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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

HONOLULU TRAFFIC.COM, *et al*., Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION, Defendants.	Case No. 1:11-cv-00307 AWT FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT Date: August 21, 2012 Time: 10:00 a.m. Hon. Wallace Tashima

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FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Federal Defendants submit this reply memorandum in support of their cross-motion for summary judgment ("Fed. Mem.," ECF No. 148) and in response to Plaintiffs' opposition memorandum ("Pl. Opp.," ECF No. 155). Where context permits, the Federal Defendants and City and County of Honolulu Defendants ("the City") are referred to collectively as "the Defendants." Elsewhere, the Federal Defendants refer specifically to the Department of Transportation ("DOT") and Federal Transit Administration ("FTA").

I. ARGUMENT

A. Defendants Complied with Section 4(f)

The Defendants' review of the Project under Section 4(f) of the Department of Transportation Act, codified at 49 U.S.C. § 303, was both procedurally and substantively proper.

1. Defendants Timely Conducted Their Section 4(f) Analysis

a) Defendants' Phased Approach was Reasonable and Proper

As Plaintiffs acknowledge, Pl. Opp. at 24, the parties differ not on whether the Defendants must fully identify Section 4(f) properties, but *when* the Defendants are required to do so. *See City of Alexandria v. Slater*, 198 F.3d 862, 871–72 (D.C. Cir. 1999). Section 4(f) "historic" properties are those that are listed or eligible for listing on the National Register of Historic Places ("NRHP"), pursuant to the

National Historic Preservation Act ("NHPA"), and section 106 of the NHPA, 16 U.S.C. § 470f, similarly requires the Defendants to "take into account" potential effects that the Project may have on NRHP-eligible historic properties. Accordingly, compliance with Section 4(f) is predicated determinations made in the section 106 process. *City of Alexandria*, 198 F.3d at 871. The Section 106 process, in turn, requires that an agency

> shall make a *reasonable and good faith* effort to carry out appropriate identification efforts, which *may include* background research, consultation, oral history interviews, sample field investigation, and field survey.

36 C.F.R. § 800.4(b)(1) (emphasis added).

In this case, the Defendants did not "defer" the Section 4(f) process until after Project approval, as Plaintiffs insist; rather, they conducted a timely, "reasonable and good faith effort" to identify all potential Section 4(f) properties. Prior to issuing the ROD for the Project, the Defendants conducted an extensive review of available data on archeological and historic resources that might exist within the Project footprint and prepared detailed reports totaling over one thousand pages in the administrative record. *See* 168:AR00037676, at 37676–882 (Archaeological Resources Technical Report); 169:AR00037883, at 37883–8097 (Historic Resources Technical Report); 177:AR00039555, at 39555–40206 (Historic Effects Report). Although the Archaeological Report acknowledges that burial sites may

exist at places beneath the Project footprint, those resources *would not be affected* by the Project except in the specific locations where the foundations of Project features may need to be excavated. 168:AR00037676, at 37806. Moreover, those features are for the most part buried under existing structures and roadways, rendering it both impractical and counterproductive to engage in extensive pre-construction surveys that might unnecessarily disturb buried resources that would otherwise be left untouched by the Project, when the final locations of various design elements — such as support columns — are not yet known.[1] *Id.* at 37704. If buried resources are discovered through the pre-construction archeological surveys that will be conducted, efforts will be taken to avoid any impacts to eligible resources by, among other things, changing the placement of supporting structures such as guideway columns. 3:AR0000030, at 92–93.

Section 4(f) does not prohibit the reasonable, phased approach that Defendants adopted. The DOT regulations implementing Section 4(f) provide that "[t]he potential use of land from a Section 4(f) property shall be evaluated *as early*

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[1] Under Department of Transportation regulations, final design work cannot be undertaken until a final Environmental Impact Statement is issued. *City of Alexandria*, 198 F.3d at 873 (citing 23 C.F.R. § 771.113(a)(1)(iii)). Plaintiffs counter that the locations of features such as stations and park-and-ride lots are known now and that pre-ROD archeological surveys should have been undertaken in those locations. Pl. Opp. at 23. That contention is rebutted fully, below.

as practicable in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. § 774.9(a) (emphasis added); *see also* 36 C.F.R. § 800.4(b)(1) (reasonable and good faith effort); *id*. § 800.4(b)(2) (phased approach). The question that remains, however, is what is *practicable*? As noted above, unidentified buried resources are by their nature inaccessible, their locations are unknown, and their investigation would involve costly, disruptive, and potentially unnecessarily damaging subsurface investigations over much larger areas than would be disturbed by the Project itself. 168:AR00037676, at 37704, 37806. In that situation, a phased approach, in which the further identification of potentially buried Section 4(f) resources is undertaken pursuant to an NHPA Section 106 Programmatic Agreement, is lawful. *City of Alexandria*, 198 F.3d at 873.[2] As noted in the Federal Defendants' opening memorandum, at 30, DOT's Section 4(f) regulations anticipate that buried resources might be discovered during project implementation. 23 C.F.R. § 774.9(e). For that reason, the Section 4(f) regulations encourage an approach that "inclu[des] . . . procedures for identifying and dealing with archaeological resources in the project-level Section 106 Memo-

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[2] *City of Alexandria* did not deal simply with limited "ancillary" activities as Plaintiffs suggest. *See* Pl. Opp. at 16. Rather, the court assumed in its analysis that the additional challenged activities could affect historic properties. Those activities included such things as construction staging, wetland mitigation, and (Footnote continued)

randum of Agreement under the National Historic Preservation Act." 73 Fed. Reg. 13,368, 13,380 (Mar. 12, 2008) (Final Rule, Preamble).

Such a phased approach is specifically endorsed by the NHPA regulations where larger corridors are involved or access is restricted. 36 C.F.R. § 800.4(b)(2). The Defendants have entered into a Programmatic Agreement under the NHPA, signed by the agencies having authority to oversee implementation of the NHPA, which provides for just such an ongoing, phased investigation of potentially buried resources.[3] 3:AR00000030, at 83–123.

The Defendants' phased approach thus fully comports with Section 4(f), even though the Programmatic Agreement does not specifically cite § 774.9(e).[4]

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dredge spoil disposal, which are not insignificant undertakings. 198 F.3d at 872.

[3] Citing the preamble to the 1980 version of DOT's Part 771 regulations, Plaintiffs assert that DOT has cautioned against relying upon NHPA Section 106 procedures to comply with Section 4(f). Pl. Opp. at 12 n.10. But the citation Plaintiffs reference adds that "analysis of alternatives, consideration of appropriate mitigation, and coordination with other agencies should be accomplished concurrently to the extent that this is feasible." 45 Fed. Reg. 71968, 71976 (Oct. 30, 1980). That only makes sense. Even though Section 4(f) may contain a substantive mandate to avoid the unnecessary use of historic properties, nothing in the statute requires extraordinary measures to *identify* buried properties in the first place. *City of Alexandria*, 198 F.3d at 873. It is therefore appropriate and lawful to employ Section 106 surveys to identify potential Section 4(f) properties.

[4] Contrary to Plaintiffs' assertion, Pl. Opp. at 13, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983), does not require that every document in an administrative record cite every provision of law that might be applicable. Rather, the case merely recites the (Footnote continued)

Similarly, Plaintiffs' argument that the concurrence of the State Historic Preservation Officer ("SHPO") in the NHPA Section 106 Programmatic Agreement could not authorize a phased investigation under Section 4(f), Pl. Opp. at 14–15, swings at a straw man. As explained above, it is the DOT Section 4(f) regulations themselves that allow for the phased approach to unknown, buried resources that the Defendants adopted in this case.

