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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HONOLULU TRAFFIC.COM, et al.	)	Case No. 11-00307 AWT
	)	
Plaintiffs,	)	FEDERAL DEFENDANTS'
	)	OPPOSITION TO
v.	)	PLAINTIFFS' MOTION
	)	FOR SUMMARY
FEDERAL TRANSIT	)	JUDGMENT, RESPONSE TO
ADMINISTRATION, et al.	)	AMICUS CURIAE, AND
	)	CROSS MOTION FOR
Defendants.	)	SUMMARY JUDGMENT

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Federal Defendants by and through the undersigned counsel, submit the following response to Plaintiffs' Motion for Summary Judgment (ECF No. 109) and their corresponding Memorandum in Support of Plaintiffs' Motion for Summary Judgment (ECF No. 109-1) ("Plaintiffs' Memorandum"). Federal Defendants also respond to the *amicus curiae* brief (ECF No. 140) filed by the National Trust for Historic Preservation ("National Trust"). Additionally, Federal Defendants hereby move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and join the arguments contained in the motion and memorandum filed contemporaneously by the City and County of Honolulu Defendants ("City").

In their motion, Plaintiffs argue that Federal Defendants violated three separate statutes in approving the Honolulu High-Capacity Transit Corridor Project ("Project"): Section 4(f) of the Department of Transportation Act, the National Environmental Policy Act ("NEPA"), and the National Historic Preservation Act ("NHPA"). However, the voluminous administrative record compiled by Defendants will demonstrate that the Project complies with these statutes and Defendants' decision to approve the Project was not arbitrary and capricious.

Plaintiffs first contend that Federal Defendants violated section 4(f) because Defendants did not adequately investigate the existence of historic properties and erroneously concluded the Project would not use certain known historic properties.

Plaintiffs also argue that Federal Defendants failed to adopt prudent and feasible alternatives to the use of certain historic properties. The National Trust made Section 4(f) arguments identical to Plaintiffs'. However, the administrative record supports Federal Defendants' determination that the Project will not use certain historic properties and that there are no prudent and feasible alternatives to the use of certain historic properties.

Second, Plaintiffs argue that Federal Defendants violated NEPA by setting forth a purpose and need statement for the Project that was too narrow and failing to consider an adequate range of alternatives. Plaintiffs also contend that Federal Defendants failed to evaluate the environmental consequences of the Project and improperly segmented the Project by omitting review of a potential extension. None of these arguments has merit. Federal Defendants developed the Project with a broad purpose and need statement that resulted in a thorough analysis of a reasonable range of alternatives. Moreover, the Project has an independent utility and thus was not improperly segmented for analytical purposes.

Third, Plaintiffs allege that the Project violates the NHPA because they claim the Programmatic Agreement covering the Project is deficient. The Programmatic Agreement adopts protective measures for all historic properties known and discovered during the course of the Project and was properly vetted with the Advisory Council for Historic Preservation ("ACHP") and the Hawaii

State Historic Preservation District ("SHPD"). The Agreement complies with applicable NHPA requirements.

Federal Defendants are entitled to judgment on all of Plaintiffs' claims.

I. INTRODUCTION

The County of Honolulu is home to nearly 1 million people and it is a destination for approximately 4.6 million visitors each year. 4: AR00000247 at 297, 303.[1] Honolulu ranks as the fifth densest city among U.S. cities, and it is one of the densest tourist areas in the world. *Id*. at 297, 300. Despite these staggering figures, the island residents and visitors rely primarily on highway infrastructure and private vehicles as a means of intra-island travel. *Id*. at 303-06.

On account of the extraordinary number of people who use Honolulu's roadways daily — approximately 2,790,000 island-wide trips — it is no surprise that the area suffers extreme traffic congestion. *Id*. at 303, 306. In fact, Honolulu was recently ranked as having the worst travel time loss due to congestion out of all other areas in the United States. *Id*. at 308. O'ahu's mountainous geography and extensive development pose a complex challenge to alleviating traffic congestion as these factors severely constrain the opportunities available to expand

[1] Citations to the administrative record will be in the form of a citation to the document number in the Administrative Record Index, followed by the Bates number of the first page of the document and the Bates number being referenced. Accordingly a citation to the fifth page (Bates AR00000252) of the Final Environmental Impact Statement (document number 4 in the index), which begins at Bates AR00000247 would be the following: 4: AR00000247 at 252.

or add to the existing roadway infrastructure. *Id*. at 306. In order to deal with this unique challenge, the City engaged in an effort to identify and analyze various alternative transportation proposals that would provide high-capacity transit service along the busiest travel corridor in O‘ahu. Through years of effort, expert analysis, public input, and guidance from the Federal Transit Administration ("FTA"), the City finally selected a proposed project that would provide a faster, more reliable public transportation service that would serve rapidly developing areas and provide mobility for people of limited income. *Id*. at 312.

On January 18, 2011, the FTA issued the ROD concluding that the Project satisfied the requirements of the NEPA and related federal environmental statutes, regulations, and executive orders. 3: AR00000030 at 32.

II. PROJECT BACKGROUND

A. THE PROJECT

The Project is a twenty-mile fixed guideway rapid transit project in the highly congested west-east transportation corridor ("Project Corridor") between Kapolei and Downtown Honolulu. 4:AR00000247 at 247, 312. This corridor is rife with a number of major transportation problems, including severe traffic congestion caused by, among other factors, heavy travel between urban centers; increased development; location of a majority of island population and jobs; and decreased affordable parking. *Id*. at 296-311. These problems produce consistent

travel delays resulting in the lowest possible level-of-service ratings during peak periods of operation. *Id.* at 308-311.

The Project will help alleviate transportation problems through the construction and operation of a 20-mile rail system that will extend from Kapolei on the west side of O‘ahu, proceed east via Farrington Highway and Kamehameha Highway, and continue with service to the Airport and Downtown before ending at Ala Moana Center. 3: AR00000030 at 32. The entire rail system will operate in an elevated exclusive right-of-way, ensuring system speed and reliability and avoiding conflicts with automobile and pedestrian traffic. 4: AR00000247 at 344. The rail system is planned to operate with multi-vehicle trains capable reaching speeds of upwards of 50 miles per hour and carrying between 325 and 500 passengers per train. *Id*. at 345. The system will use industry standard steel-wheel on steel-rail technology powered electrically by a third rail. *Id.* The Project will include 21 stations, all designed for ease of use and to accommodate elderly and disabled riders. *Id*. at 346.

B. DEVELOPMENT OF THE PROJECT

On December 27, 2005, the FTA published a Notice of Intent (“2005 NOI”) to prepare an Alternative Analysis and Environmental Impact Statement (“EIS”) in the Federal Register for a proposed transit project. 70 Fed. Reg. 72,871 (Dec. 7, 2005). The Alternatives Analysis is required by federal law and is part of the FTA

NEPA process. 49 U.S.C. §§ 5309(a)(1), 5309(e)(3); 23 C.F.R. part 450, Appendix A, ¶ 12. The 2005 NOI invited all interested individuals and organizations, and Federal, State and local agencies to comment, in writing or orally at scoping meetings, on the proposed alternatives, purpose and need, and scope of the alternatives evaluation. *Id*. The 2005 NOI indicated that the purpose of the action was to provide improved person-mobility through the identified corridor through the implementation of a high-capacity transit project. *Id*. at 72,872.

The FTA worked with the City to develop the Alternatives Analysis. 29:AR9434 at 944; s*ee also* 13730:AR00150766; 13665:AR 00150602 (minutes of FTA-City meeting, including discussion of AA and plans to further address the AA); 13476:AR 00150147 (FTA-City Meeting Agenda regarding the Alternatives Analysis, 10/10/06); 13453:AR00150107 (City checked with FTA to ensure accuracy of information in the Alternatives Analysis report, 10/23/06)).

The Alternatives Analysis process presented many opportunities for public involvement. Prior to the completion of the Alternatives Analysis, the City and the FTA engaged in a scoping process to identify appropriate alternatives to evaluate. *See* 30:AR00009556. This process culminated in the compilation of an Alternatives Screening Memo, which identified multiple alternatives to be considered for further evaluation. *Id*. The alternatives reviewed were a product of

public participation, as well as input from other sources. *Id*. at 9571 ("The screening process has included input from City staff, elected officials, community groups, the general public, and the consultant team."). As the screening memo indicates, the comments received during the public scoping were an "important element of the screening process. *Id*. at 9577.

After completing the screening process, a final Alternatives Analysis was completed. 29: AR00009434. The purpose of the Alternatives Analysis was to evaluate the alternatives developed during the screening process in terms of their costs, benefits, and impacts in order to assist in the selection of a locally preferred alternative. *Id*. at 9435. These alternatives included: the no build alternative; the transportation system management ("TSM") alternative; the managed lanes alternative (both the two-direction and reversible options); and the fixed guideway alternative (with three alignment options). 4:AR00000247 at 322; 30:AR00009556 at 9562-65.[2] These alternatives were evaluated on the basis of mobility and accessibility; planned growth and economic development; constructability and cost; community and environmental quality; and planning consistency. 4: AR00000247 at 322.

[2] The technology alternatives recommended for further study were: (1) conventional and guided bus; (2) LRT; (3) MAGLEV; (4) people mover; (5) monorail; (6) rapid rail for line haul service; (7) bus and rail feeder service to line haul system. 30:AR00009556 at 9563. A total of seventeen alignment options were also advanced for further study. *Id.* at 9565.

The Alternatives Analysis concluded that the fixed guideway alternative was the only alternative to satisfy the Project's purpose and need. *Id*. at 329. After reviewing the Alternatives Analysis and consideration of nearly 3,000 public comments, an overwhelming majority of which favored a form of fixed guideway alternative, the City Council selected the fixed guideway transit system alternative as the locally preferred alternative. *Id.* at 296, 323; 341:AR00055302.

Following the preparation of the Alternatives Analysis Report and selection of the locally preferred alternative, which narrowed the range of reasonable alternatives for further consideration, Defendants proceeded with the environmental review process under NEPA by publishing a Notice of Intent to prepare an EIS ("2007 NOI") on March 15, 2007. *See* 72 Fed. Reg. 12,254, 12,255. The 2007 NOI invited all interested individuals and organizations, as well as Federal, State, and local agencies, to provide scoping comment on the purpose and need to be addressed by a 20-mile fixed guideway transit system; the alternatives, including the modes and technologies to be evaluated; the alignments and terminations points to be considered; and the environmental, social, and economic impacts to be analyzed in the EIS. *Id.* at 12,225-227. The 2007 NOI discussed the no build alternative and two build alternatives (*i.e.*, a fixed guideway alternative via Salt Lake Boulevard and a fixed guideway alternative via the Airport & Salt Lake Boulevard). *Id.* Based on the comments submitted, the City

and FTA added a third fixed guideway alternative to be included in the Draft EIS that would serve the airport without an alignment following Salt Lake Boulevard. 4: AR00000247 at 330.

The 2007 NOI also requested input on five transit technologies: (1) light-rail transit; (2) rapid-rail transit (steel wheel on steel rail); (3) rubber-tired guided vehicles; (4) magnetic levitation system; and (5) monorail. 72 Fed. Reg. at 12,256. A technical review process that included opportunities for public comment was initiated subsequent to the scoping process to select a transit technology. 4: AR00000247 at 331. The process included a broad request for information that was publicized to the transit industry. *Id*. Transit vehicle manufacturers submitted 12 responses covering all of the proposed technologies. *Id*. Those responses were reviewed in February 2008 by a five-member panel appointed by the City Council and Mayor that considered the performance, cost, and reliability of the proposed technologies. *Id*. The panel twice accepted public comment as part of its review. By a four-to-one vote, the panel selected steel wheel operating on steel rail as the technology for the Project. *Id*. Furthermore, the Honolulu voters in the general election voted in favor of a city charter amendment to establish a steel wheel and steel rail system. *Id*. Subsequently, the City established steel wheel operating on steel rail as the locally preferred alternative to be evaluated in an EIS.

The Final EIS ("FEIS") identified the Airport Alternative as the preferred alternative. 4: AR00000247 at 337-38. The FEIS also provided a revised evaluation of Section 4(f) resources, as well as a description of the lengthy consultation by the City and FTA with the State Historic Preservation Division, the U.S. Navy, Advisory Council on Historic Preservation and other consulting parties regarding potential impacts to Section 4(f) resources. *Id.* at 680-752, 783-84. On June 25, 2010, a Notice of Availability of the FEIS was published in the Federal Register, starting a 30-day waiting period. 75 Fed. Reg. 36,386 (June 25, 2010). The waiting period was extended twice to allow further public comment on the FEIS. 32:AR00009685; 75 Fed. Reg. 43,160 (July 23, 2010). The FTA received 43 comments during this period. 3: AR00000030 at 233-34. The ROD was issued on January 18, 2011. *Id*. at 30.

III. STATUTORY BACKGROUND

A. NATIONAL ENVIRONMENTAL POLICY ACT

NEPA, 42 U.S.C. §§ 4321–4370h, requires federal agencies to prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA imposes procedural, rather than substantive, requirements. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000).

