sue and, in addition, have not made a sufficient showing of a likelihood of success on the merits of their claims, or of the possibility of irreparable injury.

PROCEDURAL HISTORY

On September 20, 2007, Plaintiffs filed a First Amended Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. (Doc. 7.)

On September 26, 2007, Plaintiffs filed a Notice Of Motion

For Temporary Restraining Order (Doc. 21) and a Memorandum In Support Of Motion For Declaratory Relief And Temporary Restraining Order. (Doc. 22.)

On October 1, 2007, Defendants filed Defendants' Opposition To Plaintiffs' Motion For Temporary Restraining Order. (Doc. 26.)

On October 1, 2007, Defendants filed Defendants' Motion For Leave To File Oversize Memorandum. (Doc. 27.)

On October 1, 2007, Plaintiffs filed Plaintiffs' Exhibits 25, 26, and 27. (Doc. 31 and 29.)

On October 2, 2007, the Court issued an Order Granting Defendants' Motion To File Oversize Memorandum. (Doc. 33.)

On October 3, 2007, Plaintiffs filed Plaintiffs' Exhibits 30, the Declaration of Fern Anuenue Holland; 31, the Declaration of Jesse Brown-Clay; 28, the Declaration of Ka'iulani Edens; and 29, the Declaration of Lea Taddonio. (Doc. 35, 37, and 39.)

On October 3, 2007, Plaintiffs filed Plaintiffs' Motion For Leave To File Oversize Memorandum. (Doc. 34.)

On October 3, 2007, Plaintiffs filed a Notice of Withdrawal of Plaintiff Wendy Raebeck. (Doc. 38.)

On October 4, 2007, Plaintiffs filed Plaintiffs' Exhibits 32, the Second Declaration of Ali'i Nui Mo'i Edmund Keli'i Silva, Jr.; and 33, October 4, 2007, article from the Honolulu Advertiser. (Doc. 40 and 41.)

On October 5, 2007, Plaintiffs' Motion for Temporary Restraining Order came on for hearing.

On October 5, 2007, during the hearing on this matter, the Court orally Granted Plaintiffs' Motion For Leave To File Oversize Memorandum. (Doc. 43.)

BACKGROUND

The facts of this case are largely undisputed. Plaintiffs challenge the validity of the U.S. Coast Guard's regulation "establishing a temporary security zone for the Hawaii Superferry transit of Nawiliwili Harbor, Kauai, Hawaii."

On August 26 and 27, 2007, the Hawaii Super Ferry's access to Nawiliwili Harbor was blocked by members of the public protesting the sailing of the Super Ferry. The Super Ferry was unable to dock on August 27, 2007. See Defendants' Opposition, Declaration of Charles W. Ray, at 3-4.

On September 5, 2007, prompted by concerns for the safety of people in the water, people on the shore, passengers on the Super Ferry, people on other vessels in the Nawiliwili Harbor, and Coast Guard personnel, the U.S. Coast Guard issued a rule that established a security zone in Nawiliwili Harbor. The security zone is to be put in place one hour before the arrival of the Super Ferry, and remains in effect until ten minutes past the time that the Super Ferry exits the harbor. The body of the rule reads as follows:

§ 165.T-14-160 Security Zone; Nawiliwili Harbor, Kauai, HI.

(a) Location. The following land areas, and water areas from the surface of the water to the ocean floor, is a security zone that is activated as described in paragraph (b) of this section, and enforced subject to the provisions of paragraph (c) of this section: All waters of Nawiliwili Harbor, Kauai, shoreward of the Nawiliwili Harbor COLREGS DEMARCATION LINE (See 33 CFR 80.1450), excluding the waters west of a line running from the southeastern most point of the breakwater of Nawiliwili Small Boat Harbor due south to the south shore of the harbor, and excluding the waters of Kalapaki Beach south to a line extending from the western most point of Kukii Point due west to the Harbor Jetty. The land of the Jetty south of Nawiliwili Park including Waapa Road is included within the security zone.