The present situation stands in contrast to the one reviewed in *North Idaho Community Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158–59 (9th Cir. 2008). In that case, the agencies prepared historical properties surveys for only one of four phases of a project. *Id*. at 1158. In this case, the Defendants conducted an extensive review over the *entire* Project corridor, with further investigation to be conducted in light of the unique circumstances posed by unknown buried resources. For that reason, *North Idaho* does not compel the conclusion that the Defendants' phased approach was improper. *Corridor H Alternatives v. Slater*, 166 F.3d 368 (D.C. Cir. 1999), is similarly distinguishable. In that case, the agency had "postponed the entire section 106 process," *see City of*

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unexceptional proposition that, in reviewing the whole of an agency's action, the court "should not attempt itself to make up for . . . deficiencies" in the agency's rationale for its decision.

Alexandria ,198 F.3d at 872,[5] whereas here the agency conducted extensive Section 106 and Section 4(f) analyses prior to project approval, *see* 198 F.3d at 873.

Contrary to Plaintiffs' mischaracterization of Defendants' position, Pl. Opp. at 18–22, Defendants do not claim that the Archaeological Resources Technical Report, 168:AR00037676, and Historic Resources Technical Report, 169:AR00037883, constituted a definitive treatment of *unknown*, buried resources. Rather, the Federal Defendants stated that those reports "reviewed the Project's use, either direct or constructive, on any *identified* Section 4(f) property . . . ." Fed. Mem. at 23. The treatment of *unknown*, buried resources still to be investigated (but only where needed) is set out in the Programmatic Agreement.[6] 3:AR00000030, at 92–95.

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[5] Plaintiffs insist that the "entire" Section 106 analysis in that case was not in fact deferred, Pl. Opp. at 17 n.14, but the D.C. Circuit's analysis in *City of Alexandria* assumed otherwise. 198 F.3d at 872.

[6] Plaintiffs also quibble with Defendants' characterization of the scope of the information relied upon in the Archaeological Resources Technical Report. *See* Pl. Opp. at 20–21. What the Federal Defendants stated in their opening memorandum, at 24, is correct: the Report covers the entire Project. It may be true, however, that the amount of existing information may differ from one portion of the proposed alignment to the next, depending upon the degree of prior archeological investigation. *See* 168:AR00037676, at 37703. Definitive information on buried resources (Footnote continued)

Plaintiffs argue that the Defendants could have — and in fact *did* — conduct the necessary Archaeological Inventory Survey ("AIS") for one portion of the Project and that, therefore, Defendants could and should have conducted pre-ROD AISs for the *entire* Project. Pl. Opp. at 22–23. But the record simply does not support that leap of logic. While it is true that an AIS was conducted for Phase I of the Project prior to the ROD, 517:AR00059459, at 59459–932, that portion of the Project alignment (and particularly western end of the Projection alignment) is an agricultural area that is much less developed than downtown Honolulu, *see id.* at 59478–84, 59495. The western portion of the Project is less likely to contain evidence of habitation during traditional Hawai`an times, *see id.* at 59501–02; 170:AR00038098, at 37686 (Table S-1). And despite the fact the Phase I of the Project is not an area of high archeological interest, the Phase I AIS report runs almost 500 pages. *See* 517:AR00059459, at 59459–59933.

Similarly, Plaintiffs argue that even if the locations of the guideway columns are not currently known, the locations of stations and park-and-ride lots were indicated in the Final Environmental Impact Statement ("FEIS") and that, accor-dingly, pre-ROD AISs should have been undertaken in those areas. Pl. Opp. at 23. That contention, however, fails to recognize the relationship between guideway

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generally requires subsurface investigation. *See id.* at 37704.

pylon placement and station design and placement, both of which need to await additional design and planning efforts. For instance, those station features that require ground disturbance (such as elevators) were not designed pre-ROD. 4:AR00000247, at 346. Moreover, the lay-out of a particular station depends upon which of three possible configurations is selected to work with the guideway in that specific location. *Id*. This information similarly was not available prior to the ROD. *Id*. At that time, as the FEIS explains, station location and design can be modified to avoid buried resources. *Id*. at 621. As for park-and-ride lots, three of the four planned lots (East Kapolei, UH West O`ahu, and Pearl Highlands have already been surveyed. 517:AR00059459, at 59460. The remaining lot (Aloha Stadium), is (like the first three) in an area estimated to contain few archeological resources, *see* 4:AR00000247, at 340–42 (maps); 170:AR00038098, at 37686 (Table S-1).[7]

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[7] Plaintiffs further submit several e-mails that they believe support their legal position that AISs had to have been conducted pre-ROD. Pl. Opp. at 7–8. Clearly, however, whatever personal opinions of individual staff are set forth in such communications, they are of limited probative value. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658–59 (2007) (under the APA, the court reviews the agency's *final* action, not views of subordinate representa-tives); *Forest Guardians v. United States Fish & Wildlife Serv.*, 611 F.3d 692, 718 (10th Cir. 2010) ("the stray comments of a low-level scientist or two — no matter how vigorously expressed — would be unlikely to render fatally infirm the other-wise unbiased environmental analysis of an entire agency"); *Nat'l Audobon Soc'y.*
(Footnote continued)

Finally, while Plaintiffs suggest that certain non-invasive techniques, such as ground-penetrating radar ("GPR") might shed light on potentially buried resources, thereby rendering pre-ROD AISs feasible, Pl. Opp. at 27 n.18, GPR is not a substitute for subsurface investigation. It is limited by soil type, soil moisture content, vegetation, and other factors. 168:AR00037676, at 37824. In Hawai`i, the success of GPR is mixed. *Id*. at 37824–25. It is anticipated that further AIS efforts will require trenching, excavation, coring, and other subsurface methods, rather than GPR probing alone. *Id*. at 37825.

In short, the record amply supports the Defendants' reasonable approach to identifying unknown, buried resources.

b) The Defendants Did Not Ignore Other Traditional Cultural Properties

Plaintiffs take Defendants to task for failing, in their view, to sufficiently consider other Traditional Cultural Properties ("TCPs") in their Section 4(f) analysis prior to issuing the ROD. Pl. Opp. at 29–33. Plaintiffs confuse cultural resources under State law with TCPs under Section 4(f). The only NRHP or

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v. Dep't of the Navy, 422 F.3d 174, 198–99 (4th Cir. 2005) (agency decision should be assessed on its objective validity, not "the alleged subjective intent of agency personnel divined through selective quotation from email trails"). Similarly, the Defendants were not required to defer to the views of other agency representatives who offered comments on their reports. *See Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000) (agency not required to defer to (Footnote continued)

NRHP-eligible TCP identified was the Chinatown Historic District, which is discussed further below. 3:AR00000030, at 91; 177:AR00039555, at 40142. Plaintiffs have identified no potential TCPs (other than unknown buried resources) that the Defendants have failed to consider.[8]

In fact, the Defendants *did* consider State Law Act 50 cultural resources (other than burials) in the 250-page Cultural Resources Technical Report. 170:AR00038098, at 38098–350. That Report complies with *State* law mandates. *Id*. At 38123–26.