A court reviews an EIS simply to determine whether it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a proposed action. *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (internal quotations omitted). The court makes a "pragmatic judgment whether the [EIS's] form, content and preparation foster both informed decision-making and informed public participation." *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1094 (9th Cir. 2006). Once the court determines the agency took a "hard look" at a project's environmental consequences, its review is at an end. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). The Court "need not 'fly-speck' the document and 'hold it insufficient on the basis of inconsequential, technical deficiencies,' but will instead employ a 'rule of reason.'" *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). A reviewing court may not substitute its own judgment for that of the agency. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978); *see also Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994).

B. SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT

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

> The Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park . . . 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 . . . or historic site resulting from the use.

49 U.S.C. § 303(c); *accord* 23 U.S.C. § 138. This provision applies only to federally funded transportation projects. *See, e.g.*, *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1485 (10th Cir. 1990).

The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* prescribed a three step analysis for a court reviewing the Secretary's decision to use resources protected under 4(f). 401 U.S. 402, 416-17 (1971); *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 61 (4th Cir. 1990). First, the reviewing court determines whether the Secretary recognized the scope of his authority was limited to approving a use of land protected by 4(f) where there was no reasonable and prudent alternative to such use and all possible planning had been undertaken to minimize the harm to the 4(f) resource. *Overton Park*, 401 U.S. at 416; *Hickory Neighborhood*, 893 F.2d at 61. Second, the reviewing court must determine whether the Secretary's decision was based upon the relevant factors and was not arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Id.* Though a searching and careful inquiry is required, the reviewing court is not to substitute its own judgment for that of the agency. *Id.*

Third, the court must determine whether the Secretary followed the necessary procedural requirements. *Overton Park*, 401 U.S. at 417; *Hickory Neighborhood*, 893 F.2d at 61.

Other than for uses with *de minimis* impacts and certain limited exceptions in 23 C.F.R. § 774.113, "use" of Section 4(f) property occurs in one of three circumstances:

> (i) When land is permanently incorporated into a transportation facility;
> (ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purposes as determined by the criteria in [23 C.F.R. § 774.13(d)]; or
> (iii) When there is a constructive use of a Section 4(f) property as determined by the criteria in [23 C.F.R. § 774.15].

23 C.F.R. § 774.117. A constructive use occurs when:

> when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

23 C.F.R § 774.115.

C. THE NATIONAL HISTORIC PRESERVATION ACT

Section 106 of the NHPA requires federal agencies to "make a reasonable and good faith effort" to identify adverse effects to historic properties resulting from federal undertakings. 36 C.F.R. § 800.4(b)(1); *see also* 16 U.S.C. § 470f.

The ACHP administers the NHPA, s*ee* 16 U.S.C. §§ 470i, 470s, and has promulgated regulations under Section 106 to govern federal agency compliance with the NHPA. *See* 36 C.F.R. Part 800. These regulations direct agencies to determine if a project qualifies as an "undertaking" that "has the potential to cause effects on historic properties." *Id*. § 800.3(a). If so, the agency must consult with the state historic preservation officer ("SHPO") to "[d]etermine and document the area of potential effects." *Id*. § 800.4(a)(1); *see id*. § 800.16(d). The agency, along with the SHPO, is then directed to "apply the National Register criteria" to arguably eligible sites within the area of potential effects. *Id*. § 800.4(c)(1). If the agency finds that historic sites may be affected, it must solicit the views of various parties. *Id*. § 800.4(d)(2). The agency then applies the criteria delineated in the regulations to determine if there is an adverse effect, *id*. § 800.5(a), and if so, engages in further consultation to resolve any such adverse effects, *id*. § 800.6. Under these regulations, an agency may satisfy its Section 106 requirements by entering into a programmatic agreement to govern the implementation of undertakings. *See id*. § 800.14(b). In cases where a programmatic agreement for agency programs applies, "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated . . . ." *Id*. § 800.14(b)(2)(iii).

The NHPA does not prohibit harm to historic properties, but creates obligations "that are chiefly procedural in nature." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005). Both statutes "have the goal of generating information about the impact of federal actions on the environment; and both require that the relevant federal agency carefully consider the information produced." *Id*.; *see Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 608 (9th Cir. 2010).

D. THE FEDERAL TRANSIT ACT AND NEW STARTS PROGRAM

The Project is funded in part by the FTA under the New Starts program. The FTA is a grant-making agency within the U.S. Department of Transportation. Chapter 53 of Title 49 authorizes the Secretary of Transportation to make grants or loans to assist states and local agencies in financing the planning, development, and improvement of mass transportation facilities. 49 U.S.C. § 5301. Under various sections of the statute, Congress makes funds available for capital and operating assistance in support of local public transportation programs. *See, e.g.*, 49 U.S.C. §§ 5307, 5309. The FTA administers the statutory program. *Id*. § 5301. The aim of the statute is to assist localities in solving their transit problems. *See, e.g*., *Pullman, Inc. v. Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971). FTA provides federal financing to local transit systems, which are entrusted with making

decisions on the details of projects that received federal funding under Chapter 53. *Id*. at 438-39.

The New Starts program authorized at 49 U.S.C. § 5309 is among the largest, most competitive and most prescriptive discretionary grant programs in the Federal sector. The statute, in 49 U.S.C. § 5309(d), delineates the criteria for project justification and local financial commitment, and the FTA regulations at 49 C.F.R. Part 611 provides for the procedure whereby a project may advance to become candidates for Federal financial assistance under a Full Funding Grant Agreement ("FFGA"). This procedure occurs in approximately four phases.

In the first phase, a proposed project is developed through "the metropolitan and Statewide planning process." 49 C.F.R. § 611.7. Then, the local project sponsor prepares an alternatives analysis. *Id.* § 611.7(a). This analysis "develops information on the benefits, costs, and impacts of alternative strategies to address a transportation problem in a given corridor, leading to the adoption of a locally preferred alternative." *Id*. § 611.7(a)(2). The analysis must also include evaluation of a "no-build alternative, a baseline alternative, and an appropriate number of build alternatives." *Id*. § 611.7(a)(3). From this analysis, the project sponsor must select the locally preferred alternative. *Id.* § 611.7(a)(4).

After completion of the alternatives analysis, FTA will then determine whether to approve entry of a proposed project into a preliminary engineering. *Id.*

§ 611.7(b)(4). During this phase, "the scope of the proposed project is finalized, estimates of project costs, benefits and impacts are refined, NEPA requirements are completed, project management plans and fleet management plans are further developed, and local funding commitments are put in place." *Id.* § 611.5. Upon completion of the preliminary engineering and approval by the FTA, the proposed project will enter the final design phase. 49 C.F.R. § 611.7(c). If the FTA approves the final design, an FFGA may be executed. *Id.* § 611.7(d); 49 U.S.C. § 5309(d)(2).

Although the decision whether to execute an FFGA belongs to the Secretary of Transportation and his designee, the Federal Transit Administrator, the selection of a mode, alignment, and system configuration for a project is a local decision based on local needs and objectives. *See, e.g.*, 49 U.S.C. § 5301(f)(3). Ultimately, it is the responsibility and prerogative of the project sponsor and State and local decision makers to balance the costs, benefits, and risks of the many alternatives that potentially meet the purpose and need for a transportation improvement in a discrete corridor. During this decisionmaking process, the general public is given several overlapping opportunities to make its views and opinions known regarding the selection of a mode, alignment, and system configuration.

IV. STANDARD OF REVIEW

A. THE ADMINISTRATIVE PROCEDURE ACT

Plaintiffs acknowledge that judicial review in this case is governed by section 706(2)(A) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). Pls.' Mem. at 9, 13. Section 706(2)(A) provides that a reviewing court may set aside "agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Plaintiffs have the burden to prove that the agency action was arbitrary and capricious. *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009). Review under this standard is "highly deferential," with a presumption in favor of finding the agency action valid. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (citation and quotations omitted). Under such deferential review, this Court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 376 (1989).

A reviewing court owes special deference to an agency's technical judgments, and must allow the agency to rely upon the reasonable opinions of its

own experts, "even if, as an original matter, a court might find contrary views more persuasive." *McNair*, 537 F.3d at 1000 (quoting *Marsh*, 490 U.S. at 378); *see also League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (court's deference is at its highest when reviewing matters within the agency's expertise); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (same); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1215 (9th Cir. 2008) (explaining standard).

B. SUMMARY JUDGMENT

Summary judgment is proper if the evidence "shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because claims brought under the APA are appropriately decided without trial or discovery, on the basis of an existing administrative record, such claims are properly decided on summary judgment. *See* 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2733 (3d ed. 1998). Courts use Rule 56 motions for summary judgment to review agency administrative decisions under the APA. *See, e.g.*, *Nw. Motorcycle Ass'n v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). Courts base this review on the administrative record compiled by the agency. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

V. ARGUMENT

The following section discusses each of the arguments advanced by Plaintiffs and the National Trust. First, this memorandum addresses Plaintiffs' and the National Trust's Section 4(f) claims. As shown below, there is no merit to the allegations that Defendants failed to perform a sufficient Section 4(f) analysis or made use determinations that are arbitrary and capricious. Second, Plaintiffs' NEPA claims are refuted. Because the administrative record demonstrates that Defendants set forth a reasonable purpose and need statement and evaluated all reasonable alternatives to the Project, there is no basis to vacate the ROD. Additionally, because the ROD contains an evaluation of the economic consequences of the ROD and does not improperly segment the Project, there is no basis to remand the decision for further analysis. Third, this memorandum shows that there is no basis for Plaintiffs' NHPA claims because Defendants entered into a Programmatic Agreement that sets forth the protocol regarding the use and avoidance of historic properties as well as mitigation measures to ensure that steps are taken to minimize harm to historic properties. Accordingly, the Court should deny Plaintiffs' Motion and grant judgment in favor of Defendants.

A. DEFENDANTS COMPLIED WITH SECTION 4(F)

Plaintiffs contend that Defendants failed to satisfy the requirements of Section 4(f) because: (1) they did not properly identify Section 4(f) historic

properties; (2) they did not properly evaluate the Project's potential to use Section 4(f) properties; and (3) they failed to consider feasible and prudent alternatives to the use of Section 4(f) properties. Pls.' Mem. at 13-51. The National Trust also argues that Defendants did not properly identify Section 4(f) historic properties and did not adequately document the Project's potential to use Section 4(f) properties. Amicus Br. at 4-24. The record shows otherwise. Defendants identified Section 4(f) historic properties and designed a method of doing so that was approved by the ACHP and the SHPD. After identifying these properties, Defendants carefully analyzed the Project and its potential to use each of the properties. When Defendants determined that the Project would use a Section 4(f) property and that use was not *de minimis*, Defendants looked at all feasible and prudent alternatives that would prevent use of the properties, and where none existed, Defendants incorporated all possible planning to minimize the harm to each property. For this reason, Defendants are entitled to summary judgment on Plaintiffs' Section 4(f) claims.

1. Defendants Properly Identified Historic Properties within the Project Area Prior to Issuing the Record of Decision

The National Trust and Plaintiffs first argue that Defendants failed to identify iwi kupuna (Native Hawaiian Burials) and other potentially eligible Traditional Cultural Properties ("TCP") during the Section 4(f) evaluation of the Project. Neither party claims that Defendants overlooked known TCPs, rather they

claim that in addition to the evaluation Defendants performed prior to issuing the ROD, that Defendants were also obligated to verify whether unknown or underground TCPs existed along the Project Corridor. The law does not require this type of invasive analysis, however, and the Court should find there is no legal support for Plaintiffs' argument.

a. Section 4(f) Legal Standard

For historic properties, the Section 4(f) review process generally begins once a Section 4(f) property is identified during a review of the area of potential effect under Section 106 of the NHPA. *See Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004) ("In order to determine what sites merit protection under Section 4(f), the [FTA] relies in large part on reviews conducted pursuant to Section 106 of the National Historic Preservation Act."). "Section 106 provides a process through which affected historic sites are identified, while Section 4(f) limits the circumstances in which the sites identified through the Section 106 review process can be 'used.'" *Id*. Section 4(f) applies only to "historic" resources or properties, which are sites that are either listed on the National Register of Historic Places or that have been determined to be eligible for

inclusion on the National Register. *See* 23 C.F.R. §§ 774.17 (Definition of "Historic site"); 774.11(d)(1) (Applicability).[3]

The regulations instruct an agency to "make a reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1). A reasonable and good faith effort "may include background research, consultation, oral history interviews, sample field investigation, and field survey." *Id.* Additionally, as part of this effort the "agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." *Id.*

b. The Section 4(f) Identification Process

Defendants complied with Section 4(f) because they properly identified the area of potential effect pursuant to the NHPA and reviewed the Project's use, either direct or constructive, on any identified Section 4(f) property in the FEIS. 168:AR00037676 at 37676-882; 169:AR00037883 at 37883-8097;

[3] The authority to determine whether a historic site is eligible for inclusion in the National Register is vested in the lead federal agency (here the FTA) with a concurrence role for the SHPO. 36 C.F.R. § 800.4(c)(2). If the SHPO disagrees with the lead federal agency's eligibility determination, the lead federal agency must request the Keeper of the National Register to make the eligibility determination. *Id*. In addition, certain Native Hawaiian organizations may request the ACHP to seek an eligibility determination. *Id*.

