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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

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

Defendants.

Civil No: 11-00307 AWT

MEMORANDUM (1) IN SUPPORT OF CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, (2) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND (3) IN RESPONSE TO MEMORANDUM OF *AMICUS CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION

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

Date Action Filed: May 12, 2011

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Time: 10 A.M.
Judge: Honorable A. Wallace Tashima

No Trial Date Set

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ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
AA or Alternatives Report	Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report
Advisory Council	Advisory Council on Historic Preservation
AIS	Archaeological Inventory Survey
Am.Br.	*Amicus Curiae* Memorandum of the National Trust for Historic Preservation
APA	Administrative Procedure Act
APE	Area of Potential Effects
AR	Administrative Record
City	City and County of Honolulu
Draft EIS	Draft Environmental Impact Statement
Final EIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
HEPA	Hawai‘i Environmental Policy Act of 1974
HOT	High Occupancy Toll
HOV	High Occupancy Vehicle

Acronym or Abbreviation	Definition
Lead Agencies	Federal Transportation Administration and the City and County of Honolulu
Makai	Toward the ocean
Mauka	Toward the mountain
MLA	Managed Lane Alternative
National Register	National Register of Historic Places
National Trust	National Trust for Historic Preservation
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOI	Notice of Intent
O‘ahu MPO	O‘ahu Metropolitan Planning Organization
OIBC	O‘ahu Island Burial Council
ORTP	O‘ahu Regional Transportation Plan 2030, as amended
Pl.Br.	Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment
PA	Programmatic Agreement
Project	Honolulu High-Capacity Transit Corridor Project

Acronym or Abbreviation	Definition
RFI	Request for Information
ROD	Record of Decision
RTP	Regional Transportation Plan
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
Section 106	16 U.S.C. § 470
Section 4(f) or 4(f)	49 U.S.C. § 303
Section 4(f) Property	Land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and eligible historical sites
SHPD	Hawai‘i State Historic Preservation Division
SHPO	Hawai‘i State Historic Preservation Officer
TCPs	Traditional Cultural Properties
TOP 2025	Transportation for Oah‘u Plan
Transportation Systems Management	Improvements to existing transportation system without major capitol investments

MEMORANDUM (1) IN SUPPORT OF CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, (2) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND (3) IN RESPONSE TO MEMORANDUM OF THE *AMICUS CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION

I. INTRODUCTION

Plaintiffs seek to invalidate the Federal Transit Administration's ("FTA") approval of the Honolulu High-Capacity Transit Corridor ("Project"). Plaintiffs' goal is to kill rail as a viable method of alleviating Honolulu's serious traffic congestion problems between Ewa plain and the commercial center of Honolulu.

The 20-mile Project corridor contains over 60% of O'ahu's population and 80% of O'ahu's jobs. AR1:00000247 at 297.[1] After the Project is completed, people living, working, and traveling in the corridor will have modern and reliable transportation to areas now largely dependent on private automobiles. Access to key employment centers such as downtown Honolulu, Pearl Harbor Naval Base, and Honolulu International Airport will vastly improve.

The following figure from the Final Environmental Impact Statement ("Final EIS") documents the need for the Project.

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[1] Administrative Record ("AR") citations are to the AR volume followed by the first page of the document cited and the bates number for the pinpoint citation within the document.

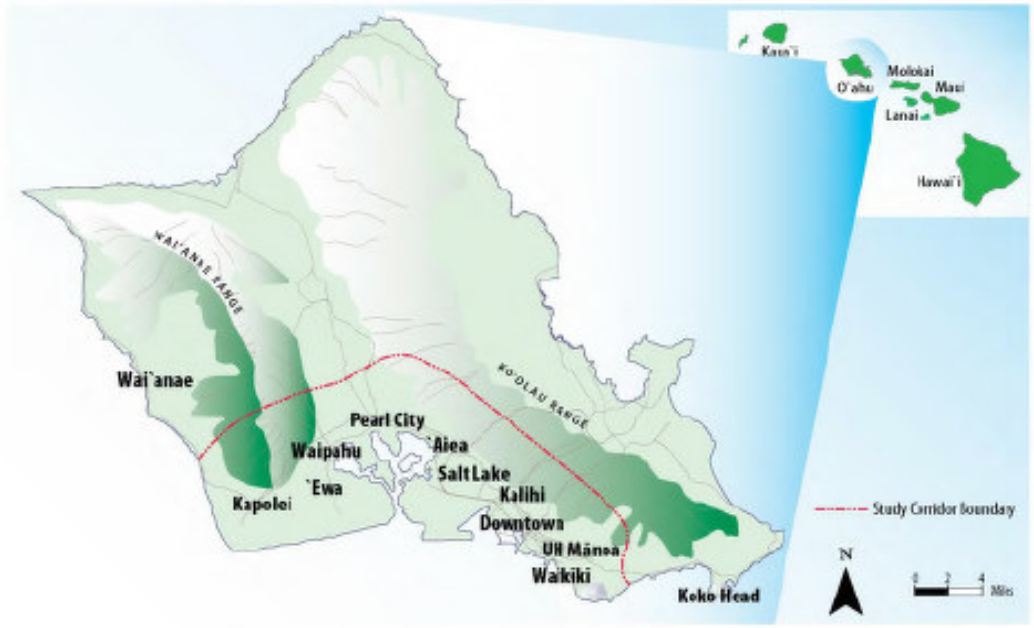
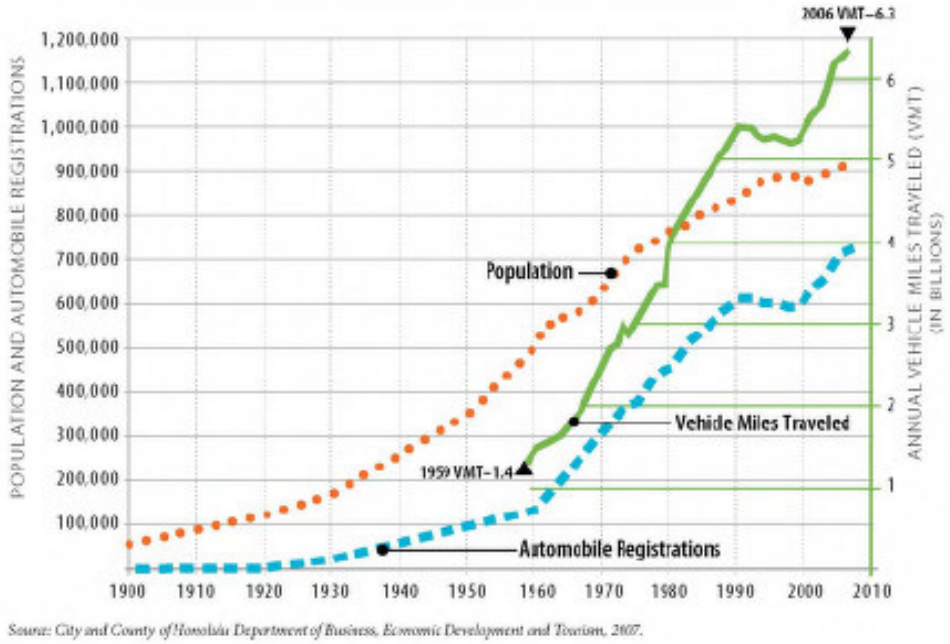


Figure 1-1 Honolulu High-Capacity Transit Corridor Project Vicinity



Source: City and County of Honolulu Department of Business, Economic Development and Tourism, 2007.

Figure 1-2 Population, Vehicle Ownership, and Vehicle Miles Traveled Trends for O'ahu

AR1:0000247 at 293.

O‘ahu’s population has increased dramatically in the last five decades, but the vehicle miles traveled over the same period (indicated by the green line) have increased even more dramatically. The reason is clear. Honolulu, Hawai‘i’s largest city and most populated county, depends primarily on the private automobile for transportation. As a result, Honolulu suffers from the worst traffic congestion in the nation, according to one authority. *See* INRIX. Inc., *INRIX Traffic Scorecard, http://scorecard.inrix.com/scorecard/* (last visited June 1, 2012); Decl. of David Miller, Ex. A.