2. Defendants Properly Considered Potential Use of Section 4(f) Resources

Plaintiffs continue to insist that the Defendants' Section 4(f) evaluation of the four properties at issue (Aloha Tower, Walker Park, Irwin Park and Mother Waldron Playground) was arbitrary and capricious. However the record, including the extensive discussion in the Historic Effects Report, 177:AR0039555, at 39555–40206, fully supports the Defendants' determination that the Project will not constructively use these four properties. A finding of "constructive" use requires the conclusion that a "project's proximity impacts are so severe that the protected

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sister agency's conclusions, but only to consider and address them).

[8] The Programmatic Agreement further provides that the City will undertake a study to determine whether any other TCPs — currently unknown — may exist. 3:AR00000030, at 91–92.

activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired." 23 C.F.R. § 774.15(a). "Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished." *Id*. The four constructive use determinations discussed below are sound.

a) Aloha Tower

Plaintiffs can cite only to evidence that *some* views of the Tower from *some* vantage points may be blocked to *some* degree. Pl. Opp. at 35–38. Nothing in the record supports Plaintiffs' insistence that the *primary* views of the Tower will be obstructed and that the Project would thus constructively use the Tower under 23 C.F.R. § 774.15(e)(2).[9] 4:AR00000247, at 745–46.

The FEIS is supported by the Historic Effects Report, which thoroughly evaluates potential constructive use of the Aloha Tower. 177:AR00039555, at 39871–77. Consistent with the conclusions of the FEIS, 4:AR00000247, at 745–46, the Historic Effects Report notes that the Project will be constructed within the center of the six-lane Nimitz Highway. 177:AR00039555, at 39872. Although at some points the guideway may obstruct views of the Tower, the Report notes —

[9] Plaintiffs do not argue that the Project would obstruct views *from* the Tower. Nor would the Project affect views of the Tower from the water.

importantly — that the Tower "is often not visible because of the presence of vegetation or built resources that block views for pedestrians and motorists[,]" and "is not universally visible because of these numerous modern intrusions." *Id.* Indeed, trees growing in the area proposed for the guideway partially block some views of the Tower even today. *Id.* On the whole, the Project would have no adverse effect on the Tower's integrity of setting. *Id.* at 39872–73. The Project does not therefore constructively use the Tower.

b) Walker Park

In claiming that the Defendants ignored Walker Park's historic setting, Plaintiffs themselves ignore the discussion of that property in the Historic Effects Report. *See* Pl. Opp. at 39–41. That Report concludes that Walker Park "does not [today] retain integrity of setting." 177:AR00039555, at 39861. For that reason, despite the fact that the Park has been determined to be NRHP-eligible as an "early example of a created greenspace," *id.* at 39861, the introduction of the Project in the vicinity of the property was not considered an adverse effect, *id.* at 39861–62; *see also id.* at 39585–88 (discussing significance of "integrity of setting"); 4:AR00000247, at 731, 744. That is because the Park itself contains numerous non-historic features, and the area outside the Park boundary has not been identified "as a historically significant feature of the property[,]" including as it does modern high-rise development and the Nimitz Highway. *Id.* at 39861–62.

Therefore, the proximity of the Project to the Park does not constitute a constructive use. *See* 23 C.F.R. § 774.15(e)(2) ("substantial impairment to visual or esthetic qualities" if project "substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting"); *id.* § 774.15(f)(1) (finding under NHPA of "no adverse effect" results in no constructive use).

Plaintiffs' repeated assertion that the Defendants failed to consider potential noise impacts on Walker Park, Pl. Opp. at 41–42, continues to miss the mark. Plaintiffs challenge the FEIS's conclusion that sound levels at Walker Park are anticipated to be 65 decibels ("dB"), while Plaintiffs claim that the actual sound level will be 82 dB. Pl. Opp. at 41–42. The confusion evidently stems from the fact that Plaintiffs refer to the unadjusted Sound Reference Level ("SEL") of 82dB, citing Addendum 01 to the Noise and Vibration Technical Report, 1145:AR00072897, at 72898. But as that document describes, the raw SEL is then refined through further modeling to result in the actual sound level at a given receptor under given conditions. *Id.* at 72898–900. This was also explained in the revised version of Addendum 01, 191:AR00042163, at 42164–66, cited in the Federal Defendants' opening memorandum, at 39. Where projected noise from a project impairs the "[e]njoyment of an urban park where serenity and quiet are significant attributes," constructive use may be found, 23 C.F.R.

§ 774.15(e)(1)(iv). Walker Park is, however, an urban park adjacent to noisy city streets; the noise levels expected from the Project are projected to be within FTA criteria. 4:AR00000247, at 561, 729; 160:AR00033642, at 33651–52; 109:AR00022575, at 22622–30. Accordingly, there is no constructive use. *See* 23 C.F.R. §774.15(a), (f)(2), (3).

Finally, Plaintiffs note that the ROD refers to Walker Park at one point as a "visual signpost" and then jump to the conclusion that the Defendants' constructive use analysis fails to address certain unspecified "visual qualities." Pl. Opp. at 42–44. But that contention is merely a variation of Plaintiffs' first argument — that the Project will harm the Park's historical "setting." Plaintiffs cite to nothing in the record suggesting any visual impairment of the Park. *See* Pl. Opp. at 43–44. Instead, they offer that the Project will generally have "visual impacts" as it runs through downtown Honolulu. *Id*. at 43. But those contentions fall far short of demonstrating that the Defendants' constructive use determination here was "arbitrary and capricious." *See* 23 C.F.R. § 774.15(e)(2) (requiring obstruction of primary views of property or substantial detraction from setting).

c) Irwin Park

Plaintiffs insist that because Irwin Park is an example of the work of a noted landscape artist, the constructive use determination should have focused on "land-scaping." Pl. Opp. at 45. The property is NRHP-eligible because it represents the

work of landscape architect Robert O. Thompson. 177:AR00039555, at 39865. However, the Park itself is dominated by paved automobile parking, *id.*, and is surrounded by modern urban features, *id.* at 39869–70; 4:AR00000247, at 731–32. Moreover, while Pier 10/11 and the Aloha Tower are "historically significant features within the property's setting," *id.* at 39865, the introduction of the guideway would not "alter any historically significant views or visual features" *id.* at 39866. As one can see from the visual simulation,[10] the guideway would be simply another urban feature located across the street from the Park, within the median of the Nimitz Highway. That placement simply cannot constitute "constructive use" under the Section 4(f) regulations, and the Defendants were not arbitrary or capricious in concluding as much. *See* 23 C.F.R. § 774.15(e)(2) (requiring obstruction of primary views of property or substantial detraction from setting).[11]

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[10] Plaintiffs have never contended that the visual simulations contained in the Historic Effects Report and FEIS are misleading or were improperly created.