170:AR00038098 at 38098-350. The actual evaluation of potential historic resources and archaeological sites began as soon as work started on the Draft EIS. In 2006, the City conducted an initial identification of potential historic and cultural resources as part of the preparation of the Alternatives Analysis required by Congress for New Starts projects. 168:AR00037676 at 37709-12; 169:AR00037883 at 37907-08; 170:AR00038098 at 38124; *see* 49 U.S.C. § 5309(c)(1). To perform this review, Defendants utilized information from U.S. Department of Agriculture soils survey data, which provided insight as to the possible location of archeological and burial materials; previous archaeological investigation results; previously recorded archaeological resources; historic land records; and previously recorded burial locations. 168:AR00037676 at 37709-12. This resulted in the production of the Archaeological Resources Technical Report ("Archaeological Report") covering the entire Project. *Id.* at 37676-882.

The Archaeological Report documents the efforts and studies undertaken as part of the review for cultural and historic properties. Such efforts include a comprehensive literature search; consultations with cultural and ethnic experts; review of archaeological research within the study corridor that was conducted and compiled for various private, municipal, state, and federally funded projects; and a comprehensive above-ground investigation conducted along the entire length of the Project to identify any evidence of previously-unknown historic and cultural

resources. *Id.*; 4:AR00000247 at 619. The Archaeological Report discusses three categories of resources: burials, pre-contact archaeology, and post-contact archaeology. 168:AR00037676 at 37708; 659:AR00061744 at 61744-46; 660:AR00061747 at 61747-50. It also contains a detailed discussion of the "Affected Environment" for each sub-area of the Project, which includes an identification of known resources in each sub-area as documented by previous archaeological reviews. 168:AR00037676 at 37714-805.

The Archaeological Report discusses the potential impacts from the Project. *Id.* at 37806-21. This analysis includes a discussion of potential impacts to known burials within each of the evaluated sub-areas. *Id*. The Archaeological Report acknowledges that burials could be affected by the Project, but noted that, for most of the study area, any such resources are buried beneath roadways, residences, businesses, and parking lots. *Id*. at 37806. The Archaeological Report concluded that, with the exception of disturbances such as those caused by excavation of a foundation, the Project's construction would pose no additional impacts to any burials beyond existing conditions. *Id.*[4]

[4] As part of the environmental studies for the Draft EIS, the City and the FTA also prepared the Cultural Resources Technical Report. 9170:AR00038098 at 38098-350. This report identified cultural resources, practices, and beliefs that may be affected by the Project. *Id*. at 38107. It also discussed potential mitigation measures. *Id*. at 38194-99.

Throughout the historic properties identification process, Defendants consulted extensively with dozens of interested public and private parties, including the ACHP, the SHPD, the O'ahu Island Burial Council, the National Park Service, the U.S. Navy, and the National Trust for Historic Preservation. These consultations are documented in detailed minutes of dozens of meetings between the FTA and the consulting parties and in the formal Programmatic Agreement entered into by the FTA, the City, the ACHP, the SHPD and the U.S. Navy. 3:AR00000030 at 83-123. In addition, potential impacts on historic, archeological, and cultural sites were discussed at length in the draft and final EISs, and thus were available for public comment. 4:AR00000247 at 617-37, 680-752; 17:AR00007223 at 7516-29, 7555-94. This work was all completed prior to the issuance of the ROD.[5]

c. The National Trust's and Plaintiffs' Arguments that Defendants Violated Section 4(f) is Unfounded

Defendants rigorously adhered to the ACHP regulations regarding the level of effort required to identify historic properties. In addition to these efforts, Defendants designed as part of the Project a protocol that provides for additional screening for underground historic properties. This plan resulted from the acknowledgment in the Archaeological Report that some archaeological resources

[5] Plaintiffs' argument that Defendants failed to identify other unspecified TCPs is unavailing because the record shows Defendants made a reasonable effort to identify TCPs prior to the issuance of the ROD.

may exist below ground within the Project Corridor, most of which "are buried beneath roadways, residences, businesses, and parking lots." 168:AR00037676 at 37806. Performing below-ground surveys in these areas would be unduly burdensome not only for Defendants, but also to the residents of Honolulu because "[i]dentification of these archeological resources beneath in-use streets, sidewalks and highways would likely pose a significant disruption of traffic." *Id.* at 37704. This would impose significant costs and time expenditures "because of the need to disrupt traffic, saw-cut and remove existing pavement to expose underlying sediments, search for archeological deposits, and then repave the affected area." *Id*. Such invasive below-ground surveying would necessarily have preceded the precise engineering studies that are needed to determine Project column placement. 168:AR00037676 at 37704; 664:AR00061769 at 61679-80. This analysis may not even be necessary as finalizations in the Project's design will determine the points at which subsurface disturbance is needed for the columns, allowing for the adjustment of column placement to allow for any discovery during construction of eligible archaeological resources.. 168:AR00037676 at 37704. Accordingly, below-ground surveying at such an early stage could cause more harm to historic properties than it would avert. For this reason, Defendants' approach is prudent and avoids unnecessary impacts to historic properties.

Despite the tremendous level of effort Defendants expended to identify historic property and develop a protocol for handling sites discovered during construction, the National Trust and Plaintiffs argue that Defendants impermissibly postponed a Section 4(f) review until after the issuance of the ROD by phasing identification of Section 4(f) resources according to the separate phases of the Project's construction. Pls.' Mem. at 18; Amicus Br. at 4-10. The National Trust and Plaintiffs claim that Defendants' approach in this case is identical to the one overturned by the Ninth Circuit in *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008). Pls.' Mem. at 18-19; Amicus Br. at 7-9. The Ninth Circuit's opinion in *North Idaho* is not applicable, however, because the record before the Court demonstrates that Defendants did not wait until after the ROD was issued to conduct a Section 4(f) review.

In *North Idaho*, the plaintiffs brought a challenge to a proposed highway construction project, claiming that the defendants failed "to survey for, identify, and evaluate the impacts on historic properties for all four phases of the Project as required by § 106 and § 4(f)." 545 F.3d at 1158. This claim was based on the fact that the defendants had "conducted a detailed [NHPA] § 106 identification process and § 4(f) evaluation only with respect to [one] phase of the Project, and [had] not done so with respect to the remaining three phases of the Project." *Id*. The court

found that the Section 4(f) evaluation needed to be completed before the issuance of a record of decision, and thereby found the defendants phased approach to be in violation of Section 4(f). *Id*. at 1159-60.[6] Here, however, Defendants engaged in a thorough Section 4(f) evaluation before issuing the ROD. The Court can reject the National Trust's and Plaintiffs' arguments on this basis alone because Defendants Section 4(f) review was neither arbitrary nor capricious. *See Laguna Greenbelt*, 42 F.3d at 534 (the courts review compliance with Section 4(f) under the APA "arbitrary and capricious" standard of review) .

The Court can also reject their arguments because Defendants' decision to establish an additional procedure for addressing the discovery of underground historic properties during the actual construction phases of the Project does not render the Section 4(f) evaluation incomplete. Defendants' approach not only makes practical sense, but it is also reflected in the applicable regulations and

[6] In support of their argument, Plaintiffs and the National Trust also cite *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371-72 (D.C. Cir. 1999) and Plaintiffs also cite *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784 (9th Cir. 1983). Pls.' Mem. at 19; Amicus Br. at 7. Neither of these cases is relevant, however, because they do not impose an obligation on an agency to conduct below-ground surveys for unknown historic properties. In *Corridor H*, the court found a violation of Section 4(f) because the agency deferred all analysis until after the approval of a project. 166 F.3d at 373. In *Benton Franklin Riverfront Trailway*, the court found a violation of Section 4(f) because the agency failed to include an analysis of a known historic property—a historic bridge. 701 F.2d at 788-89.

approved by courts. *See, e.g. City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999).

This procedure also comports with Section 4(f)'s mandate. The Section 4(f) regulations anticipate that archeological sites may be encountered during construction. *See* 23 C.F.R. § 774.9(e). In order to deal with this contingency, agencies are encouraged to come up with plans that would potentially resolve such circumstances. *See* 73 Fed. Reg. 13,368, 13,380 (Mar. 12, 2008) ("Another approach that is encouraged is the inclusion of procedures for identifying and dealing with archaeological resources [discovered during construction] in the project-level Section 106 Memorandum of Agreement under the National Historic Preservation Act."). The regulations also specifically authorize phased identification and evaluation of historic properties with the agreement of the federal agency and the SHPO. 36 C.F.R. § 800.4(b)(2). Here, the ACHP and the SHPD concurred that the FTA conducted an adequate evaluation of potential archaeological sites. 3:AR00000030 at 83, 87, 121-22. The concurrence in the FTA's methodology by the ACHP and the SHPD establishes that the FTA's approach to the evaluation of potential archaeological sites was not arbitrary and capricious. *See Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982) (In reviewing an agency's decision, a court "must satisfy itself that the Secretary evaluated the . . . project with the mandate of [section] 4(f) clearly in mind.") (citation omitted).

Courts have upheld the use of this approach under similar circumstances. In *Valley Community Preservation Commission*, for example, the Tenth Circuit held that the agency complied with Section 4(f) when it made significant efforts to identify and evaluate historic properties along the project corridor prior to project approval, but deferred investigation of potential unidentified historic properties until after the record of decision. 373 F.3d at 1089 (stating that plaintiffs failed to show that the agency "declined to follow the necessary procedural requirements by adopting the Programmatic Agreement and deferring the evaluation of certain properties until after the issuance of the ROD."). Likewise in *City of Alexandria*, the D.C. Circuit found that the agency did not violate Section 4(f) when it conducted a preliminary survey of historic properties prior to project approval and delayed analysis regarding historic properties that may be impacted by construction activity until after completion of the environmental review process. 198 F.3d at 872-73. The court stated that "the precise identification of these sites requires 'substantial engineering work' that is not conducted until the design stage of the project; indeed the [agency] is required to conduct such 'final design activities' *after* it completes its Final EIS." *Id*. at 873. The court held that Section 4(f) did not forbid the "rational planning process adhered to by the [agency]." *Id.*[7]

[7] In *City of Alexandria*, the plaintiffs also argued that the agency was obligated to conduct a complete Section 4(f) evaluation before the project approval because the agency could feasibly identify the sites that could be impacted by future

As stated above, Defendants followed the same approach approved by the cases cited above. They conducted a comprehensive evaluation of the Project Corridor prior to issuance of the ROD to determine potential impacts to all known historic properties. 168:AR00037676 at 37806-21. Defendants then instituted a protocol to address any impacts to historic properties discovered after the ROD. Accordingly, the Court should uphold Defendants' Section 4(f) analysis.

2. Defendants Properly Evaluated the Project's Potential to use Section 4(f) Resources

The National Trust and Plaintiffs next argue that Defendants' evaluation of the Project's potential to constructively use identified Section 4(f) resources was arbitrary and capricious with respect to the following historic properties: (1) Aloha Tower, (2) Walker Park, (3) Irwin Park, and Mother Waldron Park. Pls.' Mem. at 23-33; Amicus Br. at 10-11.[8]

a. Legal Standard

Section 4(f) applies only where an agency determines that a project will directly or constructively "use" a Section 4(f) Property. 49 U.S.C. § 303(c). The

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construction activities "without doing 'final design' plans for the project." 198 F.3d at 873. The court held, however, that "the standard of "'feasibility,' while relevant to whether an agency may use 4(f) properties, has no application in determining when the agency must identify them." *Id*.

[8] Plaintiffs also challenged Defendants' analysis with respect to the Merchant Street Historic District and the Makalapa Navy Housing. Pls.' Mem. at 28-30; 34-37. These challenges are not properly before the Court however, as the Court dismissed these claims. *See* Order on Defs.' Mots. for Partial Summ. J. (ECF No. 137).

Section 4(f) regulations define "constructive use" narrowly. "Constructive use" only occurs where the project's impacts are so severe that the activities, features or attributes that quality the property for protection under Section 4(f) are substantially diminished. 23 C.F.R. § 774.15. The record shows otherwise, and Defendants' determination that there will be no use of these sites should be upheld.

b. Defendants' Use Determination

Defendants extensively reviewed the potential impacts to Section 4(f) properties resulting from the approval of the Project. *See* 4:AR00000247 at 728-47; 177:AR 00039555 at 39555-40206. The efforts Defendants expended during this process are detailed in the FEIS and the Historic Effects Report. 4:AR00000247 at 680-752; 177:AR00039555 at 39555-40206. This analysis considered relevant facts concerning environmental impacts ranging from noise to aesthetics to access. 4:AR00000247 at 680-752; 177:AR00039555 at 39555-40206. As a result of this analysis, Defendants concluded that "the Project will result in the direct use of 11 Section 4(f) historic properties, use with *de minimis* impacts on two historic properties, use with *de minimis* impacts on three park and recreational properties, and temporary occupancy of two recreation properties" and that there would be no constructive use of other Section 4(f) Properties. 3:AR00000030 at 41; 4:AR00000247 at 685, 747. As shown below, the

conclusion that there was no constructive use of Section 4(f) Properties was reasonable. *See Adler*, 675 F.2d at 1093.

c. Aloha Tower

The National Trust and Plaintiffs contend that Defendants' determination that there would not be a constructive use of Aloha Tower was arbitrary and capricious because it did not adequately assess the Project's impact on the view of the property. This argument is not supported by the record.