Honolulu’s reliance on automobiles has caused a dramatic decline in mobility, increased the cost of goods and services, and imposed a burden on the economy. It also encourages longer commutes and lower density development in outlying areas contrary to the City’s land use policies.

Hawai‘i’s citizens and their elected officials have made an historic choice to develop a transportation system that provides a modern, efficient and equitable alternative to highways and the private automobile. The Project reflects a considered policy choice regarding the future of O‘ahu, based on a robust and open debate within the State’s democratic institutions, with federal government participation over several decades.

Plaintiffs personally disagree with the policy choice and political decisions made by Hawai‘i’s citizens and elected officials. One Plaintiff is a former elected official who is seeking election as the Mayor of Honolulu in order to reverse the

decision of the citizens and elected officials of Hawai'i. This, of course, is his right in a democratic society, but it is an objective to be realized in the appropriate legislative bodies. It is not the role of the courts to resolve the policy dispute underlying Plaintiffs' lawsuit. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1994) ("*Chevron*") ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .")

Having failed in their opposition to the Project in all legislative and administrative forums,[2] Plaintiffs seek to block the Project by asking this Court to second-guess technical, fact-bound, administrative determinations made by the FTA after extensive consultation with, and concurrence by, the relevant state and federal agencies. The burden is on Plaintiffs to demonstrate on the basis of the ***record as a whole*** that FTA acted arbitrarily and capriciously in approving the Project. 5 U.S.C. § 706(2)(A). Since Plaintiffs cannot satisfy this burden through a full and fair exposition of the ***whole record***, they instead resort to distortions, mischaracterizations and selected misinterpretations of discrete portions of the voluminous record. An objective review of the whole record as required by the Administrative Procedure Act ("APA"), demonstrates that FTA and the City rigorously followed the procedures required by federal law.

---

[2] Plaintiffs Cayetano, Heen, Roth and the Small Business Hawaii Entrepreneurial

II. STATEMENT OF FACTS

A. Project Description

The Project is a 20-mile elevated fixed guideway rail transit project, to be funded by dedicated local tax revenues and federal sources. AR1:00000247 at 361. It includes 21 stations and will connect Kapolei on the west side of O'ahu, with Ala Moana Center, located on the east along Honolulu's southern shore. AR1:00000030 at 37; AR1:00000247 at 252, 339. The Project provides transit access to the major employment centers, activity centers, and tourist destinations in Honolulu, including the Pearl Harbor Naval Base, Aloha Stadium, Leeward Community College, the Honolulu International Airport, Chinatown, the downtown business center, the Civic Center, the Port of Honolulu, and the Ala Moana Center. AR1:00000247 at 340-343.

With the exception of the Kapolei end of the Project, the Project alignment is located within previously developed and highly urbanized residential, industrial, and commercial areas, and most of the guideway support columns will be installed along and over already developed roadways. AR1:00000247 at 343.

The Project will operate in an exclusive elevated guideway, except for a short exclusive at-grade section near Leeward Community College, to ensure system speed and reliability and to avoid conflicts with automobile and pedestrian traffic. AR1:00000247 at 344. Similar to rail transit systems in Portland,

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Foundation did not bother to participate at all in the administrative proceedings.

Sacramento, San Francisco, San Diego, Los Angeles and many other cities in the U.S. and around the world, the trains will be industry-standard steel wheel on steel rail, electrically powered from a third-rail system. AR:00000247 at 345. The trains are capable of speeds greater than fifty miles per hour and will provide a fast, comfortable and convenient alternative to the use of private automobiles and buses on highly congested streets and highways. *Id*.

All stations will provide for level boarding. Escalators and elevators will be used to accommodate elderly and disabled passengers. AR1:00000247 at 346. Most stations will provide connections to local bus routes. Transit centers are included at the University of Hawai‘i West O‘ahu, West Loch, Pearl Highlands, and Aloha Stadium stations. AR1:00000247 at 358.

The Project has identified funding from dedicated local tax revenues and federal funding. AR1:00000247 at 777. Construction and pre-construction activities in the first and second construction phases of the western portions of the Project have begun. Construction is planned to be completed within a total of four adjacent phases. Construction is scheduled to be completed by 2018, and the Project is scheduled for full service in 2019. AR1:00000247 at 362.

B. Project History

1. The Multi-Decade Evaluation of Transportation Alternatives

The Project is the result of several decades of environmental, economic, and engineering study, including the analysis of many alternative solutions to the area’s

mobility challenges, by the City, the State of Hawai‘i, FTA, and other agencies. AR1:00000247 at 292-96. The Project reflects years of consultation and coordination with the Hawai‘i State Historic Preservation Officer ("SHPO"),[3] the federal Advisory Council on Historic Preservation ("Advisory Council"),[4] the O‘ahu Island Burial Council ("OBIC"), the National Park Service ("NPS"), the U.S. Navy, native Hawaiian organizations, historic preservation advocates, low-income advocates, environmental organizations, and many other stakeholders and interested parties. The SHPO, the Advisory Council, and the U.S. Navy have all issued approvals of the Project.

The City approved, and the Governor accepted, the Final EIS in accordance with the Hawai‘i Environmental Policy Act of 1974 (Haw. Rev. Stat. §§ 343-1 to 343-8) ("HEPA") – the state equivalent of the National Environmental Policy Act ("NEPA"). AR5:00090222. The Hawai‘i First Circuit Court rejected a separate state law challenge to the City and State approvals. *Kaleikini v. Yoshioka*, Civil

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[3] The SHPO administers the State of Hawai‘i's historic preservation program. 36 C.F.R. § 800.16(v). Haw. Rev. Stat. § 6E-5.

[4] The Advisory Council is the federal agency with the responsibility to oversee and to provide guidance and advice to other federal agencies concerning implementation of the National Historic Preservation Act. *See* 36 C.F.R. § 800.2(b).

No. 11-1-0206-11 GWBC, *appeal docketed*, No. SCAP-11-0000611 (Haw. 2012).[5]

More than any project in Hawai‘i’s history, the public, through its elected representatives and through direct votes, has expressed its support for the Project. In 2005, recognizing the need and public support for the Project, the Hawai‘i State Legislature authorized the City to levy a general excise and use tax surcharge to construct and operate a mass transit system serving O‘ahu. *See* Haw. Rev. Stat. § 46-16.8. The Honolulu City Council subsequently adopted a tax surcharge to fund the Project. AR3:00055355. Finally, the citizens of the City approved an amendment to the City Charter declaring that the City should establish a steel wheel on steel rail transit system. AR3:00055181 at 55182.

Planning for a fixed guideway transit project began in the 1960’s, with the preparation of the 1967 O‘ahu Transportation Study, and continued in the 1970’s with the preparation of preliminary engineering studies for a fixed guideway rapid transit system. AR1:00000247 at 294; AR2:00031486; AR3:00052513-54029. The City completed an environmental impact statement (“EIS”) for a fixed guideway project in 1992, but failed to obtain approval of necessary funding, rendering it an infeasible alternative at the time. AR1:00000247 at 294;

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[5] In *Kaleikini* case, a Native Hawaiian cultural descendant of the Kaka‘ako area sought to enjoin the Project on grounds that an Archaeological Inventory Survey (“AIS”) had not been completed for the entire Project corridor before the approvals

AR1:00013306. In 1998, after extensive public involvement, the City developed a mobility concept plan which identified the need for highway and transit improvements. In 2000, the City completed an EIS to improve bus transit operations, including a bus rapid transit system. AR1:00000247 at 294; AR2:00047258.

In 2004, the O'ahu Metropolitan Planning Organization[6] (O'ahu MPO") "initiated an update to the Regional Transportation Plan ("RTP"), as required by federal law. 49 U.S.C. § 5303; AR1:00000247 at 294. The RTP evaluated a range of alternative transportation improvements, including a fixed guideway system in various corridors and alternatives to a fixed guideway system. AR1:00000247 at 295. After extensive public involvement, the O'ahu MPO approved the RTP, including as a "key component a fixed guideway that will serve the H-1 travel corridor." AR1:00000247 at 295; *see also* AR3:00050745 at 50747; AR2:00030423 at 30428 (Amended ORTP). The Amended ORTP states that the "proposed fixed guideway from East Kapolei to Ala Moana will become the backbone of the transit system – connecting major employment and residential centers to each other and to downtown Honolulu." AR2:00030423 at 30428.