[11] Plaintiffs observe that the Cultural Resources Technical Report found that Irwin Park contains "certain types of cultural resources." Pl. Opp. at 32 (citing 170:AR00038098, at 38153, 38181, 38192. The first and third citations simply indicate that Irwin Park contains two stones, apparently of cultural value, but provides no other information. *Id.* at 38153, 38192. The second citation indicates that access to these stones may be altered but will be maintained. *Id.* at 38181. Accordingly, even assuming these two stones are Section 4(f) properties — and there is no indication from the record that they are — they will not be constructively used by the Project. *See* 23 C.F.R. § 774.15(e)(3) (access restriction must "*substantially diminish*[] the utility of a significant publicly owned park, recreation
(Footnote continued)

Plaintiffs find fault with the Defendants' use of noise data from the Aloha Tower Market Place to represent noise levels at the Park, *see* Fed. Mem. at 39–40, arguing that the "marketplace is not a park." Pl. Opp. at 47 & n.29. That is true, but Irwin Park is an *urban*, not a rural, park — and is primarily used as a parking lot — so use of Aloha Marketplace as a benchmark for noise analysis was not arbitrary or capricious. Accordingly, there is no constructive use of the Park.

d) Mother Waldron Playground

Plaintiffs' argument that the Defendants failed to properly consider the Playground's historic and aesthetic attributes boils down to their insistence that the mere presence of the guideway adjacent to the Playground "is the epitome of constructive use." Pl. Opp. at 49. But that rhetoric is not supported by the DOT Section 4(f) regulations, which provide that a project may constructively use a property if its proximity to the property "substantially detracts from the setting of a [the] property which derives its value in substantial part due to its setting." 23 C.F.R. § 774.15(e)(2). The Historic Effects Report concludes that the proximity of the guideway to the Playground will constitute an "adverse effect," 177:AR00039555, at 39909–10, but that is not the same as constructive use of the Playground under 23 C.F.R. § 774.15(a). 73 Fed. Reg. 13368, 13386 (Mar. 12,

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area, or a historic site") (emphasis added); *id*. § 774.15(f)(5) (same).

2008).

Plaintiffs again assert that the Defendants' noise analysis was inadequate, Pl. Opp. at 50–51, but in so doing, Plaintiffs completely ignore the Federal Defendants' explanation of why anticipated noise levels at the Playground would be within ambient levels and not the 82 dB that Plaintiffs insist on. *See* Fed. Mem. at 42–43 & n.11. Plaintiffs simply exclaim that the Federal Defendant's analysis is "implausible," without bothering to explain why. Pl. Mem. at 50. As explained with respect to Walker and Irwin Parks, the 82 dB SEL level is *not* the same as the received sound level; to get from one to the other requires significant further calculation. *See* 109:AR00022575, at 22673–716. Again, there is no constructive use of the Playground.

3. Defendants Properly Considered Feasible and Prudent Alternatives

The parties agree that the Project would use the Chinatown Historic District and Dillingham Transportation Building. Pl. Opp. at 52. But contrary to Plaintiffs' claims, there are no feasible and prudent alternatives to the Project. *See* 49 U.S.C. § 303(c)(1); 23 C.F.R. § 774.3(a).

An alternative is not prudent if it does not satisfy the transportation needs of a project. *Alaska Ctr. for the Env't v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997); *City of Alexandria*, 198 F.3d at 873; *Citizens Against Burlington v. Busey*, 938 F.2d 190, 204 (D.C. Cir. 1991); 23 C.F.R. § 774.17 ("Definition of Feasible

and Prudent Avoidance Alternative" at (3)(i)). Nor is an alternative prudent if it requires an extraordinary increase in cost, 23 C.F.R. § 774.17 ("Definition of Feasible and Prudent Avoidance Alternative" at (3)(iv)), or causes severe impacts to protected resources, *id*. at (3)(D)). None of Plaintiffs' suggestions would have been a feasible and prudent alternative.

a) <u>Managed Lane Alternative</u>

As explained more fully in Section II.B.3(a), below, the Managed Lane Alternative ("MLA") was eliminated following the Alternatives Analysis because it did not adequately meet the purpose and need of the Project. It was therefore not "prudent."[12] *Alaska Ctr.*, 131 F.3d at 1288; *City of Alexandria*, 198 F.3d at 873; *Citizens Against Burlington*, 938 F.2d at 204.

Plaintiffs counter that it was a violation of Section 4(f) for the Defendants to have failed to consider the MLA as a feasible and prudent alternative because it had been eliminated from further consideration as a Project alternative under NEPA. Pl. Opp. at 54–55. But the law is clear that an alternative that does not meet a project's purpose and need is not "prudent"; therefore, no further analysis was needed. The only document Plaintiffs rely on as authority for their contrary

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[12] Contrary to Plaintiffs' claim, it is not "undisputed" that the MLA would have no impacts on historic resources. *See* Pl. Opp. at 52 n.31. In fact, it would have greater visual impacts along its length. 29:AR00009434, at 9545.

position, the FTA Section 4(f) Policy Paper, provides that "simply because under NEPA an alternative (*that meets the purpose and need*) is determined to be unreasonable, does not by definition[] mean it is imprudent under the higher substantive test of Section 4(f)." 101:AR00021938, at 21946 (emphasis added). At the same time, the Paper states clearly that "[a]n alternative may be rejected as not prudent * * * [if] [i]t does not meet the project purpose and need[.]" *Id.* In that situation, "the analysis or consideration of that alternative as a viable alternative comes to an end." *Id.* Therefore, the Defendants did not need to engage in the analysis that Plaintiffs lay out in bullet points over two pages of their opposition memorandum. Pl. Opp. at 56–57.

Although it may true that the Defendants' analysis of the MLA may not have used the "magic words" — that the MLA would "compromise[] the project to a degree that it [would be] unreasonable to proceed with the project in light of its stated purpose and need," 23 C.F.R. § 774.17 (Definition of "Feasible and prudent avoidance alternative" at (3)(i)) — it was clearly implicit in the Alternatives Analysis, described further in Section II.B.3(a) below, that proceeding with the MLA, which did not meet the Project's purpose and need, would have rendered proceeding with that alternative "unreasonable." And while it may be true that the Section 4(f) analysis in the FEIS did not specifically evaluate the MLA, the Alternatives Analysis and FEIS's own discussion of alternatives adequately

addressed the shortcomings of the MLA. *See* 29:AR00009434, at 9435; 4:AR00000247, at 324–29. In reviewing the Defendants' Section 4(f) analysis, the Court may, and should, consider the entire record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (a court's "review is to be based on the full administrative record that was before the Secretary at the time he made his decision"); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1165 (9th Cir. 1997) (FEIS may refer to other documentation in the record for analysis); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) ("Section 706 of the APA provides that judicial review of agency action shall be based on 'the whole record.' 'The whole record' includes everything that was before the agency pertaining to the merits of its decision.") (citing *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555–56 (9th Cir. 1989)). Clearly, there is ample support in the record for rejecting the MLA as a feasible and prudent alternative, and Plaintiffs' opposition memorandum offers nothing other than their own statements of opinion. Pl. Opp. at 61.

b) Tunneling Alternative

Although professing concern for buried resources, Plaintiffs nevertheless criticize the Defendants for failing to further consider tunnel alignments for the guideway, rather than the selected elevated alternative. Pl. Opp. at 61–68. In addition to being illogical, Plaintiffs' position lacks merit. Both tunnel alterna-

tives, King Street and Beretania Street, are both too expensive and too potentially disruptive to be considered "prudent" alternatives under 23 C.F.R. § 774.17.[13]

First, Plaintiffs' analysis of the tunnel alternatives' anticipated costs is simply incorrect. As noted in the Federal Defendants' opening memorandum, at 47–49, a tunnel under King Street would have added between $650 million and $1 billion to the Project costs (in 2006 dollars). *See* 4:AR00000247, at 705, 719; *see also* 948:AR00067416, at 67428 (comparative costs of alignment alternatives). Plaintiffs counter with citations to the 2007 Tunnels and Underground Stations Technical Memorandum, 923:AR00065304, at 65334–35, which they insist displays much lower costs. But as explained in greater detail in the City's reply memorandum, that document on its face reveals that those costs are only the construction costs of the tunnel bore alone and do not include the costs of constructing the other facilities necessary to service the tunnel, including (significantly) underground stations and track.[14] *Id*. at 65334. Plaintiffs cite no authority for the proposition that a cost increase approaching $1 billion on a project otherwise

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[13] While the Beretania Tunnel might have cost less than the King Street alignment, it would not have served the Project's purpose and need because it would have resulted in poor transit benefits. 29:AR00009434, at 9520, 9540; 4:AR00000247, at 709.