Aloha Tower is a 184-foot tall Art Deco tower constructed in 1926. 4:AR00000247 at 745. It was designed to serve as a landmark for those arriving by boat. *Id*.. Aloha Tower qualifies for protection under Section 4(f) for its design elements and its historic association to the harbor. *Id*. at 745-46; 177:AR00039555 at 39871-73. Aloha Tower is situated among Downtown high-rises, recently constructed buildings, and a modern shopping mall. 4:AR00000247 at 746. These structures currently obstruct views from the mountain side of Aloha Tower. *Id*. at 528, 746, 177:AR00039555 at 39874-75.

The Project will be located in the median of the existing Nimitz Highway, approximately 420 feet inland of the tower. 4:AR00000247 at 746. Elements of the Project will be visible from the observation deck of Aloha Tower, but the Project will not impact any of the historically significant views of Aloha Tower,

including views of Aloha Tower from the water.[9] *Id.*; AR 00039555 at 39871-73. Defendants, therefore, reasonably determined that the Project "will not impact the views of the tower's design elements nor alter its historic setting . . . ." 3:AR00000030 at 183. The SHPD and the ACHP concurred with the Lead Agencies' determination. *Id*. at 121-22.

Plaintiffs argue that the record supports a finding that the views of Aloha Tower will be substantially impaired. This argument is based on out of context citations to the FEIS. For example, Plaintiffs' citation to the statement in the FEIS that the "Downtown Station and guideway will be dominant features in views," Pls.' Mem. at 24, does not reference views toward Aloha Tower, but rather describes views at the Nimitz Highway/Fort Street Intersection, which are inland of Irwin Park and Aloha Tower Marketplace and look east toward Koko Head. 4:AR00000247 at 512). Plaintiffs similarly misinterpret a statement in the FEIS that "the guideway structure will partially block a view of the Aloha Tower." Pls.' Mem. at 24 (citing 4:AR00000247 at 512). As stated in the FEIS, Defendants analysis shows that this partially obstructed view constitutes a low impact, not a significant one. 4:AR00000247 at 512. In fact, no visual impacts specific to Aloha Tower were designated "significant." *Id*.

[9] The National Trust argues that the Project will block viewsheds from the water. Amicus Br. at 13. There is no evidence to support this argument, however, as the Project will be located mauka (toward the mountain) of Aloha Tower, thus it cannot obstruct views of Aloha Tower from the water. 4:AR00000247 at 746

The FEIS indicates that Aloha Tower will still be visible from many vantage points in the downtown area, and the Project will not impact views of Aloha Tower's design elements nor alter its historic setting in any way. 3:AR00000030 at 183. Indeed, the setting mauka (mountain-side) of Aloha Tower is dominated by large-scale commercial development in the Port of Honolulu, the six-lane Nimitz Highway and the many modern high rise office buildings in downtown Honolulu. 177:AR00039555 at 39874-75. Defendants reasonably concluded, therefore, that the Project does not constructively use Aloha Tower because it will not impair any of the features of Aloha Tower that make it historically significant.

d. Walker Park

Walker Park is a small park, just under .75 acres, that is situated among modern high rise office buildings and between major streets. 4:AR00000247 at 744; 177:AR00039555 at 39861-62. The park was developed in 1951 and is eligible for listing on the National Register for its association with the development of the Downtown Honolulu waterfront and Central Business District, and as an "early example of a created greenspace in the Central Business District." 3:AR00000030 at 181-82, 4:AR00000247 at 744. Plaintiffs and the National Trust claim that there is insufficient evidence in the record to support a conclusion that the Project will not result in the constructive use of Walker Park. Pls.' Mem. at 26-

27; Amicus Br. at 23. Plaintiffs contend that the Project's noise and visual impacts suggest it will result in a constructive use. *Id.*

The record supports a finding of no constructive use. As documented in the FEIS, Defendants evaluated impacts to the elements of Walker Park that qualify for protection under Section 4(f). 4:AR00000247 at 744; 177:AR00039555 at 39861-62. The Section 4(f) Evaluation notes the Project will not substantially impair Walker Park's historic associations, which are the features that contribute to its National Register eligibility. 4:AR 00000247 at 744. Defendants also prepared a Noise and Vibrations Technical Report. 160:AR00033642. This report evaluated, among other things, potential noise impacts to Walker Park and found that noise levels from the Project would not substantially impair the park. *Id*. Defendants calculated Project-related noise levels using FTA's reference sound levels for rail transit. *Id*. at 33671-73. Noise effects for the Project were determined by comparing the Project-generated noise exposure level at each representative receptor in the corridor to the appropriate FTA criterion, given the land use and existing noise levels. *Id*. The FEIS concludes that there are no adverse noise and vibration impacts to any Section 4(f) resource from the Project. 4:AR00000247 at 729.

Plaintiffs argue that the Project may substantially impair Walker Park. This argument, however, is founded upon mischaracterizations of the record and out-of-

context citations to select portions of the record. First, Plaintiffs try to extrapolate information in the record regarding view-plane impacts of the Project relevant to other areas and apply those to Walker Park. Pls.' Mem. at 27. Plaintiffs assert, with no evidence whatsoever, that these view impacts can be applied to Walker Park. *Id*. The section of the FEIS quoted by Plaintiffs states "[t]he Downtown Station and guideway will be the dominant features in views along Nimitz Highway. These project elements will contrast substantially with Irwin Park street trees along the highway . . . ." 4:AR00000247 at 512. This provision is not applicable to Walker Park. The analysis relevant to Walker Park shows that the Project will not substantially impair views of the park, meaning that the Project will not constructively use the park. *Id.* at 744; 23 C.F.R. § 774.15(a). Accordingly, the Court should reject Plaintiffs' extrapolation argument, as it is unsupported by fact.

Plaintiffs also contend that Defendants failed to address noise impacts to Walker Park. Pls.' Mem. at 27. As stated above, however, Defendants performed an extensive noise analysis and concluded that no adverse noise and vibration impacts to any Section 4(f) resource would result from the Project. 4:AR00000247 at 729. In fact, FTA took care to ensure that the noise impacts on Walker Park were correctly described. As shown in the record, the FTA initially found a 2008 noise analysis to be lacking in evaluation of certain issues, including elevated

buildings. 1083:AR00072348. The City, therefore, revisited its noise analysis to ensure that the report met the FTA requirements. 160:AR00033642. The FTA approved the City's approach. 1086:AR00072360. Addendum 01 to Noise and Vibration Technical Report addresses the remaining issues of noise at elevated locations. 191:AR00042163. Accordingly, the court should reject Plaintiffs' noise argument as it is contradicted by evidence in the record.

e. Irwin Park

Irwin Park is a two-acre park consisting primarily of non-historic paved automobile parking, with grass medians and monkeypod trees, located south of the very busy Nimitz Highway in Downtown Honolulu. 3:AR00000030 at 183; 4:AR00000247 at 746; 166:AR00039555 at 39865-66. Views from Irwin Park are dominated by modern high-rise and mid-rise buildings of Downtown Honolulu. Views to the west are dominated by industrial uses in the Port. 166:AR00039555 at 39869; 744:AR00062573 at 62573-677, 62579-80, 62582-87, 62589. The Project's elevated guideway will be constructed within the median of the adjacent highway inland of the park. 4:AR00000247 at 746.

Plaintiffs claim that Defendants failed to assess noise impacts and visual impacts to elements of the park. Pls.' Mem. at 31. The National Trust claims Defendants failed to asses impacts of the Project on the views of the park. Amicus Br. at 23-24. This arguments are erroneous. As the Noise and Vibration Technical

Report demonstrates, noise levels were taken one block east of Irwin Park. 4:AR00000247 at 561; 160:AR00033642 at 33651-52, 33673. Because of the noise receptor's proximity, these noise calculations are representative of those experienced at Irwin Park. The existing noise levels by the park registers 76 dBA Ldn[10]. Based on FTA noise standards, the FEIS indicates that the noise from the Project would not be noticeable above the existing ambient noise level. 4:AR00000247 at 561. Thus, the FTA reasonably concluded that there would be no significant noise impacts at this location. 160:AR00033642 at 33665-68. The Project would therefore have no adverse noise impact at Irwin Park. 4:AR00000247 at 729.

The Project also would not substantially interfere with the historically significant visual elements of Irwin Park. *Id*. at 747. Contrary to the National Trust and Plaintiffs' claims, Defendants assessed Project impacts on protected landscape features. *See id*. at 746-47, 177:AR00039555 at 39865-66. This assessment showed that the Project, which will be situated inland of Irwin Park and within the median of Nimitz Highway, would not obstruct either views of the water or Aloha Tower from the park, or views of the park from the harbor and Aloha Tower. *Id*. Moreover, the Project would not block views of Irwin Park's

[10] Ldn is scale for measuring noise that considers both day and night noise levels and gives greater weight to noise during quieter periods of the day. 4:AR00000247 at 00000554.

landscaping, meaning that it would not substantially impair these features. *Id.*; *see also* 177:AR00039555 at 39866 (finding that the Project "would not affect any of the property's physical features or further diminish the property's expression of its historic character"). Therefore, Defendants reasonably concluded that the Project would not constructively use Irwin Park.

f. Mother Waldron Park

Mother Waldron Park is a public park approximately one acre in size that is located in the mixed-use industrial area of Kaka'ako. 4:AR00000247 at 747. It is surrounded by open lots, a large surface parking lot, warehouses, and tall apartment buildings. 752:AR00062630 at 62630-35. The park is eligible for listing in the National Register for its playground and Art Deco architectural design and landscape elements. 4:AR 00000247 at 747; 177:AR00039555 at 39909. The National Trust and Plaintiffs argue that the Project will produce significant visual and noise impacts to Mother Waldron Park. This assertion is not supported by the record.

The National Trust and Plaintiffs contend that the Project will substantially impair the park by obstructing views of the park. Pls.' Mem. at 33; Amicus Br. at 19-21. This is contradicted by the record. The FEIS indicates that the Project will not eliminate primary views of the Section 4(f) elements of the park. 4:AR00000247 at 747; 177:AR00039555 at 39910-11. The FEIS indicates that

certain views of the park from neighboring apartment buildings will be partially obstructed, but that the Project will not substantially impair the park's design elements. 3:AR0000030 at 185; 4:AR 00000247 at 747. Because these are the visual elements that contribute to its eligibility for the National Register, the Project's potential visual impacts do not constitute a constructive use of the park. Additionally, because the park is located in a highly-urbanized setting surrounded by warehouses, tall buildings and parking lots and relatively small in size, the addition of the Project will not impair views of greenspace as argued by National Trust.

Plaintiffs' assertion that Defendants failed to address the Project's noise impacts on Mother Waldron Neighborhood Park is also meritless. The Final EIS shows the Project would not produce any significant noise impacts to the park. 4:AR00000247 at 561. The existing ambient noise level for Mother Waldron Park is 58 dBA. *Id*. The FTA established a noise significance threshold of 62 dBA, which is the point at which impacts to a property with the park's existing ambient noise level may occur. 160:AR 00033642 at 33668. The estimated noise impact of the Project is 56 dBA , which is below current ambient noise levels and below the FTA criteria for either a moderate or severe noise impact to the park. *Id*. This noise estimate is not contradicted by the Addendum 01 to the Noise and Vibration Technical Report, which Plaintiffs contend states that the Project will cause 82

dBA of noise at Mother Waldron Park.[11] Pls.' Mem. at 33. The 82 dBA figure represents an estimation of noise impacts prior to the implementation of mitigating measures, which would substantially reduce the noise levels. 1145:AR00072897 at 72898. After mitigation measures are applied, the report concludes that "[n]o noise impacts are predicted at . . . the park." 1145:AR00072897 at 72920. Accordingly, the Court should reject Plaintiffs argument that the Project will result in a constructive use of Mother Waldron Park.

The National Trust also contends that the proximity of the Project to Section 4(f) properties constitutes constructive use of those properties because this matter is factually similar to two other cases: *Citizen Advocates for Responsible Expansion, Inc. ("I-CARE") v. Dole*, 770 F.2d 423 (5th Cir. 1985) and *Coalition Against a Raised Expressway, Inc. ("CARE") v. Dole*, 835 F.2d 803 (11th Cir. 1988). Amicus Br. at 13-17. These two cases are not analogous, however, because in each of these cases no Section 4(f) analysis was performed. In *I-CARE*, the court found that the agency gave "inadequate consideration to the effects of the project on the historical properties" because an officer of the SHPO provided a

[11] Plaintiffs try to claim that the "reference Sound Exposure Level" or "SEL" of 82 decibels is somehow equivalent to the noise level that would be experienced within the park, which FTA estimates to be 56 dBA Leq(h). Pls.' Mem. at 33. The SEL is only a base reference level that is then converted to an equivalent sound level after taking into account project characteristics such as the number of rail cars on the train, the speed of the train, and hourly train volume. See http://www.fta.dot.gov/documents/FTA_Noise_and_Vibration_Manual.pdf, pages 6-10 through 6-13.

historic preservation clearance for a project not knowing that the overhead expansion portion of the project had been omitted. *I-CARE*, 770 F.2d at 436. This omission was significant because the overhead expansion would be constructed within five feet of certain historic properties and would completely mask others. *Id.* at 427. In fact, the SHPO officer even testified that he was misled by the inaccurate project plans and had "no doubt that the planned Overhead expansion would affect adversely [historic] properties." *Id*. at 436 & n.15.