(b) Activation. The zone described in paragraph (a) of this section will be activated for enforcement 60 minutes before the Hawaii Super Ferry's arrival into the zone and remain activated for 10 minutes after the Hawaii Super Ferry's departure from the zone. The activation of the zone for enforcement will be announced by marine information broadcast, and by a red flag, illuminated between sunset and sunrise, displayed from the Pier One and the Harbor Facility Entrance on Jetty Road.

(c) Regulations. (1) Under 33 CFR 165.33, entry by persons or vessels into the security zones created by this section and activated as described in paragraph (b) of this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. Operation of any type of vessel, including every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, within the security zone is prohibited.

A depiction of the Security Zone that would be implemented by the rule is attached as Exhibit A.

STANDARD FOR PRELIMINARY INJUNCTION

The Ninth Circuit has described the criteria to be considered when there is an application to obtain a temporary restraining order or preliminary injunctive relief:

Under the "traditional" criteria, a plaintiff must show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternatively, a court may grant the injunction if the plaintiff "demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." Id. (citations omitted) (emphasis in original). "These two alternatives represent 'extremes of a single continuum,' rather than two separate tests." Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). "Thus, the greater the relative hardship to [the party seeking the preliminary injunction,] the less probability of success must be shown." Id. (citation omitted) (alteration in original).

Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1297-98 (9th Cir. 2003).

ANALYSIS

I. Standing

This Court is under an independent duty to examine the standing of the Plaintiffs. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional]

doctrines.'") (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)) (alteration in original).

Standing includes both constitutional and jurisprudential considerations. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Article III of the United States Constitution requires that the allegedly aggrieved Plaintiffs show that they have personally suffered some actual or threatened injury in fact which can be traced to some wrongful or illegal conduct by the U.S. Coast Guard, and that the injury is likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Plaintiffs must also assert their own legal interests as the real parties in interest. Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004).

With the exceptions noted below, Plaintiffs are recreational users of the Harbor. Plaintiffs alleging agency interference with future recreational use of the environment generally have standing under the National Environmental Policy Act. Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 457 F.3d 941, 949-50 (9th Cir. 2006).

Plaintiffs Star Newland, Lee Tepley, Paul Doubleday Massey, Jonathan Jay, Cory Harden, Marcia Sacco, Wendy Raebeck, Jeff Sacher, Fabienne Christe, Kamei Trinque, Megan Wong, Noelle Wong,

Ka'iulani Edens, and Jesse Brown-Clay do not make these allegations.

Fern Anuenue Holland, Lea Taddonio, Richard Coon, Andrea Brower, Jay H. Taylor, Barbara Wiedner, David Richard Mireles, and Michial Freigang allege they are recreational users of Nawiliwili Harbor and that the security zone will prevent their future use of the Harbor.

The Plaintiffs who do allege recreational use, though, do not allege that they made use of the mechanism put in place by the Coast Guard for passage through the security zone. See Defendants' Opposition, Decl. of Katherine Moore. On a case by case basis, users of the Harbor may ask permission of the Coast Guard to enter the security zone. A telephone number has been established and publicized for use in gaining permission. Id.; Exhibit A. As Plaintiffs have not alleged that they have sought such permission and been refused, they have no standing. Madsen v. Boise State Univ., 976 F.2d 1219, 1220 (9th Cir. 1992) ("a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit"); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 56 (D.C. Cir. 1991) (plaintiffs lacked standing to challenge failure to extend Indian hiring preferences into job categories for which they never formally applied).

None of the Plaintiffs have alleged sufficient facts to meet the standing requirements. In an abundance of caution, the Court reviews the merits of their claims as they raise important Constitutional questions.