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for the Project, which she alleged violated Hawai'i law.

[6] The O'hau Metropolitan Planning Organization includes City and State elected officials and the Directors of the Hawai'i Department of Transportation and the City Department of Transportation Services. AR3:00050745 at 50771.

2. FTA Initiation of the NEPA Process; Alternatives Analysis

In December 2005, FTA and the City (collectively, "Lead Agencies") published a Notice of Intent ("NOI") to prepare an EIS and Alternatives Analysis ("AA") for the implementation of transit improvements that potentially included high-capacity transit service in a 25-mile travel corridor between Kapolei and the University of Hawai'i at Manoa and Waikiki. AR1:00009700. Federal law requires the preparation of an AA as the first step in the NEPA process for federally-funded transit projects. 49 U.S.C. §§ 5309(a)(1), 5309(e)(3); *see also* FTA, *Linking the Transportation Planning and National Environmental Policy Act (NEPA) Processes* (23 C.F.R. pt. 450, Appendix A, Question 12).

The NOI asked the public to comment on the proposed alternatives, the Project's purpose and need, and the range of issues in a series of scoping meetings in December 2005. AR1:00009700; AR1:00008108 at 8165. The information obtained through scoping led to the preparation of the AA. Specifically, in response to comments by Honolulutraffic.com, an additional operational variation was added to the "managed lane alternative" for consideration during the AA. AR1:00005600 at 5920-5921; AR1:00009556 at 9564-9565.

The AA evaluated four alternatives to address the need for improved transportation in the study corridor: (1) no build; (2) improvements to the existing transportation system but without major capital investments ("Transportation Systems Management"); (3) managed lane alternatives ("MLA") (express buses

operating in managed lanes with tolls charged to single occupant vehicles), and (4) a fixed guideway transit system. AR1:00009434 at 9444. On November 1, 2006, the Lead Agencies issued the "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report" ("Alternatives Report"). AR1:00009434. After review of the Alternatives Report and consideration of nearly 3,000 comments received from the public, the City Council selected the Fixed Guideway Transit System Alternative as the "Locally Preferred Alternative" on December 22, 2006. AR1:00000247 at 296; AR3:00055302.

3. The Scoping Process. Circulation of Draft EIS and Evaluation of Alignment Alternatives

In 2007, after the preparation of the AA, the Lead Agencies issued a second "[NOI] to Prepare an Environmental Impact Statement." AR1:00009696. All interested individuals and organizations, as well as federal, state and local agencies, were invited to comment on the purpose and need to be addressed by a fixed guideway transit system from Kapolei to University of Hawai'i at Manoa with a branch to Waikiki. The alternatives included the modes and technologies to be evaluated and the alignments and termination points. AR1:00009696-9699. The NOI defined the No Build Alternative, described two Build Alternatives (a fixed guideway transit alternative via Salt Lake Boulevard and a second alternative via the Airport and Salt Lake Boulevard), requested comments on five transit technologies, and provided that other reasonable alternatives, consistent with the Project's purpose and need, could be added to the Draft Environmental Impact

Statement ("Draft EIS"). AR1:00009696 at 9698-9699. A third alignment alternative, serving the Airport without an alignment following Salt Lake Boulevard, was identified during the scoping process by the Hawai'i Department of Transportation. AR1:00017157 at 17173-17175. The Lead Agencies responded to the comments submitted during the scoping process. AR1:00017157 at 17173-17175.

The Lead Agencies issued the Draft EIS for the Project in November 2008. AR1:00007223, AR1:00009721. On November 21, 2008, a notice of availability of the Draft EIS was published in the *Federal Register*, notifying the public of a 45-day comment period. AR1:0009694; 73 Fed. Reg. 70,640 (Nov. 21, 2008). The public comment period was subsequently extended to February 6, 2009. AR1:00009690; 73 Fed. Reg. 77,688 (Dec. 19, 2008). The Lead Agencies conducted five noticed public hearings on the Draft EIS in December 2008. AR1:00000247 at 788. In addition, an extensive public outreach program informed the public of the Project's environmental impacts and solicited public comments on the Draft EIS. AR1:00000247 at 781-787; AR1:00005600-7060.

In addition to the alternatives evaluated in the AA, the Draft EIS evaluated the No Build Alternative and three alternative project alignments (an alignment between Kapolei and the Ala Moana Center via Salt Lake Boulevard, an alternative alignment via the Airport, and a combined alternative via Salt Lake Boulevard and the Airport). AR1:00000247 at 321-331, 337.

The Draft EIS identified ten publicly owned parks and recreation sites adjacent to the Project that were subject to evaluation under 49 U.S.C. § 303 ("Section 4(f)"). Section 4(f) requires FTA to make certain findings if a project will "use" public parklands, recreational lands, wildlife refuges, or historic sites of national, state, or local significance. AR1:00007223 at 7558. The Draft EIS also evaluated eighty-four historic resources under Section 4(f) within the Project's "Area of Potential Effects" ("APE"). AR1:00007223 at 7557-7563.

4. Significant Public Involvement in the Project

The Lead Agencies provided extensive opportunities for public comment and involvement during the evaluation of the Project and Project alternatives. AR1:00000247 at 781. The Lead Agencies conducted five noticed public hearings on the Draft EIS in December 2008, and hundreds of informal meetings and public presentations. AR1:00000247 at 781-789. Over the course of the five-year NEPA process, the Lead Agencies considered more than 3,000 separate comments in over 600 letters or e-mails. AR1:00000247 at 781, 789; AR1:00000855; AR1:00004460; AR1:00007768; AR1:00008108. The Lead Agencies prepared responses to every comment on the Draft EIS. AR1:00000855; AR1:00004077. Consistent with the vote of the electorate approving the amendment to the City Charter, the overwhelming majority of comments expressed support for the Project.

5. Inter-Agency Coordination and the Section 4(f) and National Historic Preservation Act Consultation Process

The Lead Agencies committed much of the five-year NEPA, Section 4(f) and National Historic Preservation Act ("NHPA") process to consultation and coordination with the many local, state and federal agencies with interest in the Project. The Lead Agencies consulted with twenty-six state and federal agencies. AR1:00000247 at 783; AR1:00005600.

In addition, the Lead Agencies conducted extensive consultations with over two dozen agencies and organizations concerning potential impacts to parks, historic properties, and cultural resources. AR1:00000247 at 783-784. These organizations included:

- Advisory Council;
- United States Navy;
- Historic Hawai‘i Foundation;
- National Park Service;
- National Trust for Historic Preservation ("National Trust");
- University of Hawai‘i Historic Preservation Certificate Program;
- American Institute of Architects;
- Hawai‘i Community Development Authority;
- Office of Hawaiian Affairs;
- OIBC;

- Hui Malama I Na Kupuna O Hawai‘i Nei;
- Royal Order of Kamehameha;
- The Ahahui Ka‘ahumanu;
- The Hale O Na Ali‘i O Hawai‘i;
- The Daughters and Sons of Hawaiian Warriors; and
- Association of Hawaiian Civic Clubs, and 15 individual civic clubs.

AR1:00000247 at 784.

The Lead Agencies invited all consulting parties to participate in the negotiation of a Programmatic Agreement ("PA") to document the Lead Agencies' commitments to the protection and mitigation of potential impacts on historic and cultural resources in compliance with Section 4(f) and Section 106 of the NHPA. 49 U.S.C. § 303; 16 U.S.C. § 470.

6. Publication of Final Environmental Impact Statement

In June 2010, the Lead Agencies published a notice of availability of the Final EIS which was in the *Federal Register.* AR1:00009689; 75 Fed. Reg. 36,386 (June 25, 2010). The Final EIS included a revised evaluation of the impacts of the Project on Section 4(f) resources. AR1:00000247 at 680-752. The Final EIS documents the extensive consultation by the Lead Agencies with regard to potential impacts to Section 4(f) resources . AR1:00000247 at 783-785, AR1:00000030–43.

7. Issuance of Record of Decision and Programmatic Agreement

After many years of analysis of the Project and of many Project alternatives, the FTA approved the Project and issued the Record of Decision ("ROD") on January 18, 2011. AR1:00000030. The FTA, the City, the Advisory Council, the SHPO and the U.S. Navy entered into the PA, and the FTA incorporated the PA into its ROD. AR1:00000030–43; AR1:00000030 at 83–228.