Similarly, no Section 4(f) analysis was performed in *CARE*. In *CARE*, the agency "believed that the proposed route for [the project] did not trigger the application of section 4(f)." *CARE*, 835 F.2d at 806 ("In choosing the elevated downtown expressway, the [agency] did not make the determinations required by section 4(f)."). The court found that there were indications in the record that the challenged project would raise noise levels beyond the significance threshold and completely block views of city hall's architecture. *Id*. at 812.

Neither of these cases presents an analogous situation to this case, however, because Defendants performed a Section 4(f) analysis. Additionally, there are no facts showing that historic views would be completely obstructed by the Project or that the Project would significantly increase noise levels. Accordingly, National Trust's reliance on these cases is misplaced.

3. Defendants did not Violate Section 4(f) in approving the Project because they Considered Feasible and Prudent Alternatives to the Use of Section 4(f) Properties

Plaintiffs next argue that Defendants violated Section 4(f) by failing to consider feasible and prudent alternatives to the Project's use of certain Section 4(f) properties. Pls.' Mem. at 37-51. Plaintiffs imply that the following alternatives to the Project were feasible and prudent avoidance alternatives that Defendants should have selected over the chosen alternative: (1) the managed lanes alternative, (2) the Downtown tunnel, and (3) alternative transit technologies. *Id*. at 41-49. Plaintiffs also argue that Defendants failed to include all possible planning to minimize harm to the Section 4(f) properties used by the Project. *Id*. at 49-51. The record before the Court does not support Plaintiffs' arguments.

a. Legal Standard

Except for projects with *de minimis* impacts, before a protected resource may be "used" by a project, FTA must determine that there is no feasible and prudent alternative to using that resource. *Overton Park*, 401 U.S. at 416; *Hickory Neighborhood*, 893 F.2d at 60; *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 62 (D.C. Cir. 1987). An alternative is infeasible if, "as a matter of sound engineering" it cannot be built along that route. *Overton Park*. 401 U.S. at 411. An alternative is imprudent if it presents "unusual factors" or extraordinary "community disruption" which counsel against building it. *Id.* at 413. The six

factors for considering an alternative to be imprudent are contained in 23 C.F.R. § 774.17, which states that an alternative is imprudent if:

> (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need; (ii) It results in unacceptable safety or operational problems; (iii) After reasonable mitigation, it still causes: (A) Severe social, economic, or environmental impacts; (B) Severe disruption to established communities; (C) Severe disproportionate impacts to minority or low income populations; or (D) Severe impacts to environmental resources protected under other Federal statutes; (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude; (v) It causes other unique problems or unusual factors; or (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

If no feasible and prudent alternative is available, FTA must also find that the project includes all possible planning to minimize the harm to the protected 4(f) resources. *See* 23 C.F.R. § 774.3(a)(2); *Overton Park*, 401 U.S. at 411; *Hickory Neighborhood*, 893 F.2d at 60; *Sensible Transp.*, 826 F.2d at 62. The agency may select between two alternatives that cause substantially equal harm to 4(f) resources. *Sensible Transp.*, 826 F.2d at 66 (citation omitted).

b. Defendants Properly Concluded that the Managed Lane Alternative is not a Prudent or Feasible Alternative

Plaintiffs contend that using their proposed managed lanes alternative would avoid use of two Section 4(f) properties, the Chinatown Historic District and the Dillingham Transportation Building. The managed lanes alternative, which is

discussed in more detail below in Section V(B)(2)(b), consists of an elevated toll roadway that would terminate prior to downtown. Defendants initially considered this alternative, but later rejected it because it did not meet the purpose and need of the Project of providing, among other things, improving corridor mobility and an alternative to mixed-use traffic. 4:AR00000247 at 324-27; 29:AR 00009434 at 9434-555. Because this alternative compromised the Project to the degree that it was unreasonable to proceed in light of its purpose and need, it is not prudent. 23 C.F.R. 774.17; s*ee also Alaska Ctr. for the Env't v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997) (An alternative that does not meet the purpose and need of the project may be rejected as not prudent.).

c. Defendants Properly Concluded that the Downtown Tunnel is not a Prudent or Feasible Alternative

Plaintiffs contend that use of certain Section 4(f) properties could be avoided by routing the Project through a tunnel underneath downtown Honolulu. Pls.' Mem. at 45. This alternative is not prudent, however, because of the extraordinary cost associated with it.

Defendants analyzed the Downtown tunnel alternative and concluded that building the Project underground through Downtown area alone would have increased construction costs by $650 million in 2006 dollars. 4:AR 00000247 at 705; 29:AR 00009434 at 9522. Adjusting to year of expenditure dollars based on the cost estimates for the Locally Preferred Alternative, this would have added

$793 million to the Project. 4:AR00000247 at 705; 29:AR00009434 at 9522. If the Downtown tunnel was extended west underneath Dillingham Boulevard to avoid additional Section 4(f) Properties, Project costs would have increased by more than $1 billion in 2006 dollars. 4:AR00000247 at 705; 29:AR00009434 at 9522. Defendants determined that this amount of additional costs would be of an extraordinary magnitude beyond what could be funded. 4:AR00000247 at 705. The Downtown Tunnel was therefore not a prudent alternative because the funding sources available in the financial plan would not be capable of covering an increase to Project costs of this magnitude. *Id.* at 756-59. An alternative is not "prudent" if it results in costs of an extraordinary magnitude. 23 C.F.R. § 774.17 (alternative is imprudent if it "results in additional construction, maintenance, or operational costs of an extraordinary magnitude").[12]

The importance of cost in FTA's assessment of the Project is well documented in the record. 3:AR00000030 at 238-39; 4:AR00000247 at 291, 317-19, 756-59; 356:AR00055625 at 55626; 369:AR0056639; 3286:AR00099809; 8032:AR00120677 at 120677-78, 10217:AR00133206. Cost is a particularly

[12] Defendants also rejected a second tunnel alternative in the Beretania tunnel. This tunnel would have not only increased the costs of the Project, but it also would have failed to serve the Project's purpose and need. 29:AR 00009434 at 9540. The Beretania tunnel would have connected to King Street east of the Capital District, preventing it from connecting to Ala Moana Center. 4:AR00000247 at 709. In bypassing Ala Moana Center, this alignment would serve the fewest residents and jobs and potentially result in less ridership and revenue. 29:AR00009434 at 9520; 948:AR00067416 at 67427-29.

sensitive factor in the construction of the Project. Under the law, the FTA may not approve a major transit project that does not have sufficient financial support for its construction, operation and maintenance. 49 U.S.C. § 5309(d). An increase in construction cost approaching 20% of the total project, to say nothing of continuing maintenance responsibilities, would have made it unreasonable to proceed with the Project. 1202:AR00074598 at 74598-688.

In addition to the much higher costs for either of these tunnels, studies documented the significant environmental issues associated with tunneling in a highly developed urban environment such as Downtown Honolulu. 923:AR00065304 at 65321, 65326-30, 65333-34. Tunneling would have involved large scale construction in Downtown Honolulu above ground to access the tunnels, and then substantial below ground construction. *Id*. at 65321, 65326-30, 65333-34. Tunneling would have encountered ground water and had a potential for settlement during construction, which could have damaged buildings in the Chinatown, Merchant Street, and Capital Historic Districts. *Id.* at 65321. A Downtown Tunnel also would have potentially caused significant disturbance to any below ground cultural resources. 168:AR 00037676; 8855:AR00125000 at 125005. Given the cost of the King Street and Beretania Tunnel options, combined with their potential to cause severe damage and disturbance to historic properties through settlement and adverse impacts to potential below ground cultural

resources, the finding that the construction of a tunnel through the downtown area was not prudent is not arbitrary and capricious.

d. Defendants Properly Concluded that Alternative Transit Technologies are not Prudent or Feasible Alternatives

Plaintiffs also suggest that alternative transit technologies could avoid some of the Project's use of Section 4(f) properties. Pls.' Mem. at 47-49. These alternatives are not prudent, however, because they do not meet the Project's purpose and need. As discussed in further detail below in Section V(B)(2), the non-rail alternatives did not meet the purpose and need of the Project because they did not among other things, provide increased corridor mobility or provide a reliable means of public transit to disadvantaged communities. 29:AR00009434 at 9587-99. The remaining rail technologies that were evaluated by Defendants all required similar guideway infrastructure, and thus would not have provided an alternative with noticeably different impacts than the selected steel wheel on steel rail technology. 339:AR 00055203 at 55208-09, 5522-26. Accordingly, the Court should uphold Defendants' determination that no prudent and feasible alternatives existed.

e. Defendants Included all Possible Planning to Minimize Harm

Plaintiffs contend that Defendants failed to include all possible planning to minimize harm to certain Section 4(f) properties, namely the Chinatown Historic District and Aloha Tower. Pls.' Mem. at 49-51. "All possible planning" means

that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. 23 C.F.R. § 774.17. With regard to historic sites, all possible planning generally refers to the measures that normally serve to preserve as much of the historic activities, features, or attributes of the site as possible, as agreed to by the FTA and the officials with jurisdiction over the resource in accordance with the consultation process under Section 106 of the NHPA and its implementing regulations at 36 C.F.R. Part 800. Id.

Plaintiffs' argument that the Project did not include all possible planning to minimize harm to section 4(f) properties is contradicted by the record, which shows Defendants included all possible measures to minimize harm to the Chinatown Historic District.[13]

The City, the FTA, SHPD, the U.S. Navy, and the ACHP entered into a Programmatic Agreement that detailed specific mitigation measures from the Project's Mitigation Monitoring Program to minimize impacts on Section 4(f) Properties that may be impacted by the Project. 3:AR00000030 at 45-228. FTA's regulations expressly state that this process provides for all possible planning to minimize harm for historic sites. 23 C.F.R. § 774.17 (definition of "all possible planning to minimize harm").

[13] Additionally, Plaintiffs' argument regarding Aloha Tower is baseless because, as stated above, the Project will not result in the use of this historic property.

Plaintiffs' asserted harm to the Chinatown Historic District and Aloha Tower are baseless. Contrary to Plaintiffs' assertion, the Final EIS did include discussion of steps taken to minimize harm. The Section 4(f) Evaluation notes that, throughout the planning and design of the Project, the guideway has been designed to be as narrow as possible to minimize potential use of Chinatown Historic District. 4:AR00000247 at 719. Moreover, the guideway runs along Nimitz Highway along the makai edge (ocean-side) of the district, and it only uses 0.3 acres of a parking lot on a parcel that contains contributing elements. *Id.*. Plaintiffs argument concerning Aloha Tower is meritless because, as demonstrated above, the Project will not use this resource, and thus the "least overall harm" analysis is inapplicable. *See* 23 C.F.R. § 774.3(c)(1). Accordingly, the Court should uphold Defendants Section 4(f) analysis and find that Defendants did not violate Section 4(f).

B. DEFENDANTS COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Plaintiffs contend that Defendants violated NEPA by (1) unreasonably constraining the Project's purpose and need statement, (2) failing to identify and evaluate reasonable alternatives in the FEIS, (3) failing to evaluate the Project's environmental consequences, and (4) improperly segmenting the Project to avoid disclosing potential environmental impacts. Pls.' Mem. at 51-71. Each of these arguments is meritless. As shown by the record, Defendants satisfied NEPA's

requirements by establishing a broad purpose and need that allowed Defendants to consider and evaluate all reasonable alternatives. Additionally, Defendants disclosed in the FEIS the potential environmental impacts of its action and the cumulative effects of the Project to any foreseeable future actions. Accordingly, the Court should find that Defendants complied with NEPA and affirm Defendants' approval of the Project.

1. The Project's Purpose and Need Statement is Reasonable and Allowed for the Consideration of Various Alternatives

Plaintiffs contest the FTA's purpose and need statement for the Project, contending that FTA defined the purpose and need so narrow as to be in violation of NEPA. *Id.* at 51-53. The record before the Court shows, however, that the FTA properly defined the purpose and need of the Project in a manner that allowed for consideration of a reasonable range of alternatives.

Defining the purpose and need for a proposed action is an undertaking that invokes an agency's judgment. *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004). "Agencies enjoy 'considerable discretion' to define the purpose and need of a project." *Nat'l Parks & Conservation Ass'n*, 606 F.3d 1058 at 1070 (citation omitted); *see also Westlands Water Dist.*, 376 F.3d at 866. An agency cannot, however, define its objectives in an "unreasonably narrow" fashion so that "only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action." *Citizens*

Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). Conversely, an agency should not "frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities." *Id.* Courts, therefore, review an agency's statement of purpose under a reasonableness standard. *Westlands Water Dist.*, 376 F.3d at 866.