II. Likelihood Of Success On The Merits

A. Authority Of The U.S. Coast Guard To Establish A Security Zone

1. Standard Of Review

The Administrative Procedures Act ("APA") sets forth standards governing judicial review of decisions made by federal administrative agencies. Arizona Cattle Growers' Assoc. v. U.S. Fish and Wildlife, 273 F.3d 1229, 1235 (9th Cir. 2001); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108, 1118 (9th Cir. 2004), *opinion amended and superseded on denial of rehearing by* Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005). Pursuant to the Administrative Procedures Act, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); United States v. Bean, 537 U.S. 71, 77 (2002); Ocean Advocates, 361 F.3d at 1118; Arizona Cattle Growers' Assoc., 273 F.3d at 1236. The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. See Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 376 (1989). Review

under the standard is narrow and the reviewing court may not substitute its judgment for that of the agency. Marsh, 490 U.S. at 378; Ocean Advocates, 361 F.3d at 1118; Arizona Cattle Growers' Association, 273 F.3d at 1236 (noting "narrow scope of review").

The agency, though, must articulate a rational connection between the facts found and the conclusions made. Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir.1999). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Marsh, 490 U.S. at 378. The court may reverse under the "arbitrary and capricious" standard only if the agency:

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

2. Authority To Establish And Enforce A Security Zone

The Coast Guard's authority to establish and enforce a security zone in a harbor, is derived from the Magnuson Act, 50 U.S.C. § 191. Pursuant to the Magnuson Act, the President of the United States has the authority to proclaim that the security of the United States is threatened and to issue regulations to

safeguard vessels, harbors, ports, and waterfront facilities:

[The President of the United States has the authority to] institute such measures and issue such rules and regulations . . . to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States . . .

50 U.S.C. § 191. Pursuant to the Magnuson Act, President Truman proclaimed that the security of the United States was threatened, and promulgated regulations which constitute Part 6, Sub-chapter A. Chapter I, Title 33 of the Code of Federal Regulations to "safeguard vessels, harbors, ports, and waterfront facilities." Exec. Order No. 10173, Oct. 18, 1950, 15 F.R. 7005. By Executive Order Number 11249, President Johnson amended 33 C.F.R. § 6.04-6 to permit the Captain Of The Port "to establish security zones subject to the terms and conditions specified in [33 C.F.R.] § 6.01-5." Exec. Order No. 11249, Oct. 13, 1965, 30 F.R. 13001. The validity and scope of 33 C.F.R. Part 6 powers to create security zones has been recognized by Federal Court decisions:

The Magnuson Act of August 9, 1950, 64 Stat. 427, amplified this by providing that 'Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States,' he is authorized to issue rules and regulations designed, among other purposes, 'to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, * * *.'

United States v. Aarons, 310 F.2d 341, 343-4 (2d Cir. 1962). The U.S. Coast Guard has the authority to promulgate a rule establishing a security zone in Nawiliwili Harbor.

3. The Pre-promulgation Notice Requirement Of The APA

The Coast Guard issued its temporary final rule establishing the security zone for Nawiliwili Harbor on September 5, 2007. Promulgation of this rule followed the protests on August 26 and 27, 2007, on Kauai which raised concern over the safety of members of the public and Coast Guard personnel.

The rule has not yet been placed into practice as the Super Ferry has not sailed into Nawiliwili Harbor as of the date of this hearing on October 5, 2007. The rule can be made without prior public notice or comment. The pre-promulgation notice requirement of 5 U.S.C. § 553(b) is negated when good cause exists:

when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

5 U.S.C. § 553(b)(B).

Here, the Coast Guard had "good cause" in this matter as people commenting on the arrival of the Super Ferry placed themselves, onlookers, passengers on the Super Ferry, people on other vessels in the Harbor, and Coast Guard personnel in danger:

On August 26 and 27, 2007, protesters impeded the passage of the Super Ferry Hawaii Super Ferry into and

through Nawiliwili Harbor by entering the water from the land and waterfront facilities adjacent to the harbor, often with kayaks, surfboards, and other small vessels, and then swimming into and blocking the harbor's navigable channel. In addition, several hundred onlookers watched the unfolding events from land adjacent to the harbor. Most of these observers were on the jetty that is south of Nawiliwili Park, which is adjacent to the Matson shipping facility in Nawiliwili Harbor (hereinafter referred to as "Nawiliwili Jetty"). Some of these onlookers threw rocks and bottles at Coast Guard personnel who were conveying detained protesters to shore on August 26. Most of the protesters who entered the water were observed doing so from Nawiliwili Jetty.