III. STANDARD OF REVIEW

Plaintiffs' claims based on NEPA, Section 4(f), and the NHPA are reviewed under the standards of the APA. An agency action may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, [or] unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2). *Morongo Band of Mission Indians v. FAA*, 101 F.3d 569, 578 (9th Cir. 1998).

In its seminal *en banc* decision in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), the Ninth Circuit emphasized that the arbitrary and capricious standard "is narrow, and [we do] not substitute [our] judgment for that of the agency." *Id.* at 987. Rather, the courts "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise.'" *Id.* (citation omitted).

Under the "arbitrary or capricious" standard the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park,* Inc. v. Volpe, 401 U.S. 402 (1971)). While this inquiry must be thorough, the standard of review is narrow and highly deferential. The agency's decision is "entitled to a presumption of regularity," and a court cannot substitute its judgment for that of the agency. *Citizens to Pres. Overton Park, Inc.,* 401 U.S. at 415-16.

An agency's decision is supported by "substantial evidence" where the agency has relied on "relevant evidence a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [the agency's] findings." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). As long as there is adequate support in the record for the agency's decision, a court will not second-guess the agency. *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 810-11 (9th Cir. 1980).

Courts must conduct a "particularly deferential review of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Lands Council*, 537 F.3d at 993 (citing *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)).

IV. THE FTA COMPLIED WITH SECTION 4(f)

A. Section 4(f) and its Relation to Section 106 of the National Historic Preservation Act

Section 4(f) provides that FTA may not approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites ("Section 4(f) Property") unless it finds that: (1) there is no feasible and prudent alternative to the use of the land; and (2) the action includes all possible planning to minimize harm to the property resulting from the use. 49 U.S.C. § 303(c). A decision as to whether an activity will "use" land requires an assessment of the magnitude of direct, temporary, and "constructive" uses of land. *See* 23 C.F.R. §§ 774.17 (definition of "use") and 774.15 (defining "constructive use").

Federal law inextricably links Section 4(f) to Section 106 of the NHPA. Section 4(f) only applies to certain "historic" resources - sites that are either ***listed on*** the National Register of Historic Places ("National Register") or that have been determined to be ***eligible for inclusion on*** the National Register in accordance with the NHPA. 23 C.F.R. § 774.17 (Definition of "Historic site"), 774.11(d)(1) (Applicability). No archaeological sites – including burials or cultural properties - are subject to Section 4(f) unless the site is first determined to be "eligible for inclusion on the National Register." 36 C.F.R. § 800.16(l)(2). The authority to determine whether a historic site is "eligible for inclusion on" the National

Register is made pursuant to these NHPA regulations and vested in the lead federal agency (here, FTA), in consultation with the SHPO. 36 C.F.R. § 800.4(c)(2).

The Section 106 mitigation process also has been synchronized with the Section 4(f) process through the requirement to engage in "all possible planning to minimize harm." 49 U.S.C. § 303(c). FTA's Section 4(f) regulations define "all possible planning to minimize harm" as follows:

> With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 C.F.R. part 800 [regulations governing the Section 106 process].

23 C.F.R. § 774.17. Under FTA's regulations, therefore, the mitigation agreed to in the NHPA Section 106 process generally constitutes "all possible planning to minimize harm," as required by Section 4(f).

This close connection between the two statutes is no accident. Congress enacted the NHPA in the same year that it enacted Section 4(f). Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966). The reliance that FTA places on the Section 106 process and determinations made under the Advisory Council's regulation extend back to at least 1980, when FTA first jointly issued Section 4(f) regulations with the Federal Highway Administration ("FHWA"). *See* 45 Fed. Reg. 71,968 (Oct. 30, 1980). In 2005, Congress explicitly connected Section 4(f) and Section 106 in 2005, when SAFETEA-LU amended Section 4(f) to provide for a *de minimis*

exception to Section 4(f). 49 U.S.C. § 303(d). This *de minimis* exception relies on findings made during the Section 106 process (49 U.S.C. § 303(d)(2)). Congress's adoption of the *de minimis* exception incorporates the linkage between the two statutes that had long been agency practice.

The consultations that underpin Section 106, as well as Section 4(f) as it relates to historical resources, are defined by the Advisory Council. The Advisory Council has established regulations and policies governing how federal agencies should address potential impacts on historic, archaeological and cultural sites. *See* 36 C.F.R. §§ 800-800.16. FTA follows these regulations and guidance in its evaluation of potential Section 4(f) historic, archaeological and cultural sites and accordingly conducted "all possible planning to minimize harm" as required by Section 4(f). AR1:00000030 at 41-42; AR1:00000247 at 253, 682-683; AR3:00062135-62136; AR3:00062142 at 62143.

B. Standard of Review

In reviewing FTA's 4(f) decision under the arbitrary and capricious standard, the Court "must satisfy itself that the Secretary evaluated the . . . project with the mandate of [Section] 4(f) clearly in mind." *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982).

As directed by Congress in its recent amendments to Section 4(f), FTA adopted extensive regulations to implement Section 4(f). 23 C.F.R. §§ 774.1 – 774.17. Where, as here, the agency's decision faithfully applies regulations

adopted by the agency under the APA, the Court is required to defer to the agency's interpretation of the statute. *Chevron U.S.A. Inc.*, 467 U.S. at 866.

The determination of whether a transportation project will "use" a Section 4(f) Property necessarily involves the consideration of technical issues. Where there are disagreements on technical issues, it is within the agency's discretion to rely on the reasonable views of its own experts. *See Marsh*, 490 U.S. at 378; *Lands Council,* 537 F.3d at 987. The requirement for deference to the agency applies to this case, where two agencies with special expertise and authority regarding cultural resource issues – the Advisory Council and the SHPO – concurred in FTA's analytical methodology and findings. *Citizens for the Scenic River Bridge v. Skinner*, 803 F.Supp. 1325, 1338 (D. Md. 1991) (not arbitrary and capricious for highway agency to rely on opinions of state historic preservation officer that bridge would not have a negative effect on U.S. Naval Academy). AR1:00000030 at 83-123.

C. The FTA Complied With Section 4(f) In Its Evaluation of Unknown Burial Sites and Other Traditional Cultural Properties

Plaintiffs and Amicus National Trust incorrectly state that the FTA deferred Section 4(f) compliance until after issuance of the ROD. Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pl.Br.") at 14-17; *Amicus Curiae* Memorandum ("Am.Br.") at 4-5. They further contend that the requirement of "all possible planning to minimize harm" was not met – despite the

fact that the Advisory Council and the SHPO concurred with FTA's approach. *See* 23 C.F.R. § 774.17 ("All possible planning" for Section 4(f) incorporates Section 106 planning and consultation). The record shows, however, that FTA in fact studied the entire Project corridor for potential burial and other archaeological sites. AR2:00037676-37882.

No amount of pre-construction sampling or survey can reveal every resource underlying a twenty-mile rail corridor. The Final EIS disclosed the potential risk for discovery of potential burials that may be encountered during construction. AR1:00000247 at 691-620. To handle that eventuality while avoiding possible disturbance of burials in compliance with Hawaii state law, the Advisory Council and the SHPO approved measures requiring further ground penetrating, pre-construction sampling through a further AIS review prior to all four construction phases. *Id*. Since the highest risk of encountering unknown burials is within construction Phase 4 (in the Kaka'ako area), the sampling methodology requires 100% sampling in areas where the Project would touch ground. Archaeological survey plans for each construction phase have been approved by the SHPO. These additional surveys have been or will be completed within the construction phases well before any ground disturbing work can or will occur in the area.

If additional surveys identify a previously unidentified burial or other archaeological resources protected by state or federal law, then guideway columns will be adjusted either to straddle the site with wide supports or to adjust the span

lengths along the alignment so as to avoid the site. This ensures no Section 4(f) "use" because all burials will be preserved in place.