FTA properly detailed the purpose and need of the Project in a manner that allowed for the development of sufficient alternatives. The FTA first identified a purpose and need for the Project in 2005, by announcing that it would work with the City and County of Honolulu on a proposal "to implement transit improvements that potentially include high-capacity transit service in a 25-mile travel corridor between Kapolei and the University of Hawaii at Manoa and Waikiki." 70 Fed. Reg. at 72,871. The announcement stated that there was a need to: improve the existing overburdened transportation infrastructure, provide lower-income and minority workers with public transportation, and provide improved person-mobility by offering an alternative to private automobile travel in the area. *Id*. at 72,872. In order to address these identified needs, FTA indicated that various alternatives would be considered, such as a no build alternative, a transportation system management alternative (an enhanced bus transit system); a managed lanes alternative, and a fixed-guideway alternative. *Id.* FTA also stated

that "[a]fter appropriate public involvement and interagency coordination, other alternatives suggested during scoping may be added if they are found to be environmentally acceptable, financially feasible, and consistent with the purpose of and need for major transportation improvements in the corridor." *Id*.

Following the notice in the Federal Register, the *Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report* ("Alternatives Analysis") was prepared that evaluated the four alternatives noted above. *See* 4:AR00000247 at 296. A review of this report in combination with consideration of thousands of public comments resulted in the selection of the fixed guideway transit alternative to serve as the proposed action. *Id.* Subsequently, FTA published a second notice in the Federal Register announcing an intention to prepare an EIS on a proposal to implement a fixed-guideway transit system along a specified area of O'ahu. *See* 72 Fed. Reg. 12,254 (Mar. 15, 2007). As a result of extensive studies and public involvement, the purpose and need of the Project was refined. In addition to the goals established in the previous notice, the FTA adopted an additional purpose: "to provide faster, more reliable public transportation services in the corridor than those currently operating in mixed-flow traffic." *Id*. at 12,255. Accordingly, the FTA indicated it would consider five distinct transit technologies, two alignment alternatives, and other reasonable alternatives suggested during the scoping process

that were not previously evaluated and eliminated on the basis of the Alternatives Analysis. *Id*. at 12,556-57.

During continued development of the Project, a decision was made to select a steel-wheel on steel-rail transit system. 4:AR00000247 at 296. This decision was made primarily on the basis that the other transit technologies considered were unproven or were proprietary technologies, meaning that only a single company could provide the materials necessary for the development of the rail system. 17:AR00007223 at 7288-90. Once this determination was made, FTA developed alternatives focused on different transit routes to achieve the purpose and need identified in the FEIS.[14] 4:AR00000247 at 331-64.

The extensive amount of research into transit options and the exhaustive consideration of numerous alternatives throughout the course of this Project prove that there is absolutely no basis to conclude that FTA narrowly tailored its purpose and need statement so as to avoid consideration of other alternatives. The record is

[14] The stated purpose is: "The project is intended to provide faster, more reliable public transportation service in the study corridor than can be achieved with buses operating in congested mixed-flow traffic, to provide reliable mobility in areas of the study corridor where people of limited income and an aging population live, and to serve rapidly developing areas of the study corridor. The project also will provide additional transit capacity, an alternative to private automobile travel, and improve transit links within the study corridor. Implementation of the project, in conjunction with other improvements included in the ORTP, will moderate anticipated traffic congestion in the study corridor. The HHCTCP also supports the goals of the Honolulu General Plan and the ORTP by serving areas designated for urban growth." 4:AR00000247 at 312.

replete with detailed information regarding consideration of various transportation options and technologies. This alone renders Plaintiffs' argument meritless.

Plaintiffs argument that this case is analogous to *National Parks* is unavailing. *See* Pls.' Mem. at 53. The issue before the Ninth Circuit in *National Parks* was whether BLM could permissibly include within its purpose and need statement a private objective or private interest. 606 F.3d at 1070. The Ninth Circuit found that BLM's purpose and need statement unlawfully included a goal of satisfying a private rather than a public need — providing a private company with long-term income from the operation of a landfill — and therefore violated NEPA. *Id.* at 1071. In reaching this decision, the court focused on the fact that BLM did not have in place regulations allowing it to consider private interests as part of the purpose and need of a project. *See id*. at 1071-72. Accordingly, the Ninth Circuit remanded the decision back to the agency. *Id*.

The issue before the Ninth Circuit in *National Parks* is not the same as the issue before this Court. Here, there are no arguments by Plaintiffs or facts in the record suggesting that FTA identified a private interest as a component of the purpose and need for the Project. The record shows that FTA focused solely on the public interest in deciding how to fulfill a need for quicker and more reliable public transportation.

A more appropriate comparison for this matter can be found in *Audubon Naturalist Society of the Cenral. Atlantic. States, Inc. v. U.S. Deepartment of Transportation* (*"Audubon Naturalist Society")*, 524 F. Supp. 2d 642, 663 (D. Md. 2007), a case where a court upheld a purpose and need statement for a proposed action to provide for a highway connection between two areas. *See Audubon Naturalist Soc'y*, 524 F. Supp. 2d at 663. In *Audubon Naturalist Society*, the plaintiffs argued that the Department of Transportation ("DOT") violated NEPA by framing its purpose and need too narrowly in stating that the purpose of a proposed action was to connect areas "within central and eastern Montgomery County and northwestern Prince George's County with a state-of-the-art, multimodal, east-west highway that limits access and accommodates passenger and goods movement." *Id*. According to the plaintiffs, limiting the project to a highway was unreasonable because it prevented consideration of all alternatives other than building a new highway. *Id*. at 664. The court disagreed, finding "sufficient case law demonstrating that courts have consistently upheld purpose and need statements that called for the specific purpose of constructing a road, so long as the agency also considered broader transportation objectives." *Id*. Since the record indicated that DOT "considered broader transportation objectives, such as improving mobility or safety, which could allow for a broad range of reasonable

alternatives," the court held that the stated purpose of building a "multi-modal highway" was not too narrow. *Id*. at 664.

The FTA, like the DOT in *Audubon Naturalist Society*, framed its purpose and need statement in a manner that allowed it to consider various transportation alternatives. Plaintiffs even admit this fact in their brief. Pls.' Mem at 55, n.28 ("A fair reading of the EIS suggests that the purpose of government action here is simply to improve transit options in and around Honolulu."); *id.* at 55 ("Therefore, the range of available alternatives was also quite broad."). The record demonstrates that the FTA considered and evaluated a wide range of transportation solutions beyond a fixed-guideway rail system. 4: AR00000247 at 319-37. The fact that a fixed-guideway system was the best solution to the purpose and need does not mean that the purpose and need of the Project was overly narrow. Accordingly, this Court must reject Plaintiffs' argument and grant judgment in favor of Defendants on this issue.

2. Defendants Considered All Reasonable Alternatives

Plaintiffs next contend that Federal Defendants violated NEPA by failing to develop a sufficient number of alternatives for the Project. Pls.' Mem. at 54-66. This argument is misplaced. The record before the Court shows that FTA evaluated a considerable range of alternatives as part of the environmental review for the Project.

NEPA requires that an EIS must analyze a reasonable range of appropriate alternatives to the proposed action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14(a); *see also California v. Block*, 690 F.2d 753, 766 (9th Cir. 1982). However, this review is bounded by a rule of reason, *Westlands Water Dist.*, 376 F.3d at 868, and alternatives that do not meet the purpose and need of the proposed action need not be considered. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1248 (9th Cir. 2005) (proposed alternative of limiting vegetation removal "does not make sense" given project's purpose of preventing forest destruction and the likely destruction of forest cover by wildfires if project not implemented); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000) (agency's purpose and need was to promote efficient delivery; alternative that did not further that objective need not be considered).

An alternatives analysis "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vt. Yankee*, 435 U.S. at 551. "NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (noting that an agency need not consider "alternatives known

to be unacceptable at the outset"). Nor must an agency "consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Because the range of alternatives varies with each particular action, NEPA "does not dictate the minimum number of alternatives that an agency must consider." *Native Ecosystems Council*, 428 F.3d at 1246; *see also Laguna Greenbelt,* 42 F.3d at 524. Courts review an EIS's range of alternatives under the "rule of reason." *Westlands Water Dist.*, 376 F.3d at 868 (citation omitted).

In this matter, Defendants reasonably reviewed and evaluated numerous alternatives prior to development of the alternatives contained in the EIS. As outlined above, the alternatives considered included various transportation options (bus, automobile, and rail), as well as various rail technologies and route options. By focusing on the purpose and need for the Project, Defendants reasonably decided to eliminate from further evaluation those alternatives that did not provide an alternative to private automobile travel or that operated in mixed-flow traffic. Instead, Defendants more fully evaluated those alternatives that involved the use of a fixed guideway transit option. 4:AR00000247 at 331. Four alternatives were developed in the DEIS: the no build alternative, the fixed guideway transit alternative via Salt Lake Boulevard, the fixed guideway transit alternative via the airport ("the preferred alternative"), and the fixed guideway transit alternative via

the airport and Salt Lake Boulevard. *Id.*. Based on a thorough evaluation of these alternatives and an assessment of the impacts of each, the FTA selected a preferred alternative. *Id.* at 337.

Plaintiffs state that "the range of alternatives available to Defendants included three categories of options;" and that "[]mixing and matching the different options within those categories provided an opportunity to consider *hundreds* of reasonable possibilities for improving transportation and transit in Honolulu." Pls.' Mem. at 55 (emphasis added). The purpose of an EIS is not to evaluate hundreds of alternatives, but rather to formulate a purpose and need so that an agency can devote it resources to thoroughly evaluating a reasonable range of alternatives. If Plaintiffs were to prevail, FTA would be obligated to review every transportation technology and proposed route in the same level of detail as that performed for the steel-wheel on steel-rail technology. Under this approach, "the project would collapse under the weight of the possibilities." *Citizens Against Burlington*, 938 F.2d at 196.

Plaintiffs also contend that the FTA's alternatives analysis is inadequate for four reasons. They argue that (1) the City's alternatives analysis performed as part of the New Starts program cannot be relied upon during the NEPA process, (2) FTA's refusal of the managed lanes alternative was arbitrary and capricious, (3) that the alternatives analysis was inappropriately limited to steel-wheel on steel-rail

technology, and (4) that FTA arbitrarily refused to consider an alternative that would require action by the City Council. None of these arguments is valid.

a. FTA Properly Incorporated the City and County's Alternatives Analysis as part of the NEPA process.

Plaintiffs first argue that FTA cannot rely upon the Alternatives Analysis performed by the City as part of the NEPA process. Pls.' Mem. at 56-58. As a basis for this argument, Plaintiffs cite to 23 U.S.C. § 139(c)(3), claiming that certain procedural defects exist that make it improper for the FTA to rely on the City's analysis. Namely, Plaintiffs argue that FTA did not evaluate or approve the City's Alternatives Analysis process and that the public was precluded from reviewing and commenting on the different alternatives during this process. Plaintiffs' argument is not supported by the record.

Both the procedural manner in which Honolulu's proposal for the Project was submitted to the FTA and the manner in which the Project was analyzed pursuant to NEPA are informed by the Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 114 (Aug. 10, 2005). Congress enacted SAFETEA-LU in order to streamline the NEPA process and improve the government's ability to meet increasing transportation needs. 110:AR00022836 at 22842. Section 6002 of SAFETEA-LU, 23 U.S.C. § 139, informs the environmental review process under NEPA. *See* 23 U.S.C. § 139; 23 C.F.R. § 450.318(d). Pursuant to this section,

transportation projects must have as part of the planning process a purpose and need statement and an alternatives analysis. *See* 23 U.S.C. § 139(f)(2), (f)(4). The relevant regulations allow the purpose and need and alternatives analysis generated during the planning process to be relied upon as part of the NEPA process. *See* 23 C.F.R. §§ 450.318(a) ("The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with the National Environmental Policy Act."). Such documents are appropriately used as part of an environmental review under NEPA as long as FTA guided the process and the public was allowed to participate. *Id*.

The FTA properly relied on the City's Alternatives Analysis because the FTA was heavily involved with this process and the public was afforded numerous opportunities to participate. Contrary to Plaintiffs' representation, the record shows that FTA guided the City's preparation of the Alternatives Analysis. As stated in the FEIS, FTA guidance served as the basis of the Alternatives Analysis developed for the Project 4:AR00000247 at 317. Additionally, the public was afforded numerous opportunities to submit comments, attend meetings, and provide input throughout the duration of the Alternatives Analysis composition. 29:AR00009434 at 9435, 9551.