[14] Plaintiffs cite only the raw construction costs ($118 million for the King Street tunnel), without including contractor costs ($159 million for the King Street tunnel,
(Footnote continued)

estimated at just over $4 billion, 29:AR00009434, at 9522, is not "extraordinary." Commonsense tells us it is.

In addition to being prohibitively costly, the tunnel alignments suffer from a host of other problems. As explained in the Federal Defendants' opening memorandum, at 49–50, tunneling under downtown Honolulu would have risked encountering ground water and causing surface subsidence, 923:AR00065304, at 65321, and the construction of underground stations certainly would have caused significant disruption on the surface, *id*. at 65326–30. In addition, tunneling underground potentially risks damaging unidentified buried resources, for which Plaintiffs elsewhere profess concern. AR00050082, at 50157. While Plaintiffs dismiss these very real concerns as "post hoc" rationalizations, Pl. Opp. at 67–68, they are clearly set forth in the record and therefore cannot possibly be "post hoc" inventions.[15] Indeed, as noted above, the Court may consider pertinent — and persuasive — analysis contained in the *whole* record in reviewing whether the Defendants properly rejected the tunnel alternatives. *See, e.g.*, *Overton Park*,

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as adjusted). *See* 923:AR00065304, at 65335.

[15] Plaintiffs also assert that the technology exists to simply tunnel under potentially buried resources. Pl. Opp. at 67–68 & n.47 (citing 234:AR00050082, at 5017 *[sic]* [should be *50157*]). Even if that were true, that says nothing about the disturbances needed to create underground stations and access points to the surface for ventilation. *See* 923:AR00065304, at 65316, 65326–30.

401 U.S. at 413 n.30, 420; *City of Carmel-by-the-Sea*, 123 F.3d at 1165; *Portland Audubon Soc'y*, 984 F.2d at 1548. Potential environmental impacts are well documented in the FEIS, of which the Section 4(f) analysis is a part, and the technical analyses cited in the FEIS and included in the record are necessarily part of the overall Section 4(f) evaluation. Therefore, the fact that it would be highly problematic to tunnel under downtown Honolulu, as well as prohibitively expensive, renders the tunneling alternatives not "prudent" under Section 4(f).[16]

c) Alternative Technologies

As explained in Section II.B.3(b), below, the "alternative technologies" that Plaintiffs tout would not have met the Project's purpose and need. They are therefore not "prudent" and need not be further considered. *Alaska Ctr.*, 131 F.3d at 1288; *City of Alexandria*, 198 F.3d at 873; *Citizens Against Burlington*, 938 F.2d at 204. Nevertheless, Plaintiffs insist that the Defendants should have considered an at-grade light rail system or a Bus Rapid Transit ("BRT") alternative. Pl. Opp. at

[16] Plaintiffs assert that the Defendants did not explicitly "weigh" the problems posed by the tunnel alternatives against the importance of protecting Section 4(f) resources. Pl. Opp. at 66. But neither the regulation at 23 C.F.R. § 774.17, nor the preamble cited by Plaintiffs, 73 Fed. Reg. 13368, 13391 (Mar. 12, 2008), requires any particular format for evaluating costs versus benefits. Clearly, the record amply supports a determination that tunneling under downtown Honolulu is an imprudent alternative to an elevated railway, if one's goal is to avoid buried resources.

68–71.

In support of at-grade light rail, Plaintiffs offer only what they characterize as suggestions from the U.S. Environmental Protection Agency and two City Councilmen that at-grade light rail should be considered. Pl. Opp. at 69. But EPA merely suggested that if at-grade light rail (and BRT) were to be eliminated, the FEIS should further document that determination; EPA never suggested that those alternatives had merit. Defendants fully responded to EPA's comments on at-grade light rail. 5:AR00000855, at 974–77. The City Councilmen's letter cited by Plaintiffs merely refers back to EPA's Draft EIS ("DEIS") comments. 1066:AR00072134, at 72138.

As support for BRT, Plaintiffs merely cite their own letter to the FTA, 1055:AR00071958, and a ten-year-old FEIS prepared during an earlier round of transportation planning, 229:AR00047927. Neither of those documents overcomes the other documentation in the record, described further in Section II.B.3, below, that amply explains why these at-grade alternatives were rejected. Because those alternatives did not meet the Project's purpose and need, further analysis is unnecessary.

4. Defendants Have Included Necessary Plans to Minimize Potential Harm

DOT's Section 4(f) regulations define "all possible planning" to mean only "all *reasonable* measures." 23 C.F.R. § 774.17. Moreover, with regard to historic

properties, such measures normally are those determined through the NHPA Section 106 consultation process.[17] *Id*. (definition at (2)). In this case, the Defendants and consulting authorities, the State Historic Preservation District ("SHPD") and the Advisory Council on Historic Preservation ("ACHP"), agreed in the Programmatic Agreement on appropriate mitigation measures to address potential effects on the two historic properties that the Project would use, the Chinatown Historic District and the Dillingham Transportation Building. 3:AR0000030, at 100–06.

In response, Plaintiffs cite to the Mitigation Monitoring Program, which they assert does not include TCPs such as Chinatown. Pl. Opp. at 72 (citing 3:AR0000030, at 48–82). But they overlook the mitigation planned for the Chinatown station, 3:AR0000030, at 61, and the other mitigation measures set out in the Programmatic Agreement, *see id*. at 105–06. Plaintiffs further repeat their

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[17] Plaintiffs contend that 23 C.F.R. § 774.17 provides a method to *implement* an NHPA Section 106 Programmatic Agreement and that the Defendants have the regulatory scheme backwards. Pl. Opp. at 73. It is unclear what distinction Plaintiffs seek to draw. The Section 4(f) regulations clearly work in tandem with the procedures required under Section 106 of the NHPA. *See* 23 C.F.R. § 774.15(f)(1) (a finding of "no adverse impact" under the NHPA results in a "no constructive use" determination under Section 4(f)). Where the planning agencies and consulting agencies agree on appropriate mitigation measures for historical properties, those measures constitute "all possible planning." 23 C.F.R. § 774.17 (definition at (2)).

claim, dealt with above, that the Project "uses" the Aloha Tower (it does not), but does not provide for mitigation measures (it need not).

Plaintiffs cite to a single sentence from the Final Alternatives Screening Memorandum, 30:AR00009556, at 9623, to support their assertion that the guideway would have a "severe" impact on the Tower. Pl. Opp. at 38. But that analysis was superseded by the detailed Historic Effects Report and Section 4(f) determination, which found no such impacts. 177:AR00039555, at 39871–77; 4:AR00000247, at 745–46.

In short, the Project includes "all possible planning" for minimizing harm to the identified Section 4(f) properties.