Due to the difficulty of maneuvering in the small area of Nawiliwili, and in the interest of ensuring the safety of the protesters, the Hawaii Super Ferry's master chose not to enter the channel until the Coast Guard had cleared the channel of protesters. However, because the vessel remained outside the harbor, and because the protesters did not approach to within 100 yards of the vessel, the existing security zone (see 33 CFR 165.1410) did not provide the Coast Guard with the authority to control protestor entry into Nawiliwili Harbor or clear the channel of protesters before the Hawaii Super Ferry commenced its transit into the harbor.

See Defendants' Opposition at Exh. A, Federal Register/Vol. 72, No. 171/Wednesday, September 5, 2007/Rules and Regulations 50877.

Given the public statements made by Hawaii Super Ferry representatives, the Coast Guard anticipated that the Super Ferry operations might resume at any time. The Coast Guard was assured by Plaintiffs they would physically block the return of the Super Ferry to Kauai. See First Amended Complaint, ¶ 41 (Plaintiff Megan Wong states she will "definitely be there to block [the ferry] at whatever the cost. We will not back down [.] Many of

us are putting our life . . . on the line.") Faced with this danger to people in and around the Harbor, the Coast Guard was neither arbitrary or capricious in acting to extend the existing security zone around the Super Ferry.¹

B. Need For An Environmental Impact Statement

1. Requirements Of The National Environmental Policy Act

The National Environmental Policy Act regulates government activity that significantly impacts the environment. 42 U.S.C. § 4332. The National Environmental Policy Act was enacted "to help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). The Council on Environmental Quality administers the National Environmental Policy Act, promulgating rules pursuant to the National Environmental Policy Act that are binding on federal agencies. See 42 U.S.C. §§ 4342, 4344(3); 40 C.F.R. §§ 1501-08. The United States Coast Guard, as a federal agency, has issued administrative regulations to implement and

¹The Coast Guard has offered a subsequent opportunity for public comment on the temporary security zone rule. See, Defendants' opposition, Declaration of Charles W. Ray, at 7; see also Federal Register/Vol. 72, No. 171/Wednesday, September 5, 2007/Rules and Regulations, at 50877 ("Although the Coast Guard has good cause to issue this effective temporary rule without first publishing a proposed rule, you are invited to submit comments and related material regarding this rule on or before September 26, 2007. We may change the temporary rule based upon your comments.").

supplement the Council on Environmental Quality regulations. See 40 C.F.R. § 1507.3.

The Council on Environmental Quality rules require the Coast Guard to establish procedures for evaluation of the environmental impact of proposed Coast Guard actions. Pursuant to these guidelines, the Coast Guard must identify those actions which normally require an environmental impact statement. Id. § 1501.4(a)(1). An environmental impact statement is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Whether an environmental impact statement must be prepared is examined in an environmental assessment. An environmental assessment delineates the need for the proposed Federal action, examines alternate methods for meeting this need, and assesses the environmental impact of the proposed action. See 40 C.F.R. § 1508.9(b).

An agency may classify actions identified as having no significant effect on the human environment, as categorical exclusions. Pursuant to the National Environmental Policy Act and Council on Environmental Quality regulations, neither an environmental impact statement nor an environmental assessment is required if an action falls within a particular categorical exclusion.

Procedures set out for determining whether an action falls within a categorical exclusion shall also set out a method for

examination of the action to determine if extraordinary circumstances exist. 40 C.F.R. § 1508.4. Extraordinary circumstances are those in which a normally excluded action may have a significant environmental effect. Id.

In order to establish a categorical exclusion, the Council on Environmental Quality requires that an agency publish the proposed categorical exclusion in the Federal Register, provide an opportunity for public comment, and submit the categorical exclusion to the Council on Environmental Quality for review and approval. 40 C.F.R. § 1507.3(a). The Council on Environmental Quality reviews the proposed categorical exclusions and any comments received, and determines whether the categorical exclusions are consistent with the National Environmental Policy Act regulations. 48 Fed. Reg. 34,265.