This evidence presents a stark contrast to the image that Plaintiffs wish to portray. Rather than acknowledging that hundreds of public meetings were held

and that numerous comments were allowed on all alternatives, Plaintiffs selectively cite to a portion of a Federal Register notice that indicated FTA would not reconsider alternatives which had been rejected based on a thorough evaluation and previous public involvement. Pls.' Mem. at 58. FTA's decision not to reopen a perfectly valid Alternatives Analysis does not translate to "no comments on the [Alternatives Analysis] documents, please." *Id*. (quoting 30:AR009696 at 009699). Accordingly, the Court should find that there was sufficient participation by both FTA and the public in the Alternatives Analysis and that it was proper for the Alternatives Analysis to be used as part of the NEPA process. *Cf. Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203, 1212 (11th Cir. 2012) (finding that "'[p]ublicly available documents . . . produced by, or in support of, the transportation planning process . . . may be incorporated directly or by reference into subsequent NEPA documents' and require review by the [FTA] only 'as appropriate.'" (citing 23 C.F.R. § 450.212(b))); *see also* 23 C.F.R. § 450.318(b) ("Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents . . .").

b. Defendants' Decision to Eliminate the Managed Lanes Alternative was Reasonable

Plaintiffs next argue that FTA impermissibly rejected their suggested alternative from further development in the EIS. Pls.' Mem. at 59-61. The record

before the Court shows, however, that it was reasonable for Defendants to reject this alternative for failing to meet the purpose and need of the Project.

During the public scoping process for this Project, Plaintiffs proposed a suggested alternative referred to as the Managed Lanes Alternative ("MLA"). 13852:AR00150974. The MLA consists of an elevated toll-roadway that would provide service between downtown Honolulu and Waipahu. 4:AR00000247 at 324. Defendants evaluated two versions of the MLA: one in which the roadway would consist of two lanes operating in both directions, and one were two lanes would operate in the same direction, but could be reversed according to specific times. *Id.*. As a result of the evaluation, Defendants determined to reject the MLA because it did not meet the purpose and need of the Project. *Id.*at 327. This decision was based on the findings that the MLA would be less effective than a fixed guideway alternative at providing a faster and more reliable public transportation service; that the MLA would not provide an alternative to private automobile travel; and that the MLA would not support the need to improve transportation equity to all users, including low-income populations. *Id.*. The MLA also would have generated the greatest amount of air pollution and required the greatest amount of energy for transportation use compared to other alternatives. *Id.*. Additionally, there were no identified sources of funding for the MLA. *Id.*; *see also id.* at 329 (stating the MLA "would not have qualified for local excise and

use tax surcharge funding" and that "Federal New Starts funding could not have been used").

In an attempt to overshadow these undisputed facts, Plaintiffs claim that Defendants rejected the MLA as a result of improper modeling and cost over-estimation.[15] Plaintiffs fail to acknowledge, however, that cost-efficiency was not the main reason why the MLA was rejected. The MLA was rejected because it did not offer an alternative to private automobile traffic and it did not serve low-income populations. *Id*. at 800-02. Additionally, because the vehicles using the MLA would utilize existing infrastructure to access and exit the MLA, congestion was still a concern. *Id*.; s*ee also* 5:AR00000855 at 2085 (noting that the MLA "performed poorly compared to the Fixed Guideway Alternative on a broad range of metrics"). For this reason, there was no need to evaluate in detail the MLA because it did not meet the purpose and need of the Project. *See Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one

[15] As a basis for their argument, Plaintiffs cite to a letter authored by a city planner from Tampa, Florida. Pls.' Mem. at 61-62. Plaintiffs' attempt to create a battle of the experts is unconvincing, however, as there is no indication that the city planner has any knowledge of Honolulu's infrastructure or is well versed in the goals and purpose of the Project. Additionally, the city planner's criticism of the estimated costs of implementing an MLA in Honolulu is based only on his knowledge of constructing a structure in Tampa, Florida; he did not claim to thoroughly analyze and conduct his own study of comparable costs in Honolulu. Accordingly, there is no basis to assume that his conclusions are more reliable than those of the actual experts who performed extensive research on the alternatives based on a location in Honolulu.

thing, it makes no sense to consider the alternative ways by which another thing might be achieved."). Moreover, because the identified concerns with the MLA would not change significantly based on the consideration of a three-lane alternative in place of the two-lane alternative, 4:AR00000247 at 801-02, Defendants were not obligated to consider an alternative identical to the one Plaintiffs' proposed. *See Westlands Water Dist.*,376 F.3d at 868 (An EIS is not required to include a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences."). Accordingly, Defendants' decision to eliminate the MLA from further consideration was not arbitrary or capricious.

Plaintiffs next argue that Defendants' refusal to reconsider the decision to eliminate the MLA from detailed consideration in the FEIS was arbitrary and capricious because the MLA was a reasonable alternative. Pls.' Mem. at 62-63. As clearly shown above and demonstrated by the administrative record, however, the MLA did not meet the purpose and need of the Project. Even Plaintiffs' selective record citations show that FTA took seriously and evaluated Plaintiffs' request to reconsider the MLA. As detailed in the FEIS, FTA reviewed the prospect of the MLA as an alternative to the Project. 4:AR00000247 at 324-27, 798-802. Though the MLA appeared to be a potential alternative at the outset, FTA concluded that for numerous reasons the MLA did not meet the purpose and

need of the Project. *Id*. at 324-27. Accordingly, FTA's decision to exclude it from further evaluation in the EIS was not arbitrary and capricious.

c. Defendants Properly Limited the Consideration of Alternatives to Steel Wheel on Steel Rail Technology

Plaintiffs argue that Defendants violated NEPA by failing to consider in further detail the use of rail technology other than "steel wheel on steel rail." Pls.' Mem. at 63-64. Plaintiffs contend it was error for Defendants to rely upon a recommendation by a panel of experts to identify the proper technology to utilize as part of the Project. This argument is unfounded. The record shows that the Defendants thoroughly evaluated many different potential alternatives and developed those alternatives in the EIS that were reasonable.

As indicated above, upon completion of the Alternatives Analysis, FTA issued a notice of intent in the Federal Register informing the public that it would prepare an EIS on the proposal to implement a fixed-guideway transit system. 72 Fed. Reg. at 12,254. As part of this notice, FTA requested public and interagency input on the alternatives to be considered in the EIS, which included an analysis of five distinct transit technologies: light rail transit, rapid rail transit, rubber tired guided vehicles, magnetic levitation, and monorail. *Id*. at 12,256. Comments on alternative technologies were received at public scoping meetings and in writing. 89:AR00017157 at 17160-61. The City and County also sent out a request for information to manufacturers to provide information on each of the different

technologies identified. 4:AR00000247 at 331. Twelve responses were received. A panel of five experts reviewed this information and accepted public comment on the information on two separate occasions. *Id.*. After reviewing this information, the panel voted four-to-one in favor of the steel-wheel on steel-rail technology. *Id.*.[16]

The panel's vote was based on a number of different factors. Their selection of the steel-wheel on steel-rail technology was motivated by the fact that this technology is safe, reliable, economical, and non-proprietary. *Id.*. The fact that the technology was non-proprietary meant that the City and County would avoid having to purchase vehicles or equipment from a single manufacturer. *Id.*. Also, none of the proprietary technologies offered substantial proven performance, cost, and reliability benefits compared to steel wheel on steel-rail technology. *Id.*.

Plaintiffs attempt to find fault with this process by alleging that no environmental concerns were evaluated during this process. Pls.' Mem. at 64. This argument is belied by the record. As the chair of the technology panel indicated in a letter to the City and County, the selection of the steel-wheel technology was influenced by the fact that "[r]ail has the best long-term operating performance characteristics including the higher passenger carrying capacity;

[16] This preference was confirmed by a majority of Honolulu citizens in the general election on November 4, 2008, which resulted in an approval of a city charter amendment to authorize the director of transportation services to establish a steel wheel on steel rail system. 4:AR00000296.

better ride quality; noise impacts comparable to other technologies; better energy efficiency; lower air quality impacts; and lower long-term costs, both operating and replacement costs." 336:AR00055188 at 551899. This report identifies that the panel focused on environmental impacts, such as air quality, energy efficiency, and noise impacts. Accordingly, there is no basis to find that environmental impacts of the technologies were not taken into consideration.

Additionally, it was reasonable for Defendants to develop only the alternatives in the EIS that were reasonable options. Alternatives to the steel-wheel on steel-rail technology were not reasonable because those technologies were unproven or proprietary. 4:AR00000247 at 331. The NEPA process is intended to generate alternatives that may potentially yield real solutions to the problem at hand. *See* 23 C.F.R. pt. 450, App. A. Additionally, there is no obligation to analyze alternatives that are "remote and speculative possibilities." *Vt. Yankee*, 435 U.S. at 551; *see also id.* ("the concept of alternatives must be bounded by some notion of feasibility"). Here, the City identified that unproven and proprietary technologies were not an option because they did not provide sufficient guarantees of safety, reliability, and cost savings. 4:AR00000247 at 321, 791. In addition, there is no evidence that the environmental impacts of other technologies would have been demonstrably different such that they would need to have also been considered in detail. *See Westlands Water Dist.*, 376 F.3d at 868

(An EIS is not required to include a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences."). Accordingly, it was not arbitrary or capricious for Defendants to eliminate unproven or proprietary rail technologies as reasonable alternatives to be developed in more detail in the FEIS.

d. Defendants Considered Alternative Alignments that would Require Action by the Honolulu City Council

Plaintiffs next argue that the FEIS's alternatives section fails to comply with NEPA because Defendants failed to consider an alternative route for the Project that would move the guideway farther from the Federal Building. Pls.' Mem. at 65-66. Plaintiffs' argument is not based on any of their own identified concerns or alleged injuries, but rather it is an extension of a concern identified in comments made by certain federal judges regarding security concerns at the U.S. District Court. Plaintiffs contend that Defendants arbitrarily rejected this alternative because it would have required approval from the Honolulu City Council. *Id*. at 65. There is no merit to this argument.[17]

Defendants reasonably rejected consideration of an alternative aligning the Project farther away from the Federal Building because Defendants adequately analyzed the comments contained in the judges' letter and determined a different

[17] Plaintiffs also lack standing to raise this argument because none of the Plaintiffs indicated that they have a concrete interest in the Federal Building.

route would produce unacceptable impacts. In a letter submitted to Defendants, certain federal judges expressed a concern that alignment of the Project in proximity to the Federal Building would increase the susceptibility of the judges to terrorist attacks and therefore request an alternative alignment. 5:AR00000855 at 930-31. Defendants thoroughly researched this concern. 5:AR00000855 at 937. As stated in Defendants' response letter, the Project design was vetted with the U.S. General Services Administration ("GSA"). The Defendants and GSA worked together to design sufficient security measures unique to the Federal building that would alleviate concerns regarding a terrorist attack. *Id*. at 937-38. Defendants also considered various alternatives to placing the guideway along Halekauwila Street. *Id*. (discussing alternative alignments along King Street, Queen Street and Beretania Street). In evaluating these alternatives, however, Defendants determined that these options were inferior to the proposed alignment because they "had significant visual impacts, impacts on historic properties, evidence of burials within the vicinity of Queen Street near Kawaiahao Church, impacts on street traffic patterns, and severe engineering constraints." *Id.* at 938. Moreover, use of the Halekauwila alignment would avoid impacting the Capital Historic District. *Id.*

Plaintiffs contend that Defendants' reasoning was based upon the premise that use of a route other than Halekauwila Street would require action by the City Council. Pls.' Mem. at 65-66. Plaintiffs then argue that Defendants' rejection of

an alternative on this basis violates NEPA because agencies are obligated to consider alternatives not within the jurisdiction of the lead agency. *Id*. at 66 (citing 40 C.F.R. § 1502.14(c)). There is no merit to this argument, however, because Defendants never explicitly or implicitly rejected an alternate route because it was beyond their jurisdiction. 5:AR00000855 at 937-38. Plaintiffs' attempt to frame Defendants' rejection as based upon a jurisdictional constraint is not factually supported by the record. As stated above, the proposed alternative was not considered because of the unacceptable impacts and engineering challenges it imposed, not because it required an action by the City Council. The Court, therefore, should deny Plaintiffs' judgment on this issue.

3. Defendants Properly Evaluated the Environmental Consequences of the Project and Alternatives Thereto

Plaintiffs claim that Defendants violated NEPA by failing to account for the environmental impacts related to construction of the Project. Pls.' Mem. at 66-68. Specifically, Plaintiffs allege that the FEIS fails to discuss impacts of the Project related to the fabrication and installation of the guideway or the impacts related to development of certain areas of O‘ahu. These arguments should be rejected because Plaintiffs failed to raise them during the public comment period and because these impacts are adequately discussed in the FEIS.

Plaintiffs waived their arguments relating to any potential air quality impacts from fabrication and installation of the guideway because they failed to raise these

issues with Defendants prior to arguing them before this Court. *See, e.g., Pub. Citizen*, 541 U.S. at 764–65 ("Because respondents did not raise these particular objections to the [EIS], … [they] have therefore forfeited any objection to the [EIS] on [those] ground[s]"); *Vt. Yankee*, 435 U.S. at 553 ("it is [] incumbent upon [those] who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the [participants'] position and contentions"); *North Idaho Cmty. Action Network*, 545 F.3d at 1156 n.2 (9th Cir. 2008) ("because the tunnel alternative was not raised and identified until … well after the notice and comment periods for the [EIS and EA were] closed, any objection to the failure to consider that alternative has been waived").