B. Defendants Complied with NEPA

As explained further below, both NEPA and DOT's statutory and regulatory authorities allow — in fact, require — that NEPA analysis complement, and not duplicate, State and local transportation planning efforts. In this case, those complementary efforts resulted in a comprehensive review of potential transportation alternatives and full consideration of potential environmental impacts.

1. Defendants Properly Incorporated State and Local Planning Efforts

NEPA's implementing regulations require federal agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifi-

cally barred from doing so by some other law."[18] 40 C.F.R. § 1506.2(b); *see Laguna Greenbelt v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 n.6 (9th Cir. 1994) (EIS may incorporate state studies). Such cooperation "to the fullest extent possible" shall include joint planning, studies, hearings, and environmental analyses. *Id.* That regulatory policy is further affirmed in the statutory directive embodied in section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act — A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005). Under that provision, a State or local agency, as project sponsor, may develop the "purpose and need" statement required by the NEPA regulations, 40 C.F.R. § 1502.13, and may also develop the range of alternatives to be further analyzed, as well as determine the appropriate methodologies and level of detail for that analysis, as required by 40 C.F.R. § 1502.14. *See* 23 U.S.C. § 139(f)(4)(B), (C); *see also* 23 C.F.R. § 771.111(a)(2) (information developed in local transportation planning process may be incorporated in further environmental review documents); 23 C.F.R. § 450.318(a), (b), (d) (NEPA documentation may incorporate the results of local planning studies in the development of a purpose and need and corresponding alternatives). The State or

[18] Plaintiffs do not assert that any provision of law bars the Federal Defendants from cooperating with the City Defendants.

local agency may also develop a preferred alternative in greater detail than other alternatives, if doing so will not prevent due consideration of other alternatives. 23 U.S.C. § 139(f)(4)(D).

The FTA's Capital Investment Grant program ("New Starts") provides that DOT may provide funding to State and local government authorities for new fixed guideway transit projects (such as the Project at issue here). 49 U.S.C. § 5309(b)(1). Grants of $75 million or more (as here) require the preparation of an Alternatives Analysis. *Id.* § 5309(d)(2)(A); 49 C.F.R. § 611.7(a). An Alternatives Analysis is to be conducted pursuant to a transportation planning process that includes the selection and adoption of a locally preferred alternative. *Id.* § 5309(a)(1)(C), (D); 49 C.F.R. § 611.7(a)(2)–(4) . Section 6002 of SAFETEA–LU specifically allows the local agency project sponsor to develop the Alternatives Analysis required by the program, 23 U.S.C. § 139(c)(3), and for the Alternatives Analysis to be relied upon in subsequent NEPA documentation, *id.* § 139(c)(5); 23 C.F.R. § 450.318(d).

In this case, the Alternatives analysis is contained in the Alternatives Analysis Report, 29:AR00009434, at 9434–555, and the Alternatives Screening Memorandum, 30:AR00009556, at 9556–683. The initial screening process examined a number of alternatives, including tunneling under Pearl Harbor and developing a ferry system; those alternatives were considered infeasible or other-

wise unable to meet project goals and were therefore not included in further analysis. 30:AR00009556, at 9563; 29:AR00009434, at 9467–68. The Alternatives Screening Memorandum then carried forward four alternatives for detailed analysis: a "No Build Alternative" (including existing and planned transit and highway projects through 2030); a Transportation System Management ("TSM") Alternative, which would provide expanded bus service and selected roadway improvements; the MLA, which would create a two-lane grade-separated facility for use by BRT and high occupancy vehicles (and perhaps toll-paying single-occupant vehicles, as well); and the fixed guideway system. *Id.* at 9564–65. The Alternatives Analysis Report compared these four alternatives in greater depth to support selection by the City Council of a locally preferred option. *See* 29:AR00009434, at 9435. That analysis was then discussed and incorporated in Chapter 2 of the FEIS. 4:AR00000247, at 316–64. The FEIS also identifies and discusses alternatives eliminated from more in-depth analysis, which included those alternatives that were examined but screened out during the earlier Alternatives Analysis, *id.* at 00000320–22 & Table 2-1, as well as the four alternatives examined in depth in the Alternatives Analysis, *id.* at 322–29.[19]

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[19] It is appropriate for an FEIS to discuss alternatives eliminated during the Alternatives Analysis in the FEIS's description of alternatives not carried forward (Footnote continued)

In response to the 2007 Notice of Intent ("NOI") to prepare an EIS, 39:AR00009696, a number of comments suggested revisiting the MLA and considering other transit improvement options. Because no new information suggested that the MLA would have fared better than in the Alternatives Analysis, it was not carried forward for additional analysis in the Draft EIS. 4:AR00000247, at 330. Similarly, the other transit alternatives did not differ materially from the TSM Alternative and were similarly not considered further.[20] *Id.* Finally, the NOI requested comment on five different transit technologies: light rail, rapid rail (steel wheel on steel rail), rubber-tired guided vehicles, magnetic levitation, and mono-rail. 39:AR00009696, at 9698. As part of a technical review process, which included opportunities for public comments, industry representatives provided

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for further evaluation in the FEIS, consistent with 40 C.F.R. § 1502.14(a). *See* 23 C.F.R Part 450, App. A, Q.12. Plaintiffs insist that Appendix A to the Part 450 regulations requires that an EIS carry forward all "reasonable" alternatives and then insist that alternatives eliminated because they did not meet the Project's purpose and need or were not feasible should not have been eliminated from detailed review. Pl. Opp. at 98 & n.58. But, nothing in the Part 450 or Part 771 regulations requires DOT to essentially duplicate the Alternatives Analysis in the EIS. On the contrary, those regulations plainly authorize DOT to incorporate prior, extensive transportation planning analyses in an EIS without duplicating the effort.

[20] Those determinations were perfectly proper under NEPA. *See Headwaters, Inc. v. Bureau of Land Mgmt.,* 914 F.2d 1174, 1181 (9th Cir. 1990) ("NEPA does not require a separate analysis of alternatives which are not significantly distinguish-able from alternatives actually considered, or which have substantially similar consequences.").

information on all the relevant transit technologies; after review of that information (together with public comments), steel-wheel-on-steel-rail was selected as the preferred technology. 4:AR00000247, at 330–31.

Far from being "manipulated" as Plaintiffs charge, Pl. Opp. at 74, the NEPA process, from the initial screening of alternatives in 2005 to the preparation of the final EIS in 2010, followed FTA guidance, consistent with 23 U.S.C. § 139(c)(3). *See* 4:AR00000247 at 316–18 & Fig. 2-1; *see also* 29:AR00009434, at 9443 (Alternatives Analysis conducted in coordination with FTA). Public outreach was extensive and included over 200 public meetings, as well as the dissemination of information in print and on-line. 29:AR00009551. These efforts generated thousands of public comments. 4:AR00000247, at 296; 87:AR00016601 (Scoping Report). Thus, the record amply demonstrates that the City received the necessary guidance, evaluation, and approval from the FTA, *see* 23 U.S.C. § 139(c)(3), and provided the requisite opportunities for public participation, *see id.* § 139(f)(1), (4)(A). That is all that NEPA requires in this context.