2. Standard Of Review

Review of an agency's action raising predominantly legal, rather than factual, issues may be reviewed under a reasonableness standard. Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002). The reviewing Court must determine whether the agency's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and support by the record. See California v. FCC, 75 F.3d 1350, 1358 (9th Cir. 1996). An agency's decision not to prepare an environmental impact statement is reviewed under the

reasonableness standard. Ka Makani 'O Kohala Ohana Inc., 295 F.3d at 959 n.3 (9th Cir. 2002) ("where an agency has decided that a particular project does not require the preparation of an EIS, without having conducted an environmental assessment, and we are dealing with primarily legal issues [] we review the decision under the less deferential standard of 'reasonableness.'). The Coast Guard's interpretation of its regulations is given controlling weight unless the interpretation is erroneous or inconsistent with the regulation. Id. at 959.

3. Scope Of The National Environmental Policy Act Analysis

In order to determine whether a categorical exclusion is applicable, the scope of the action subject to the National Environmental Policy Act analysis must be defined. The Coast Guard may limit the scope of its environmental review to the activities authorized by the federal action, the creation and enforcement of the security zone, if the "private and federal portions of the project could exist independently of each other." Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1116 (9th Cir. 2000).

Here, the action to be taken by the Coast Guard is the temporary clearing of the water in the Harbor, and of a portion of the shore, to ensure the safety of those who wish to comment on the Super Ferry, people on board the Super Ferry, people onshore, personnel of the Coast Guard, and of people on vessels

in the Harbor. Facilitating the safe navigation of the Super Ferry into the Harbor does not extend the scope of the National Environmental Policy Act analysis. The Court examines the actions of establishing and enforcing the right to safe navigation by creating a security zone.

The sailing of the Super Ferry is the independent act of a private company. The Super Ferry has sailed to Maui and Kauai without the enforcement of the security zone. The actions of the Coast Guard are not intertwined with the independent act of vessels navigating the waters of the Hawaiian islands. The scope of the Coast Guard's review does not extend to an independent private vessel's possible environmental impact. Indeed, as a practical matter this would be redundant, offering no new information, as the Hawaii Super Ferry company is required to complete its own environmental impact statement pursuant to the law of the State of Hawaii. See Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 401 (9th Cir. 1989) ("We, finally, draw comfort from the fact that ordinary notions of efficiency suggest a federal environmental review should not duplicate competently performed state environmental analyses").

We have upheld an agency's decision to limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other.

Wetlands Action Network, 222 F.3d at 1116; Sylvester, 884 F.2d at 396-401.

Plaintiffs raise various environmental concerns including a concern about the Super Ferry harming humpbacked whales. See Plaintiffs' Exhibit 33, the October 4, 2007, article in Honolulu Advertiser, entitled "Hawaii Superferry risk to whales raised in 2005." This concerns the operation of the Super Ferry. There is no question raised regarding possible damage to whales from the operation of the Coast Guard in its enforcement of navigation right through the security zone. Neither do Plaintiffs point to any environmental impact stemming from the direct action of the Coast Guard. Plaintiffs' allegations of environmental impact concern the Super Ferry. The Coast Guard's limitation of the scope of review to the enforcement of the security zone is neither erroneous nor inconsistent with the National Environmental Policy Act. Wetlands Action Network, 222 F.3d at 1116.

4. The Categorical Exception

The Coast Guard has promulgated a Categorical Exception for establishing a security zone:

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

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

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

Given the scope of the National Environmental Policy Act review, the act of enforcing a security zone, the Coast Guard's decision that the temporary rule falls within Categorical Exception Number 34(g) is neither arbitrary nor capricious. See Defendants' opposition, Exh. B, Categorical Exclusion Determination.