1. FTA Evaluated the Entire Corridor Prior to its 4(f) Approval

FTA evaluated the Project's potential use of archaeological and traditional cultural properties ("TCPs"), and appropriately incorporated the studies and consultations conducted under Section 106 of the NHPA. 23 C.F.R. § 774.11(e); AR2:00037676-37882; AR2:00037883-38097; AR2:00038098-38350. Throughout this complex process, the Lead Agencies consulted extensively with interested public and private parties. These consultations are documented in the detailed minutes of dozens of meetings between the FTA and the consulting parties[7] and in the formal PA entered into by FTA, the City, the Advisory Council, the SHPO and the U.S. Navy. AR1:00000030 at 83-123.

In addition, potential impacts were discussed in the Draft and Final EISs, and thus were available to the public for comment. AR1:00000247 at 617-637, 680-752; AR1:00007223 at 7516-7529, 7555-7594. All comments were addressed

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[7] AR3:00060533; AR3:00060792; AR3:00060946; AR3:00060983; AR3:00061016; AR3:00061027; AR3:00061060; AR3:00061069; AR3:00061084; AR3:00061135; AR3:00061151; AR3:00061324; AR3:00061355; AR3:00061419; AR3:00061465; AR3:00061724; AR3:00061754; AR3:00061769; AR3:00061771; AR3:00062128; AR3:00062132; AR3:00062137; AR3:00062172; AR3:00062174; AR3:00062177; AR3:00062184; AR3:00062190; AR3:00062191; AR3:00062193; AR3:00062767; AR3:00062902.

in the Final EIS and the ROD. AR1:00000030 at 229-246; AR1:00000855-4076; AR3:00051287-51462.

Plaintiffs' Section 4(f) argument relies on isolated comments from the record, ignoring a mountain of other evidence that documents FTA's careful and thorough compliance with Section 4(f) and the NHPA. Plaintiffs' claim that FTA deferred or failed to evaluate the Project's potential impacts on cultural resources is simply false. An ***objective*** evaluation of the ***whole record*** reveals that the Lead Agencies conducted a comprehensive evaluation of cultural and other historic resources (including potential Native Hawaiian burials). *See*, *e.g.*, AR2:00037676-37882; AR2:00037883-38097; AR2:00038098-38350.

The evaluation of potential historic resources (including 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 AA required by Congress for all "New Starts" projects. AR2:00037676 at 37709-37712; AR2:00037883 at 37907-37908; AR2:00038098 at 38124; *see* 49 U.S.C. § 5309(c)(1). The "Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Archaeological Technical Report" synthesized information from U.S. Department of Agriculture soils survey data, which provided insight as to the possible location of archaeological and burial materials; previous archaeological investigation results; previously recorded

archaeological resources; historic land records; and previously recorded burial locations. AR2:00037676 at 37709-37712.

Building on the cultural resources analysis conducted as part of the AA, FTA and the City prepared the Archaeological Resources Technical Report, dated August 15, 2008 ("Technical Report"), for the ***entire Project***. AR2:00037676-37882.

The extensive archaeological studies documented in the Technical Report include:

- A comprehensive literature search;
- Consultations with cultural and ethnic experts;
- The significant amount of archaeological research within the study corridor that has been 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.

AR1:00000247 at 619; AR2:00037676-37882.

The Technical Report contains a detailed discussion of the "Affected Environment" for each sub-area of the Project, which includes an identification of all known resources. AR2:00037676 at 37714-37805.

It further discusses the Project's potential consequences, including discussion of any potential impacts to known burials. AR2:00037676 at 37806-37821. The Technical Report acknowledges the possibility of unknown burials, noting that, for most of the study area, any such potential resources are buried beneath urban development. AR2:00037676 at 37806. The Technical Report concluded that, with the exception of direct, construction-related impacts, the Project's construction would pose no additional impacts to any burials beyond existing conditions. *Id.*

To identify the APE for the Project, the Lead Agencies coordinated with SHPO. AR1:00000247 at 784-785; AR3:00059401-59404; AR3:00061744-61746; AR3:00061747-61750; *see also* 36 C.F.R. § 800.4(b) and 23 C.F.R. § 774.11(e). The APE for below-ground archaeological resources was defined to include all areas of direct ground disturbance. AR1:00000247 at 619; AR2:00037676 at 37708; AR3:00061744-61746; AR3:00061747-61750 (SHPO concurrence in APE).

As part of the environmental studies for the Draft EIS, the Lead Agencies also prepared the Cultural Resources Technical Report. AR2:00038098-38350. The Cultural Resources Technical Report identified cultural resources, practices, and beliefs that may be affected by the Project and potential mitigation measures. AR2:00038098 at 38107, 38194-38199.

In addition to this comprehensive work leading up to Section 4(f) determination, the FTA, the SHPO, and the Advisory Council established a process for additional studies of potential below ground archaeological and cultural resources that were not feasible to identify prior to the completion of more detailed engineering. AR1:00000030 at 83, AR2:00037676 at 37704. This approach reduced the potential to unnecessarily disturb archaeological resources before a preferred alternative alignment had been identified and before the engineering and design of the Project, including final column location, was fully developed. AR2:00037676 at 37704; AR3:00061769-61770. The SHPO concurred in the cultural resources evaluation methodology. AR1:00000030 at 83-123; AR2:00039555 at 40069; AR3:00061769-61770.

It is necessary to provide this overview of the extensive record of archaeological, historical, and cultural resource investigation because ***Plaintiffs failed to do so***. Instead, they base their case on four out-of-context comments submitted in 2009, prior to the completion of the Final EIS and prior to the approval of the Section 4(f) analysis in the ROD. Pl.Br. at 16. The National Trust cites its own letter, but fails to discuss the entire record establishing the thorough analysis undertaken prior to the approval of the ROD. Am.Br. at 5.

Outrageously, Plaintiffs claim that the Lead Agencies simply "did nothing" after 2009 – overlooking (i) the extensive coordination with the Advisory Council,

the SHPO and the other consulting parties, (ii) preparation of the Final EIS, and (iii) FTA's entering into the PA with the Advisory Council and the SHPO.

Plaintiffs and the National Trust further failed to cite the regulations that provide the basis for this comprehensive and detailed process. This effort to identify unknown archaeological sites more than satisfied the standard established in the Advisory Council regulations, which require a "reasonable and good faith effort to carry out appropriate identification efforts". 36 C.F.R. § 800.4(b)(1). Such "efforts" must "take into account past planning, research and studies" and ***may*** include additional types of research, including sampling and field surveys. 36 C.F.R. § 800.4(b)(1). Notably, the regulation does not require below ground surveys.

The Advisory Council adopted this regulation to provide federal agencies and the SHPO "flexibility" in defining appropriate studies to identify "historic" resources. 65 Fed. Reg. 76,698, 77,719 (Dec. 12, 2000). The regulations 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). The evaluation of the Project meets this standard.

It is also significant that the SHPO and the Advisory Council concurred that FTA conducted an adequate evaluation of potential archaeological sites. AR1:00000030 at 83, 87, 121-122. *See* 36 C.F.R. §§ 800.4(c)(2) (authority not to concur with the federal agency determination of eligibility), 800.4(d)(2) (authority

not to concur with lead agency evaluation), 800.5(c). The concurrence in FTA's methodology by the Advisory Council and the SHPO establishes that FTA's approach to the evaluation of ***potential*** archaeological sites was not arbitrary and capricious. *Lands Council*, 537 F.3d at 993 ["[Courts] are not free to 'impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'" *Id*. (quoting *Churchill County v. North,* 276 F.3d 1060, 1072 (9th Cir. 2001).

Furthermore, the PA authorized by this Section 106 regulation, and approved by the Advisory Council and the SHPO, constitutes "all possible planning to minimize harm" under FTA's regulations. 23 C.F.R. § 774.17. This factor clearly distinguishes this case from *Monroe Co. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700-01 (2nd Cir. 1972) ("*Monroe*"), where the adverse impacts of a new highway that would "use" eleven acres of a park were not subject to any conditions or requirements to reduce the impacts. *Id.* at 696, 700. *Monroe* found that "the Secretary must withhold his approval unless and until he is satisfied that there has been. . . 'all possible planning to minimize harm. . .' and that full implementation of such planning to minimize is an obligated condition of the project." *Id*. at 700. In the present case, "all possible planning to minimize harm" has been conducted, and the PA implements the planning.