Thus, the Alternatives Analysis was properly incorporated in the DEIS and then the FEIS. *See* 23 C.F.R. § 771.111(a)(2) (local planning analysis may be incorporated in environmental review documents under, *inter alia*, 23 C.F.R. § 450.318); *Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203, 1212 (11th Cir. 2012) (local planning documents may be incorporated in EIS

despite lack of FTA participation in their preparation); *see also* 23 C.F.R. Part 450 App. A. In this case, the public was afforded the opportunity both to provide input into the Alternatives Analysis and to comment on the results of the Alternatives Analysis. *See* 87:AR00016601 (Scoping Report); 957:AR00068621, at 68623 (Summary of City Council Hearings). As explained above, both SAFETEA–LU and the DOT NEPA regulations allow the DOT agencies to adopt a State or local Alternatives Analysis provided there was public input. *See* 23 U.S.C. § 139(f)(1), (4) ("opportunity for involvement"), 23 C.F.R. § 450.318(a), (d) (Alternatives Analysis may be incorporated in NEPA document consistent with, *inter alia*, 23 C.F.R. Part 771); 23 C.F.R. § 771.111(a)(2) (incorporation of transportation planning documents).

2. Defendants' "Purpose and Need" Statement was Adequate

Courts have "afforded agencies considerable discretion to define the purpose and need of a project." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998). Accordingly, a statement of purpose and need will be upheld if it is reasonable. *See Westlands Water Dist. v. Dept. of the Interior*, 376 F.3d 853, 866–68 (9th Cir. 2004) (upholding EIS where the preparers did not arbitrarily or capriciously narrow the scope of the purpose and need); *Citizens Against Burlington*, 938 F.2d at 196 ("We uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable"). Where the

proponent of a project is not a federal agency, a purpose and need statement will be upheld if it addresses the goals of the federal agency approving the action and congressional directives that inform that approval, in addition to the needs of the project proponent. *See Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010); *Citizens Against Burlington*, 938 F.2d at 196.

Here, the purpose and need statement was informed both by local needs and by federal statutory requirements. It recites the need to improve mobility, reliability, access to planned development, and transportation equity. 4:AR00000247, at 312. Those goals are fully in accord with federal policy as set forth in the New Starts program. *See* 49 U.S.C. § 5301. The statute authorizing New Starts specifically recites that

> [i]t is in the interest of the United States, including its economic interest, to foster the development and revitalization of public transportation systems that —
> (1) maximize the safe, secure, and efficient mobility of individuals;
> (2) minimize environmental impacts; and
> (3) minimize transportation-related fuel consumption and reliance on foreign oil.

Id. at 5301(a).

The Project's framing of its purpose and need did not unreasonably constrain the evaluation of reasonable alternatives. *See Westlands Water Dist.*, 376 F.3d at 866. As described above, the Alternatives Analysis considered a wide range of transportation modes, technologies, and alignments. Only after that detailed

analysis did the EIS focus on four alternatives: the "No Build" Alternative and three rail alignments. And as explained in the preceding Section, both NEPA and SAFETEA–LU expressly allow for an EIS to adopt a preliminary alternatives analysis and to carry forward for further analysis a much more focused set of alternatives. Finally, as explained further below, the alternatives that Plaintiffs seize upon as having been prematurely discarded fail on their own merits.

3. Defendants Properly Considered Potential Alternatives

a) Managed Lane Alternative

Clearly, some of the Plaintiffs would prefer that the City address automobile congestion by adding freeway capacity for motorists who can afford to pay tolls. But the Defendants' rejection of that policy preference does not by any means amount to "arbitrary and capricious" action that may be redressed in federal court under the APA, 5 U.S.C. § 706.

The MLA was rejected because it failed to compete with the fixed guideway system under a number of parameters, including the ability to serve transit markets, reduce transit travel times, reduce road congestion, and improve travel time reliability. 29:AR00009434, at 9516 (Table 3-14), 9547 (Table 6-3). Plaintiffs nevertheless insist that the Defendants did not give the MLA a fair evaluation, but those claims amount to no more than a restatement of their policy preferences and argument why the Defendants should adopt a similar preference. In any event,

Plaintiffs seriously overstate their case.

Nothing in the documents Plaintiffs cite calls into question the Defendants' conclusions that the MLA, no matter how configured, would not lessen transit unreliability or reduce transit times as well as a fixed guideway system.[21] What Plaintiffs offer instead are a series of methodological disputes. Pl. Opp. at 91–93. But agencies may rely upon the reasonable opinions of their own experts, "even if, as an original matter, a court might find contrary views more persuasive." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

b) Alternative Technologies

As discussed above, the Defendants considered both public and industry comment on five different rail technologies. There was nothing inappropriate about that effort as a means of refining a locally preferred alternative, consistent with applicable law. *See* 23 U.S.C. § 139(f)(4)(D) (detailed development of preferred alternative); 49 U.S.C. § 5309(a) (1)(C), (D) (selection and adoption of locally preferred alternative). Plaintiffs counter that the Defendants failed to give

[21] For example, even if the MLA employs buses and vanpools, those vehicles will need to use City streets prior to entering, and upon exiting, the managed lanes. 230:AR00049484, at 49532–35, 49541–46 (Alternatives Analysis: Detailed Definition of Alternatives).

due consideration to putative environmental advantages of alternative technologies, Pl. Opp. at 94–95, but the only potential environmental benefit they are able to identify is a suggestion that MAGLEV (magnetic levitation) may be quieter than steel on steel, *id*. at 95 n.57. But even there, Plaintiffs fail to prove their point. The cited portion of the administrative record merely reports SELs at 50 feet for various technologies. 109:AR00022575, at 22682 (Table 6-3). As the report notes, one must then "convert from these reference SELs to noise exposure based on operating conditions and parameters such as train consists *[sic]*, speed, and number of trains per hour." *Id*. at 22682. The report then presents four pages of equations that are needed to calculate that conversion. *Id*. at 22682–85. The report does not conclude that any MAGLEV system, operated in any fashion, is quieter than any steel-on-steel system.

c) Alternative Alignments

Plaintiffs claim that the Defendants failed to consider other possible Project alignments, focusing however only upon concerns raised by *other* parties and otherwise not shared by any of these Plaintiffs. Pl. Opp. at 96–98. Leaving aside the Plaintiffs' lack of standing to champion issues of concern only to occupants of the Federal Building, *see Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (plaintiff must assert his own rights); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (same), the Plaintiffs fail to rebut the Defendants' arguments that they considered other

possible alignments, but rejected them as posing both engineering difficulties and greater environmental impacts. 5:AR00000855, at 937–38; *see* Fed. Mem. at 72–74. There is no suggestion that any alternative was rejected merely because it would have required City Council action, and Plaintiffs offer no competent evidence to the contrary. *See* Pl. Opp. at 97–98.