Plaintiffs fail to allege any "extraordinary circumstances" directly related to the acts of the Coast Guard in enforcing the security zone which require additional analysis of environmental impact.

C. Infringement Of First Amendment Rights

The First Amendment to the United States Constitution entitles citizens to the "ability to communicate [their views] effectively." Menotti v. City of Seattle, 409 F.3d 1113, 1138 (9th Cir. 2005). The right to freedom of expression is not without limits. In public fora, reasonable restrictions may be placed on the time, place, and manner of speech. Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 12 (C.A.1 (Mass.) 2004). These restrictions are permissible provided they "are justified without reference to the content of the regulated speech", "are narrowly tailored to serve a significant governmental interest", and "leave open ample alternative channels for communication of

the information." Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

Plaintiffs' First Amendment claims are defined by a confusion between the idea of conveying opinions and beliefs, with the ability to physically block the act of another. Mr. Sinkin, attorney for the Plaintiffs, stated at the hearing:

[T]he message that the plaintiffs are trying to deliver here is that the continued operation of Super Ferry is illegal. That the alignment of state, federal and law enforcement officials to make that illegal act possible is illegal. And that the only way they can act to deliver that message is to try to prevent the illegal action.

Giving them a place over on the beach to wave a sign saying, "this is illegal, please don't do it," is not effective speech in this instance. The effective speech is in fact the self-help that they are engaging in. That's the only effective answer to an illegal act that is an official illegal act. So that's the nature of their free speech and their First Amendment complaint.

October 5, 2007, Hearing Transcript at 24.

Plaintiffs' argue that free speech only exists when the speech is "effective", that is, when it results in forcing others physically to comply with Plaintiffs' beliefs:

The Court: I want to be clear about what you're saying. [] You're saying the speech is the ability to be in the water and block the Super Ferry from landing?

Mr. Sinkin [counsel for Plaintiffs]: That is correct. That is enforcing the law, in [Plaintiffs'] view. And the only way to say it's illegal is to enforce the law.

The Court: And, so, being able to be on the side, in a visible position, where someone is either supporting the Super Ferry, or is against the Super Ferry operating, you don't consider that sufficient exercise of the First Amendment right?

Mr. Sinkin: I don't consider it sufficient [.]
October 5, 2007, Hearing Transcript at 25.
Plaintiffs are mistaken in their understanding of the law.
Bl(a)ck Tea Society, 378 F.3d at 12. The government interest in
keeping people safe from injury is a sufficient legal basis for
the reasonable regulation of the time, place, and manner of
public comment on the Super Ferry. Id. The security zone rule
protects the safety of all, not by limiting speech, but by
limiting dangerous acts.

1. The Security Zone Rule Is Content Neutral

Plainly, the security zone rule excludes all persons seeking
to physically block the progress of the ferryboat, not just those
commentators who disfavor the Super Ferry. See § 165.T-14-160
Security Zone. Plaintiffs' allegation that the security zone
regulation is not content neutral is unsupported. This
allegation is simply a mis-interpretation of the security zone
regulation. The security zone is to be enforced against any
person seeking to place themselves in the path of the ferryboat,
whether holding a sign saying "welcome to Kauai" or "go home".
See October 5, 2007, Hearing Transcript at 13; compare with,
§ 165.T-14-160 Security Zone.

The security zone rule is designed to prevent entry to
people seeking to physically block the ferryboat, but will allow
people seeking safe passage through the security zone for

recreational purposes. Permission may be sought of the Coast Guard Captain of the Port for passage into the security zone. There is not a bar to safe use of the Harbor. See Exhibit A; see also Defendants' Opposition, Decl. of Kathleen Moore.

2. The Security Zone Rule Is Narrowly Tailored

The boundaries of the security zone are strictly defined by the danger the Coast Guard seeks to avoid. The security zone only encompasses the area in the Harbor needed for the safe passage of the Super Ferry, and only encompasses those portions of the shore needed to prevent onlookers from entering the cleared water of the Harbor, and from being close enough to throw rocks and bottles at Coast Guard personnel. See Exhibit A; see also Defendants' Opposition, Decl. of Ray at Exhibit A, Background and Purpose of the security zone rule.