The extensive record of planning along the ***entire*** Project route establishes that Plaintiffs' reliance on *North Idaho Community Action Network v. United*

States Department of Transportation, 545 F.3d 1147 (9th Cir. 2008) is also misplaced. In *North Idaho*, the FHWA and the state transportation department conceded that they had only conducted the Section 4(f) evaluation and the Section 106 identification process for one out of four phases of a highway project. There was no dispute that they had "not conducted the necessary identification and evaluation for the other phases of the Project." *Id*. at 1159 n.8.

Here, in contrast, the exhaustive research, interview, and survey process described above has identified all known and knowable archaeological resources along the entire length of the Project. This record of extensive outreach, consultation, and the agreement of stakeholder agencies with FTA's evaluation of resources along the entire corridor distinguishes the Section 4(f) evaluation for the Project from *North Idaho* and from the other cases cited by Plaintiffs.

Plaintiffs and the National Trust also cite *Corridor H Alternatives v. Slater*, 166 F.3d 368, 371-72 (D.C. Cir. 1999). As an amicus in *Corridor H*, the National Trust ought to be aware that the entire Section 4(f) and Section 106 analysis was deferred until after the ROD in that case. *Id*. at 371. The agencies had not made any type of preliminary Section 4(f) investigation or determination. *Id*. at 373. In the present case, all known and knowable historic resources have been identified, and a reasonable good faith effort was made to identify unknown underground resources.

Plaintiffs also cite *Benton Franklin Riverfront Trailway and Bridge Committee. v. Lewis*, 701 F.2d 784 (9th Cir. 1983), which is entirely inapplicable. This was a case of a ***known*** historic resource's exclusion from the NEPA process, the final EIS has failed to identify the bridge at issue as an historic resource. *Id*. at 788-89. No known resource has been excluded from the Section 4(f) analysis for the Project.

Finally, Plaintiffs cite *Valley Community Preservation Commission v. Mineta*, 373 F.3d 1078 (10th Cir. 2004). This case, which ***upheld*** a Section 4(f) determination that provided for additional analysis of unknown resources subsequent to the record of decision, strongly supports FTA's approach to the evaluation of unknown archaeological sites and is discussed below.

2. The Evaluation of Unknown and Unidentified Below-Ground Resources Complied with Section 4(f)

Plaintiffs do not claim that FTA failed to conduct a Section 4(f) evaluation for identified burial sites that are on or "eligible for inclusion on" the National Register. Rather, Plaintiffs claim that FTA did not conduct an adequate study to identify unknown and unidentified Native Hawaiian burial sites and other properties that "might" be within the Project alignment, that "might" be eligible for listing on the National Register, and that the Project "might" not avoid. Pl.Br. at 15-17. National Trust makes a similar argument. Am.Br. at 4-5.

The Archaeological Resources Technical Report summarizes the Project's likely impacts on subsurface archaeological resources as follows:

> With few exceptions, the archaeological resources that could be affected by the Project consist of subsurface deposits, including burials [and other remains]. ***Throughout most of the archaeological study area, these subsurface resources are buried beneath roadways, residences, businesses, and parking lots***. [W]ith the exception of direct, construction-related impacts (e.g., disturbance caused by the excavation of a foundation), the Project's construction would pose no additional impacts to these subsurface archaeological resources than what they have already been exposed to (e.g., through traffic vibration).

AR2:00037676 at 37806 (emphasis added).

This is the context within which Plaintiffs' claim that FTA should have conducted additional underground surveys must be evaluated. Except for part of its west end, most of the Project is in the heavily urbanized area of Pearl Harbor, the Airport and downtown Honolulu. AR1:00000247 at 296-297. Plaintiffs assert that below-ground surveys should have been conducted in subareas where the Final EIS states that there is a "high" likelihood of burials (Pl.Br. at 17, citing AR1:0000247 at 691), but fail to reveal that these areas – Dillingham, downtown Honolulu, and Kaka'ako – are "urban centers." AR1:00000247 at 453.

Below-ground surveys could only be conducted in these areas with enormous disruption. AR2:00037676 at 37704. Cost and time requirements are significant "because of the need to disrupt traffic, saw-cut and remove existing

pavement to expose underlying sediments, search for archaeological deposits, and then repave the affected area." *Id*.

Even more significantly, Plaintiffs fail to disclose that below-ground surveys conducted before the completion of detailed engineering, which will provide the specific location of guideway columns, could needlessly disturb archaeological resources. As the Archaeological Resources Technical Report states,

> Until there is certainty regarding column placement, any archaeological testing associated with the Project's archaeological historic property/archaeological resource identification effort could be outside the actual project footprint and ***could disturb archaeological resources that would otherwise not be disturbed by the Project***.

AR2:00037676 at 37704 (emphasis added); *see also* AR3:00061769-61770.

To avoid causing enormous, unnecessary environmental damage, FTA needed to know which alternative was the preferred alternative, which was only identified in the Final EIS, and where guideway columns would be located, which required more detailed engineering of the selected alternative. AR2:00037676 at 37704; AR3:00061769-61770. The engineering studies necessary to provide this information are at a level of detail beyond what is appropriate prior to the approval of the Final EIS. 23 C.F.R. § 771.113(a); *see also* 40 C.F.R. § 1506.1(a)(1) (minimizing environmental impacts prior to project approval).

In response to these practical and legal constraints, Lead Agencies adopted a methodology that was approved by the SHPO and the Advisory Council.

AR1:00000030 at 83-123; AR1:00000247 at 618-624. The Lead Agencies committed to conduct additional below ground surveys for unknown and unidentified burials and other cultural resources as soon as more detailed engineering allowed the identification of the precise areas that would be disturbed by the guideway and station construction. AR1:00000030 at 91-95; AR1:00000247 at 618-624. These surveys will take place within the precise areas to be disturbed by the Project before the start of any construction that might disturb any unknown below ground cultural resources. AR1:00000247 at 620; AR2:00037676 at 37704. The final design of the guideway columns and other Project elements will be modified to avoid any newly identified burials. AR1:00000030 at 91-95; AR1:00000247 at 618-624.

It is also important to note that Plaintiffs and National Trust are simply wrong in claiming that the unknown and unidentified Native Hawaiian burials are automatically eligible for listing on the National Register without a specific eligibility determination. Pl.Br. at 15; Am.Br. at 7-8. Archaeological sites are only subject to Section 4(f) if they are on or "eligible for inclusion on the National Register". 23 C.F.R. §§ 774.17 (definition of "Historic site"), 774.11(d)(1) (applicability). 36 C.F.R. § 800.16(l)(2); 23 C.F.R. § 800.4.

The Advisory Council's policy on Native American and Hawaiian burial sites makes it clear that, while such sites ***might*** be eligible, eligibility may not be assumed and cannot be determined without a review of each particular burial site.

Advisory Council, *Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects* (2007), available at http://www.achp.gov/news022307hr.html ("Burial Policy"); Decl. of David Miller, Exh. B.

The Burial Policy sets out eight recommended principles, which the PA follows, when burial sites and funerary objects are encountered. AR1:00000030 at 91-95. Compliance with the Burial Policy ensures that FTA will avoid such sites wherever possible and treats any sites that may be discovered with respect. AR1:000000030 at 91-95.

Valley Community Preservation Commission, 373 F.3d 1078, which Plaintiffs cite to support the proposition that "[r]esources must be identified and evaluated prior to project approval," (Pl.Br. at 14), actually supports Defendants' approach to archaeological resources. The Tenth Circuit held that FHWA complied with Section 4(f) where the agency had made significant efforts to evaluate historic properties along the project corridor and to determine adverse effects, but deferred investigation of potential, but ***unidentified***, Section 4(f) Properties until after the ROD. *Id.* at 1089. FHWA had "performed extensive reviews prior to issuing the Final EIS and the ROD and adopted the PA for the more limited purpose of analyzing 'determinations of effect on any previously unidentified cultural resources and potential impacts to identified cultural resources that may be affected by any design changes and construction activities.'" *Id.* The

court held that plaintiffs had failed to establish that the agency "declined to follow the necessary procedural requirements by adopting the PA and deferring the evaluation of certain properties until after the issuance of the ROD." *Id.*

Similarly, in *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999), the D.C. Circuit upheld the FHWA's Section 4(f) analysis, which included a survey of historic sites but did not include below-ground surveys for potential, but unknown, historic sites in several portions of the project area (construction staging areas and dredge oil disposal sites). *Id.* at 872. The court held that "the precise identification of these sites requires 'substantial engineering work' that is not conducted until the design stage of the project." *Id*. at 873. The court reasoned that "indeed, the Administration [was] required to conduct such 'final design activities' *after* it complete[d] its Final EIS." *Id.* (emphasis in original).