In addition to being waived, the Court should also reject Plaintiffs' arguments because the FEIS adequately discloses construction related impacts. The record before the Court shows that Defendants adequately analyzed and disclosed the impacts to the environment associated with the construction of the Project. The FEIS discusses air quality impacts associated with the construction phase of the Project. 4:AR00000247 at 645. This section discloses that pollution from construction activities will primarily be generated in the form of fugitive dust

and mobile-source emissions. *Id*.[18] The FEIS also indicates that the Project will comply with Hawaii's fugitive air pollutant emissions regulations. *Id.*

Defendants also took a hard look at the impacts of the Project on land use and growth. In their brief, Plaintiffs put forth a vague argument that the FEIS fails to provide meaningful information relevant to Project's impact on "environmental resources." Pls.' Mem. at 67. Plaintiffs, however, fail to identify with any specificity which resources they believe are not addressed. Regardless, any argument alleging that the FEIS is deficient for failing to address an indirect impact of the Project must fail because the FEIS discloses information on the potential indirect impacts of the Project. The FEIS provides a full account of the foreseeable direct, indirect, and cumulative effects of the Project on the environment. 4:AR00000247 at 655-74. As stated in the FEIS, the Project is not forecasted to "decrease or increase regional population or the number of jobs," but it is likely to "influence the distribution, rate, density, and intensity of development in the study corridor." *Id.* at 656. The FEIS estimates that population density may increase around rail stations, and in certain areas additional development may occur. *Id.* at 658-59. This development is not expected to exceed estimated levels. *Id*. at 657.

[18] Mobile-source pollution is considered to be pollution "generated from the operation of construction equipment near construction sites and from traffic disruption and congestion during construction." 4:AR00000247 at 645.

The FEIS also discusses the reasonably foreseeable impacts of the Project on various resources, including land resources, ecosystems, wildlife, water resources, and cultural resources. *Id*. at 661-73. In discussing these resources, the FEIS notes there will be both beneficial and detrimental impacts to certain resources. *Id.* The FEIS notes that overall the planned development and use of resources resulting from the Project may prove to be more beneficial than would continued development under the no build alternative. *Id*. at 673-74 ("The effects on growth with the No Build Alternative would be more severe than the impacts of the Project."). Therefore, the Court should find that the discussion of impacts in the FEIS constitutes a hard look at the environmental impacts of the Project.

4. Defendants did not Unlawfully Segment the Project

Plaintiffs' last NEPA argument alleges that Defendants unlawfully segmented the NEPA analysis by excluding as part of the Project consideration of two additional guideway routes to that would extend the Project to the University of Hawaii and Waikiki. Pls.' Mem. at 68-70. This argument is legally deficient because Plaintiffs fail to recognize that a segmentation claim cannot be made when there is only one action and that action has an independent utility. Additionally, Plaintiffs' argument is factually unsupported because the FEIS evaluates the reasonably foreseeable impacts of extensions to the Project.

The City identified as part of the locally preferred alternative four planned extensions connecting the Project to West Kapolei, Univeristy of Hawaii's Manoa Campus, Waikiki, and the Salt Lake area. 4:AR00000247 at 362. The extensions were not included as elements of the Project, but rather are considered to be future projects that would be subject so separate detailed environmental reviews. *Id*. at 364. The extensions were not included as part of the Project because no funding had been identified for these portions of the City's locally preferred alternative. *Id.* at 791. On account of the absence of funding for the extensions, no engineering design or environmental evaluation of that design could be completed. *Id.* Accordingly, FTA determined that it would not grant any New Starts approvals for the extensions of the elevated rail system as part of the Project. *Id.*

NEPA and its implementing regulations instruct an agency to consider including within the scope of its environmental analysis a consideration of "actions" that are connected or cumulative. 40 C.F.R. § 1508.25(a). An agency must discuss "two or more agency actions . . . in the same impact statement where they are 'connected' or 'cumulative' actions." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 999 (9th Cir. 2004) (citing 40 C.F.R. § 1508.25(a)(1), (2)).

Plaintiffs argue that Defendants were obligated to assess the impacts of both the Project and the potential extensions of a guideway to two different areas because, in their view, these actions are "connected." Pls.' Mem. at 68-69 (citing

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); *Hammond v. Norton*, 370 F. Supp. 2d 226, 247-53 (D.D.C. 2005)). But a finding that two actions are "connected" requires that there in fact be *two* "actions," as defined in 40 C.F.R. § 1508.18(a). Here, there is clearly only one action as the proposal for any extensions to the Project have not been developed.

The cases Plaintiffs rely upon are inapposite, therefore, because they involve situations where multiple projects or actions were proposed and analyzed in separate NEPA documents. *See Thomas*, 753 F.2d at 757 (challenging two proposed actions consisting of a "proposed road and the timber sales that the road is designed to facilitate"); *Hammond*, 370 F. Supp. 2d at 231 (challenging two proposed actions consisting of the construction of 260 miles of new petroleum pipeline and conversion of 220 miles of existing natural gas pipeline to petroleum pipeline, which would be combined to provide for a single pipeline). Accordingly, the Project is not connected to another action that needs to be evaluated in a single EIS.

The Project is also not connected to another action because it has independent utility. Independent utility is the litmus test for determining whether unlawful segmentation exists. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002); *see also* 23 C.F.R. 771.111(f). Under this test, "[t]he proper question is whether one project will serve a significant purpose even if a

second related project is not built." *See Sensible Transp.*, 826 F.2d at 69); *see also Native Ecosystems Council*, 304 F.3d at 894 ("[w]here each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions [under NEPA].") (citation omitted).

Here, the Project has independent utility because it serves a discrete purpose and is not dependent on another action to take place. 4:AR00000247 at 791. The Project will provide public rail transportation along a 20 mile corridor of O'ahu. 3:AR00000030 at 37. It can serve this purpose regardless of whether the elevated guideway extends beyond the currently designated terminus at Ala Moana Center. *Id.* at 38. Because the Project can operate and serve a purpose independent of additional actions, it does not constitute a connected action.

Although Plaintiffs are correct that routes cannot be added to an existing rail line network without the existence of the network in the first place, that truism does not demonstrate that the Project lacks "independent utility." The possibility that future routes may physically connect with the Project's infrastructure does not make the Project an action "connected to" that existing infrastructure within the meaning of 40 C.F.R. § 1508.25(a)(1). *See Vill. of Los Ranchos*, 906 F.2d at 1483 ("Even if a local project terminates at a point of juncture with a federally funded project, that would not preclude segmentation."); *Pres. Endangered Areas of Cobb's History v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1247 (11th Cir. 1996)

("just because the project at issue connects existing highways does not mean that it must be considered as part of a larger highway project"). Under Plaintiffs' contrary view, the Department of Transportation would need to analyze the impacts of all existing highways as an action connected to any proposal for a new highway. But that is not how NEPA is interpreted. *See Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975) (holding that impacts of a segment of a highway project could be considered separately from impacts of the rest of the highway because the segment had independent utility); *Vill. of Los Rancho*, 906 F.2d at 1483-84 ("Because all local projects must start and end somewhere, under plaintiffs' theory the entire highway network across the country could be considered one project. Such an implication is obviously indefensible."). The Court, therefore, should find that the Project is not connected to another action within the meaning of NEPA.

To the extent Defendants were obligated to discuss the potential cumulative impacts of the Project in conjunction with future extensions of the rail guideway, they did so in the FEIS. The FEIS contains discussions regarding the impacts of potential extensions to the Project in Section 3.6.2 and 4.19.3. *See* 4: AR00000247 at 439-40, 660-73. Section 3.6.2 discusses potential effects on the extensions on transit, streets and highways. *Id*. at 439-40. Section 4.19.3 provides a broader discussion of the cumulative impacts of the Project in combination with the extensions on a variety of resources. *Id*. at 670-73 (discussing cumulative visual

impacts, noise impacts, archaeological impacts, impacts to trees, and environmental justice issues). Accordingly, the Court should find that Defendants adequately analyzed and disclosed the cumulative impacts of this Project in relation to the potential extensions of the rail guideway.

C. DEFENDANTS COMPLIED WITH THE NATIONAL HISTORIC PRESERVATION ACT

Plaintiffs argue that the Programmatic Agreement in place for the Project is insufficient because it does not provide protections for historic resources in certain areas. Pls.' Mem. at 73. This argument lacks merit. The Programmatic Agreement comprehensively covers all areas impacted by the Project.

The NHPA regulations define a historic property as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places," which "include[s] properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria." 36 C.F.R. § 800.16(l)(1).[19] The Programmatic Agreement adopts the same definition of historic property. 3:AR00000030 at 117. Thus, under the terms of the

[19] "The term 'traditional cultural property' or 'TCP,' is a term used by the National Park Service to refer to 'properties of traditional religious and cultural importance' that may be eligible for listing on the National Register under 16 U.S.C. § 470a(d)(6)(A)." *Te-Moak Tribe*, 608 F.3d at 608 n.16 (citing National Park Service National Register Bulletin 38).

Programmatic Agreement and the NHPA, the Programmatic Agreement may be used in cases where projects contain Traditional Cultural Properties.

Defendants satisfied the requirements of the NHPA because they took into account the effects of the Project on historic properties and worked with the ACHP and numerous consulting parties to develop a Programmatic Agreement that adequately addresses all issues relevant to the Project. Defendants have adhered to the Programmatic Agreement, and thus, are not in violation of the NHPA.

Plaintiffs' allegations that the agency violated the NHPA by failing to fully document the Project's impact on sites eligible for historic listing and by failing to consider alternatives with less impacts, ignores the substantial record in this case. The agency's Section 106 process illuminates the issues here. In December 2007, FTA contacted the SHPD, 660:AR00061747, which recommended that FTA conduct historic and archeological surveys and engage in consultation with local organizations to locate sites eligible for National Register listings. 659:AR00061744 at 61744-45. Following the initiation of the Section 106 process, numerous meetings were held 561:AR00060792; 629AR00061419; 624:AR00061389; 643:AR00061465; 644:AR00061468; 652:AR00061724; 654:AR00061731; 655:AR00061733; 658AR00061741, surveys were conducted of historical and archeological resources 533:AR00060266; 554:AR00060711; 557:AR00060770; 651:AR61716; and a draft memorandum of agreement was

prepared that discussed survey results, project impacts and mitigation measures. 603:AR00061151; 610:AR000 61276. Drafts were circulated to the consulting parties and the public for comment. 605:AR00061175; 611:AR00061288; 618:AR00061347. After numerous revisions were made, a final programmatic agreement was memorialized and signed. 3:AR00000030 at 121-23.

As a result of that process, Federal Defendants concluded that the project would adversely affect a number of historic properties and archaeological sites. *Id.* at 85. The agency included as part of the Project minimization and avoidance measures in order to avoid and minimize adverse effects on historic properties. *Id.* at 86, 94-95. These measures apply to both identified properties as well as those that have not been identified but may be discovered during later phases of the Project. *Id*. at 92-93. Also included within the Programmatic Agreement, are provisions allowing for continued public involvement and comment throughout the construction process. *Id*. at 86. The SHPD agreed with the mitigation plan that was developed.

The Programmatic Agreement represents the end of the NHPA process, a point at which the agencies responsible for historic resources were satisfied that the impacts to the historic resources have been minimized to an acceptable level, and a point at which the agency's responsibilities under Section 106 of the NHPA were satisfied. 36 C.F.R. § 800.6(c). Where this occurs, "[w]hile the plaintiffs may

disagree with the conclusion, they have no recourse under Section 106." *Neighborhood Ass'n of the Back Bay v. Fed. Transit Admin.*, 393 F. Supp. 2d 66, 76 (D. Mass 2005); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

VI. REMEDY

Should the Court rule in Plaintiffs' favor on any issue in this matter, Federal Defendants request this Court to provide for a period of additional briefing on the issue of remedy. Federal Defendants believe this is necessary because "[a] violation of NEPA or the NHPA alone does not compel the issuance of an injunction." *Quechan Indian Tribe v. U.S. Dep't of the Interior*, No. CV 07-0677-PHX-JAT, 2007 U.S. Dist. LEXIS 47974, *22 (D. Ariz. June 29, 2007); *see N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007) ("a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction . . . ."); *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.").

Additionally, separate briefing, if necessary, on the issue of an appropriate remedy would assist the Court in exercising its equitable powers. *See Idaho Farm Bureau v. Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary

procedures."); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under the APA is controlled by principles of equity.") (citations omitted). Moreover, because courts may consider evidence outside of the record to fashion an appropriate remedy, separate briefing provides the Court an opportunity to analyze additional evidence. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025-26 (9th Cir. 1980).

VII. CONCLUSION

For the reasons stated above and contained in the contemporaneous memorandum filed by the City, Federal Defendants request this Court to deny Plaintiffs' motion for summary judgment and reject the arguments contained in the National Trust's *amicus curiae* brief, and enter judgment in favor of Defendants on all issues.

DATED: June 1, 2012.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU TRAFFIC.COM, et al.	)	Case No. 11-00307 AWT
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
FEDERAL TRANSIT ADMINISTRATION, et al.	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following:

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