The security zone is also narrowly tailored in time. The security zone only goes into effect one hour before the Super Ferry enters the Harbor, and lasts until ten minutes after the ferryboat exits the Harbor, just enough time to ensure a safe turnaround of the Super Ferry which would endanger no one. Id.

3. Ample Opportunity For Effective Expression Is Left Open

Two areas have been provided, by the shape of the safety zone, for use by those who wish to publicly comment on the sailing of the Super Ferry. 33 C.F.R. § 165.T14-160(a), see Exhibit A.

These areas allow those who wish to comment publicly on the Super Ferry to be clearly visible to observers onshore, persons on the pier, persons at the Super Ferry mooring facility, and persons aboard the Hawaii Super Ferry. Defendants' Opposition, Charles W. Ray Decl., at ¶8.

This is sufficient as "an entire medium of public expression" is not foreclosed by the safety zone. Menotti v. City of Seattle, 409 F.3d 1113, 1138 (9th Cir. 2005); Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004).

Plaintiffs', in their Reply memorandum, admit the security zone leaves them the ability to protest the operation of the Super Ferry in a manner that can be seen:

Permitting the Plaintiffs and others of like mind to stand or float to the side, while a violation of law is taking place; with the opportunity to wave signs, shout, or otherwise communicate with the law breakers; is not sufficient . . .

Plaintiffs' Reply at 13.

II. Irreparable Injury

Plaintiffs have not made a sufficient showing of irreparable injury. Plaintiffs primary contention is that the implementation of the security zone prevents what they term "effective" free speech, which they define as the ability to physically prevent the passage of the Super Ferry. Plaintiffs' Reply at 17:

If HSF returns to Kaua'i, Plaintiffs intend to again peacefully place themselves in from of the HSF to prevent HSF from breaking the law and inflicting harm on their 'aina.

Plaintiffs make no other allegation of injury.

Absent any allegation of irreparable injury to a legal right, and given that Plaintiffs have no likelihood of success on the merits, there are no grounds for issuance of a temporary restraining order.

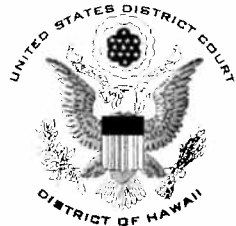
CONCLUSION

For the foregoing reasons:

The Court **DENIES** Plaintiffs' Motion For Temporary Restraining Order.

IT IS SO ORDERED.

DATED: October 9, 2007, Honolulu, Hawaii.