Here, the analysis of archaeological resources followed the approach approved in *Valley Community Preservation Commission* and *City of Alexandria*. The FTA's evaluation reflects comprehensive analysis of potential impacts to Section 4(f) Properties – both known and unknown. The Lead Agencies conducted surveys for existing and potential historic sites throughout the entire length of the 20-mile Project alignment. Indeed, the agencies went beyond the survey effort upheld in *City of Alexandria* by additionally conducting surveys within construction staging areas. AR2:00037676 at 37706.

As discussed previously, Plaintiffs' reliance on *North Idaho Community Action Network*, 545 F.3d 1147, and *Corridor H. Alternatives*, 166 F.3d 368, is entirely misplaced. In those cases, FTA completely deferred compliance with Section 4(f) altogether. In this case, in contrast, FTA conducted a comprehensive Section 4(f) evaluation of the entire Project prior to approving the ROD, and additionally adopted measures to identify and protect unidentified below ground cultural resources prior to the start of construction in each phase.

This methodology complies with the Section 4(f) regulations, with case law, and with the recommendations of the agencies and organizations with expertise and authority over the affected resources.

3. The Identification of TCPs Was Not Arbitrary and Capricious

Plaintiffs' and amicus' argument that the Lead Agencies did not do enough to identify TCPs is nothing more than a restatement of their arguments regarding unknown and unidentified burials. Plaintiffs once again ignore the mountain of evidence that the Lead Agencies conducted a comprehensive study of all relevant cultural resources in the Project area including potential TCPs. *See* evidence cited in Section IV.C.1 above. After all of the many investigations and consultations regarding cultural resources described above, neither the Plaintiffs nor any other interested party has come forward with evidence of the existence of any other TCP on the Project alignment other than Chinatown.

Amicus cite an informal guidance bulletin[8] prepared by staff of the NPS for the proposition that TCPs are automatically eligible for inclusion on the National Register. Plaintiffs are wrong. The stated purpose of the bulletin is to assist agencies in identifying TCPs and whether they are eligible for inclusion on the National Register. *Bulletin 38* at 10–18. The bulletin simply reflects the authors' views regarding criteria under the Advisory Council regulations. 36 C.F.R. § 60.4.

The Lead Agencies, in fact, applied the Advisory Council criteria to identify Chinatown as a TCP and to determine the Project impacts. AR1:00000247 at 626-633. The Advisory Council guidance documents make it clear that TCPs and other cultural resources sites are not automatically eligible for inclusion on the National Register. *See* Section IV.C.1 above. The Advisory Council regulations do not confer any greater status to TCPs than to other potential "historic" sites that ***may*** be eligible for inclusion on the National Register. As with other historic properties, the decision whether a TCP is eligible for inclusion on the National Register is vested in FTA after consultation with the SHPO. 23 C.F.R. § 800.4.

The essential facts are: (1) the Lead Agencies conducted a comprehensive evaluation of potential TCPs; (2) the SHPO and the Advisory Council concurred in the Lead Agencies' evaluation; and (3) the PA establishes protection for potential TCPs in the event that additional research reveals a previously unidentified TCP.

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[8] This informal guidance document is not accorded *Chevron* deference. *See*

V. THE LEAD AGENCIES PROPERLY EVALUATED POTENTIAL USE OF SECTION 4(f) SITES AND COMPLIED WITH SECTION 4(f)

A. Introduction

The Lead Agencies' extensive reviews of potential impacts to Section 4(f) Properties (AR1:00000247 at 728-747; AR2:00039555-40206) resulted in a determination of direct use of 11 Section 4(f) historic properties, *de minimis* impacts on two historic properties, and three park and recreational properties, temporary occupancy of two recreation properties, and no constructive use of other Section 4(f) Properties. AR1:00000030 at 41; AR1:00000247 at 685, 747.

The Final EIS/Section 4(f) Evaluation and the Historic Effects Report demonstrate that extensive attention was given to potential Project impacts on Section 4(f) Properties. AR1:00000247 at 680-752; AR2:00039555-40206. FTA's decision to approve the Section 4(f) evaluation was based on this extensive analysis, which considered relevant facts concerning environmental impacts ranging from noise to aesthetics to access. *Id*.

B. Statutory and Regulatory Background

1. The Definition of "Use" and "Constructive Use"

As directed by Congress, FTA has adopted regulations defining "use" and other Section 4(f) requirements. 23 C.F.R. §§ 774.1-774.17. "Use" occurs where land is permanently incorporated into a transportation facility, there is a temporary

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Christenson v. Harris County, 529 U.S. 576, 587 (2000).

occupancy of land that is adverse to the terms of the statute's preservation purpose, or there is a "constructive use" of a Section 4(f) Property. 23 C.F.R. § 774.17. The 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 qualify the property for protection under Section 4(f) are ***substantially diminished***. 23 C.F.R. § 774.15.

Constructive use, therefore, is a site-specific determination, and nothing in the law requires a constructive use finding whenever a transportation project will be constructed anywhere near a Section 4(f) Property. Amicus National Trust describes three cases involving the construction of highways as if these cases mandate a constructive use finding in this case, but each of those cases involved a careful assessment of a particular site and a particular project's impacts – and none of the sites or the impacts resemble those at issue here.

National Trust focuses on *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423 (5th Cir. 1985), which assessed "use" by the expansion of an elevated highway that would double the number of automobiles travelling on the highway. *Id.* at 427. The elevated highway would come within a few feet of a number of Section 4(f) Properties, including the "Water Garden," a park used for outdoor events such as weddings and concerts. *Id.* No Section 4(f) report was prepared until two years after the conclusion of environmental review,

and even then, the report did not even mention the Water Garden. *Id*. at 442. *I-CARE's* constructive use determination is inapplicable.

National Trust also cites *Stop H-3 Association v. Coleman*, 533 F.2d 434 (9th Cir. 1976), in which the Ninth Circuit overturned a District Court decision that had denied Section 4(f) status to a National Register-listed petroglyph boulder. The court further stated, without analysis, that the highway would "use" the boulder. *Id*. at 445. As the dissent noted, "[t]he appellants alleged that H-3 would use the rock but the trial court made no findings on the issue and the point has not been argued during this appeal. *Id*. at 453; *see also id*. (noting "the absence of evidence and findings on the effect of the highway on the rock."). Because of its unique procedural context, which was based on a District Court's refusal to apply Section 4(f) to a resource that was clearly eligible, and the absence of any facts or analysis to explain its conclusion of "use," *Stop H-3* does not establish any constructive use in this case.

Finally, National Trust contends that *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988) ("*CARE*") somehow demonstrates constructive use here. *CARE* is yet another case where ***no*** Section 4(f) determination had been made at all -- "[t]he FHWA believed that the proposed route [for an elevated highway] did not trigger the application of section 4(f)." *Id*. at 806. The court found that the failure to apply Section 4(f) was unreasonable based on evidence in the record showing that the highway would

constructively use Section 4(f) resources. The Court cited specific evidence showing that:

> The record shows that as a result of the additional vehicles, air pollution would rise in nearby areas and the park would experience an increase in future carbon monoxide levels. . . .
>
> More importantly, noise levels would rise significantly. The final EIS predicts that the noise level for these properties would rise to between seventy-five and eighty decibels. *Id*. at IV-36. This is substantially greater than the Environmental Protection Agency's goal of fifty-five decibels. We believe that the significant increase in noise would adversely affect each protected property.

Id. at 811-12. In addition to air pollution and noise, the court noted impacts on specific views and "dirt and debris" from the elevated freeway. *Id*. at 812. Far from establishing that elevated transportation projects generically create constructive use effects, *CARE* simply shows that the FHWA was wrong to ignore specific evidence of impacts regarding that specific project when it decided not to conduct a Section 4(f) analysis.