4. Defendants Properly Considered Potential Environmental Effects

a) Direct Effects from Construction

Plaintiffs offer the make-weight argument that the FEIS failed to consider potential air pollution impacts from the fabrication and installation of concrete components of the guideway or from the transportation of materials for construction. Pl. Opp. at 99–100. If Plaintiffs thought that analysis of these non-issues was so important, they should have alerted the Defendants to their concerns during the NEPA process, which Plaintiffs acknowledge they failed to do. *Id.* at 100. Accordingly, Plaintiffs have waived those claims. *See U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

Plaintiffs counter that the City's "fabrication facility" for concrete components to be used in the guideway was not disclosed until the ROD, but the ROD, Appendix D, merely provides the location of the casting yard that will be used. 3:AR00000030, at 246. Actual construction impacts, including fugitive dust from

construction activities and vehicle emissions, were discussed first in the DEIS, 17:AR00007223, at 7535, and then in the FEIS, 4:AR00000247, at 645. Accordingly, not only have Plaintiffs waived any claim that those discussions were inadequate, but their claim fails on the merits: the Defendants *did* consider construction-related impacts on air quality. While it is true that the FEIS did not compare any estimated increase in air emissions from the transportation of materials for the guideway from remote locations with projected emissions from the transportation of materials for other potential alternatives, NEPA does not require agencies to engage in that kind of speculative analysis. Rather, "[a] reasonably thorough discussion of the *significant* aspects of the probable environmental consequences is all that is required by an EIS[, and a]n EIS need not discuss remote and highly speculative consequences." *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1089–90 (9th Cir. 2004) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)) (emphasis added).

b) Indirect and Cumulative Effects

Plaintiffs incorrectly assert that the purpose of the Project is to "induce" or "promote" growth. Pl. Opp. at 100–01. As explained above, that is simply incorrect; the Project's purpose is to move people to destinations in downtown Honolulu efficiently and fairly. To the extent that it is relevant, the potential

distribution of existing populations within and outside the study corridor, and specifically around transit centers, is addressed in the FEIS as an indirect effect of the Project, under 40 C.F.R. § 1502.16(b). 4:AR00000247, at 656–60.

Plaintiffs also repeat their charge that the FEIS did not sufficiently address amorphous "environmental impacts" in areas where the Project would supposedly induce growth. Pl. Opp. at 100. But the FEIS did address the Project's potential impacts on land use, including associated environmental effects, as part of its cumulative effects analysis under 40 C.F.R. § 1508.27(b)(7). NEPA does not require more. *Laguna Greenbelt*, 42 F.3d at 525–26.

5. Defendants Did Not Improperly Segment the Project

Plaintiffs argue that by not fully analyzing future extensions of the Project in the current FEIS, the Defendants improperly "segmented" the Project in contravention of 40 C.F.R. § 1508.25(a)(1). Pl. Opp. at 101–05. The Defendants did not "segment" the Project. Rather, they complied both with NEPA's implementing regulations and DOT's own regulations governing NEPA compliance. 23 C.F.R § 771.111(f).

DOT's NEPA regulations require that a proposed action have "independent utility," meaning that it "be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made," and that it "connect logical termini and be of sufficient length to address environmental matters on a

broad scope." 23 C.F.R. § 771.111(f)(1), (2); *see Sensible Traffic Alternatives and Resources, Ltd. v. FTA*, 307 F. Supp. 2d 1149, 1168 (D. Haw. 2004). The proposed 20-mile route for the Project, connecting East Kapolei with the Ala Moana Center, certainly has independent utility and connects logical termini. *See Daly v. Volpe*, 514 F.2d 1106, 1110–11 (9th Cir. 1975) (approving EIS evaluating 7-mile section of Interstate highway).[22]

Similarly, under the generally applicable NEPA regulations, two or more actions are "connected" if they are "closely related," 40 C.F.R. § 1508.25(a)(1), meaning that they either "[a]utomatically trigger other actions which may require environmental impact statements," or "[c]annot or will not proceed unless other actions are taken previously or simultaneously," or "[a]re interdependent parts of a larger action and depend on the larger action for their justification," *id*.

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[22] Under 23 C.F.R. § 771.111(f)(3), a proposed action may not "restrict consideration of alternatives for other reasonably foreseeable transportation improvements." Plaintiffs' only support for their view that the Project did so is *Named Individual Members of San Antonio Conserv. Soc'y v. Tex. Dep't of Transp.*, 446 F.2d 1013 (5th Cir. 1971), *see* Pl. Opp. at 103 & n.59, is a case in which the defendants divided a proposed highway project into three pieces during the litigation and in response to opposition, *see* 446 F.2d at 1017–18. There is no credible claim here that the Project at issue does not stand on its own feet as a legitimate action. In any event, *San Antonio* does not support the claim that the Project here has restricted consideration of other alternatives: clearly numerous transportation alternatives were considered and may be further considered in the future for those areas to which the guideway (or may not) connect later on.

§ 1508.25(a)(1)(i)–(iii). In resolving that question, the Ninth Circuit applies an "independent utility" test, which asks whether "each of two projects would have taken place with or without the other and thus had 'independent utility,'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). Under *Hankins*, the test is met when only *one* of the projects would go forward without the other. *Id*. "When *one* of the projects might reasonably have been completed without the existence of the other, the *two* projects have independent utility and are not 'connected' for NEPA's purposes." *Hankins*, 456 F.3d at 969.[23] As a result, even if the Plaintiffs were correct that the as-yet-unplanned Project extensions did *not* have independent utility, it is undeniable that the Project itself does. 3:AR00000030, at 37–38; 4:AR00000247, at 791. Therefore, the Defendants did not improperly "segment" the Project from possible future extensions. *See Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975) (applying independent utility analysis to highway segment); *Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1483–84 (10th Cir. 1990) (highway projects may be analyzed separately and are not "connected" actions merely because the highways themselves "connect").

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[23] In contrast, *Thomas v. Peterson*, 753 F.2d 754, 758–59 (9th Cir. 1985), cited in Pl. Opp. at 101, involved two projects, *neither of which* the court found had "independent utility."

To the extent it was necessary to discuss the potential impacts of future extensions to the Project, the FEIS did so in the context of its cumulative impacts analysis. In that context, the FEIS addressed the potential effects of the extensions on streets, transit, and highways, 4:AR00000247, at 439–40, as well as other environmental impacts and environmental justice concerns, *id*. at 670–73.

In sum, Defendants complied with NEPA and are entitled to summary judgment.

C. Defendants Complied with the National Historic Preservation Act

Plaintiffs insist that the Project will adversely affect unidentified "historic resources" other than the Chinatown and Merchant Street Historic Districts, particularly through the potential for future development near transit centers, and that the Programmatic Agreement provides for no corresponding mitigation measures. Pl. Opp. at 105–08. One is left to guess what Plaintiffs may be referring to; certainly they have not carried their burden to demonstrate that the Defendants' decision to approve the Project was arbitrary and capricious. In fact, the Mitigation Monitoring Plan accompanying the ROD enumerates mitigation measures to address potential impacts to historic properties along the Project corridor, including TCPs, 3:AR0000030, at 60–62, 74–82 (referencing Programmatic Agreement requirements), and to address visual and other concerns, *id*. at 50–54. Such efforts are further set forth in the Programmatic Agreement. *Id*. at

91–110. The Programmatic Agreement properly reflects the Defendants' compliance with the NHPA.

D. Plaintiffs Have Not Demonstrated Any Entitlement to Injunctive Relief

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, ___ U.S. ___, 130 S. Ct. 2743, 2761 (2010). Plaintiffs have not made that showing; at a minimum further briefing on this issue would be necessary.

II. CONCLUSION

For the reasons set forth above, the Federal Defendants respectfully urge the Court to grant their motion for summary judgment and deny the Plaintiffs' motion for summary judgment.

Respectfully submitted,

DATED: July 13, 2012

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.5

I hereby certify that the foregoing document was prepared with Microsoft Word using Times New Roman 14-point proportionally spaced font. The document contains 10,497 words, including headings, quotations, and footnotes, but excluding the caption pages, tables, this Certificate of Compliance, and the Certificate of Service. That word count was given by the word-count feature of the Microsoft Word program with which this document was created.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 13, 2012

/s/*David B. Glazer*
David B. Glazer

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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