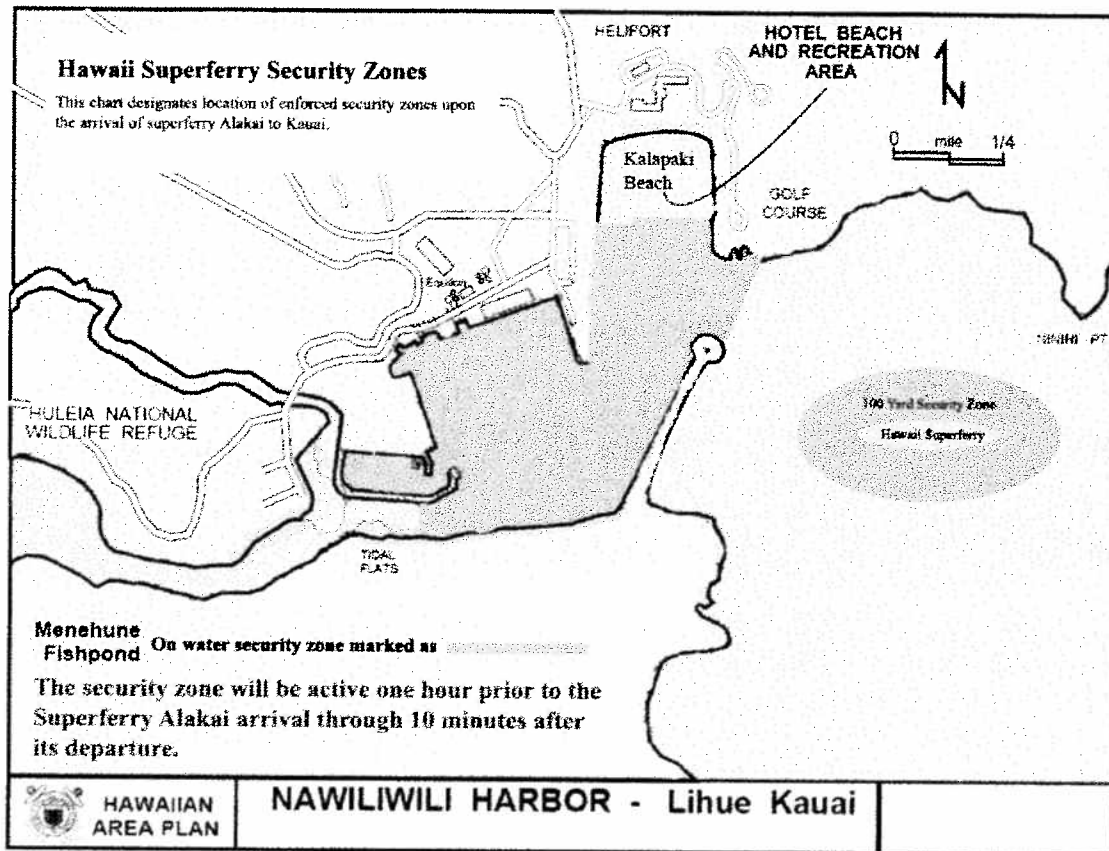


/S/ Helen Gillmor

Helen Gillmor
Chief United States District Judge

Megan Wong, et al. v. George W. Bush, President of the United States, et al., Civ. No. 07-00484 HG-LEK ; ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

COAST GUARD SECURITY ZONE



Q: What is the Coast Guard doing in Nawiliwili Harbor?

The Coast Guard is actively working with other federal, state and local authorities, and Hawaii Superferry, to ensure the safest plan possible for the Alakai's trips to Kauai. The Coast Guard is committed to performing its mission of ensuring the safety and security of the maritime environment in Hawaii, including the safety of peaceful protesters who obey the law and are not a threat to security.

Q: Am I allowed to use the harbor during the security zone?

Coast Guard officials will determine on a case-by-case basis who is allowed into, out of, and through Nawiliwili Harbor during the security zone operation. The security zone will be in effect one hour prior to the Hawaii Superferry's arrival through ten minutes after its departure. Also, be aware that Jetty Road will be closed as long as the security zone is in effect.

An active traffic control system will be established and boaters and the maritime community should **contact the Coast Guard via CH 12 on VHF radio, the day of the Alakai's transit, and/ or by calling 1-808-927-0865, ahead of time or on the transit day**, to determine if use of the harbor will be granted.

Q: Who is enforcing the security zone?

The responsibility for the safety and security of Nawiliwili Harbor is shared among state authorities, the Coast Guard and other law enforcement agencies.

Q: What are the fines and penalties if laws are violated?

Protestors who fail to comply with orders pertaining to the security zones, purposely injure or threaten to injure an enforcement officer or attempt to destruct or interfere with vessels may be punished by imprisonment for up to 10 years, and may be fined up to \$32,500. Any vessel used to violate a security zone, including surfboards, kayaks and canoes may be immediately confiscated and forfeited.

Q: If I choose to protest Superferry within the active security zone, will I be arrested?

Protesters who violate established security zones and disobey lawful orders to disperse will be apprehended, and may be arrested and prosecuted. If the security of a vessel engaged in commerce is threatened, the Coast Guard will take appropriate action to address the threat.

For Coast Guard information regarding safety and security plans for the next Hawaii Superferry voyage to Kauai, contact the public information office at 1-808-842-2029, or visit www.uscgohawaii.com.

EXHIBIT A