In this case, a Section 4(f) analysis was conducted for every resource contested by National Trust. *CARE* is inapplicable.

2. Feasible and Prudent Avoidance Alternatives

A feasible and prudent avoidance alternative avoids the use of a Section 4(f) Property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) Property. 23

C.F.R. § 774.17. In assessing the importance of protecting the Section 4(f) Property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute. *Id.*

An alternative is not feasible if it cannot be built as a matter of sound engineering judgment. *Id.* It is not prudent if: (1) it compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need; (2) it results in unacceptable safety or operational problems; (3) after reasonable mitigation, it still causes severe social, economic, or environmental impacts, severe disruption of established communities, severe disproportionate impacts to minority or low income populations, or severe impacts to environmental resources protected under other Federal statutes; (4) it results in additional construction, maintenance, or operational costs of an extraordinary magnitude; (5) it causes other unique problems or unusual factors; or (6) it involves multiple of these factors that, while individually minor, cumulatively cause unique problems or impacts of an extraordinary magnitude. *Id.*

FTA developed this definition in response to a Congressional directive to clarify the meaning of "prudence" and "feasibility" under Section 4(f). *See* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") § 6009(b), Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005), 1876; H.R. Rep. No. 109-203, at 1057 (2005) (Conf. Rep.). The FTA's

interpretation of this directive is subject to *Chevron* deference. *See Chevron U.S.A. Inc.*, 467 U.S. at 865-66.

3. The FTA Has Discretion To Select Among Alternatives That "Use" Section 4(f) Resources

Use of a Section 4(f) Property is not absolutely prohibited. Rather, if the selected project alternative will use a Section 4(f) Property, FTA may approve an alternative that: (1) causes the least overall harm in light of the statute's preservation purpose; and (2) includes all possible planning to minimize harm to the property. 23 C.F.R. § 774.3(c). For historic sites, all possible planning generally means the planning conducted under Section 106. 23 C.F.R. § 774.17.

C. Specific Section 4(f) Properties

By the Order entered on May 17, 2012, ECF No. 137, the Court dismissed Plaintiffs' Section 4(f) claims regarding Merchant Street Historic District, Makalapa Navy Housing and Pearl Harbor, as well as any claim regarding a Section 4(f) Property not identified in Plaintiffs' standing declarations. (ECF No. 137). Plaintiffs did not advance any further challenge determinations for any other Section 4(f) Properties in their opening brief, and as such, any such additional claims are waived. *See Goldberg v. Pac. Indem. Co.*, 405 Fed. Appx. 177, 179 (9th Cir. 2010) (unpublished) (plaintiffs waived argument by failing to raise it in their brief).

1. Aloha Tower

Aloha Tower is 1926 Art Deco tower that qualifies for Section 4(f) protection for its design elements and its historic associations. AR1:00000247 at 745-746; AR2:00039555 at 39871-39873. The Tower has only marginal integrity of setting, with Nimitz Highway, downtown high-rises, recently constructed buildings, and a modern shopping mall surrounding it. AR1:00000247 at 746.

The Project will be located in the median of the existing six-lane Nimitz Highway, approximately 420 feet ***inland*** of the tower. AR1:00000247 at 746. National Trust demonstrates an astonishing lack of familiarity with the site, and with the record, when it claims that the Project will block views of the Tower "from the water." Am.Br. at 13. The Tower is between the Project and the water, and there is no way that the Project could block views of the Tower from the water. AR1:0000247 at 631; AR2:0033496 at 33594-33597; AR3:00062558.

In fact, the Project will not impact ***any*** of the historically significant views of Aloha Tower, as documented in the record (AR1:00000247 at 512, 528, 746; AR2:00039555 at 39871-39875) and described more fully in the FTA's brief. While the Project will be visible from the observation deck of Aloha Tower, the Lead Agencies determined "it will not impact the views of the tower's design elements nor alter its historic setting . . . ." AR1:00000030 at 183. Contrary the Plaintiffs' assertion, no visual impacts specific to Aloha Tower were designated "significant" – nor should they have been. AR1:00000247 at 512. The SHPO and

the Advisory Council concurred with the Lead Agencies' determination. AR1:00000030 at 121-122.

2. Walker Park

Walker Park is a small park, less than 3/4th of an acre, set among modern high rise office buildings. AR1:00000247 at 744; AR3:00062527; AR2:00039555 at 39861-39862; AR3:00062682. Developed in 1951, it 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." AR1:00000030 at 181-182; AR1:00000247 at 744.

Contrary to Plaintiffs' assertion, the FTA evaluated impacts to the elements of Walker Park that qualify it for protection under Section 4(f). AR1:00000247 at 744; AR2:00039555 at 39861-39862. Plaintiffs' mischaracterization of the record is documented in the federal defendants' memorandum, in which City Defendants join. In short, Plaintiffs "extrapolated" visual impacts that were found at other Section 4(f) Properties – asserting, with no evidence whatsoever, that these site-specific impacts could be applied to Walker Park. Pl. Br. at 27, citing AR1:00000247 at 512 (discussing Irwin Park, not Walker Park).

Plaintiffs and National Trust ignore the fact that the Lead Agencies expressly addressed visual and noise impacts to Walker Park. *See* AR1:00000030 at 181-182; AR1:00000247 at 744 (visual impacts); AR2:00033642; especially,

33671-33673l; AR2:0042163 (noise impacts). The Final EIS/Section 4(f) Evaluation notes that there are no adverse noise and vibration impacts to any Section 4(f) resource from the Project. AR1:00000247 at 729.

The analysis concludes that the Project will ***not substantially impair*** Walker Park's historic associations, which are the features that contribute to its National Register eligibility. AR1:00000247 at 744; 23 C.F.R. § 774.15. Ignoring all of this evidence, National Trust bases its argument on an unsupported opinion that "aesthetic intrusions" in the Park constitutes constructive use. Am.Br. at 23. National Trust's personal opinion does not demonstrate that the FTA's conclusions were arbitrary and capricious.

3. Irwin Park

Irwin Park is a two-acre park consisting primarily of a non-historic, paved parking lot, with grass medians and mature monkeypod trees, located between Nimitz Highway and Aloha Tower Marketplace in downtown Honolulu. AR1:00000030 at 183; AR1:00000247 at 746; AR2:00039555 at 39865-39866; ARSupp.1:00153048 at 153054. Views from Irwin Park are dominated by the modern high-rise and mid-rise buildings of downtown Honolulu. Views to the west are dominated by industrial uses in the Port. AR2:00039555 at 39869; AR3:00062573-62677, 62579-62580, 62582-62587, 62589. The Project's elevated guideway will be constructed, within the median of the adjacent highway, inland of the park. AR1:00000247 at 746.

Plaintiffs' claim that the Lead Agencies never studied potential noise impacts on Irwin Park (Pl.Br. at 31) is erroneous. As the Noise and Vibration Technical Report demonstrates, noise levels a block east of the park are representative of those at Irwin Park. AR1:00000247 at 561; AR2:00033642 at 33651. The existing noise level at that location is 76 dBA Ldn.[9] Applying FTA noise standards, *Transit Noise and Vibration Impact Assessment* (2006)[10] the noise study included in the Final EIS concluded that the noise from the Project would not be noticeable above the existing ambient noise level. AR1:00000247 at 561. Thus, FTA reasonably concluded that the noise impacts at this location are ***not significant***. AR2:00033642 at 33665-33668; AR1:00000247 at 729.

Additionally, the Project would not substantially interfere with the historically significant visual elements of Irwin Park. AR1:00000247 at 747. Plaintiffs' claim that the Project's impacts on protected landscape features were not assessed (Pl.Br. at 32) is also unfounded. AR1:00000247 at 746-747; AR2:00039555 at 39865-39866. The Project will obstruct neither views of the water or Aloha Tower from the park nor views of the park from the harbor and

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[9] FTA noise standards are based on community reaction to noise. The standards evaluate changes in existing noise using a sliding scale. The higher the level of existing noise, the less room there is for a project to contribute additional noise. AR2:00033642 at 33665.

[10] http://www/FTA.dot.gov/documents/FTA_Noise_and_Vibration_Manual.pdf

Aloha Tower. *Id.* Moreover, while the Project would add a visual element that may contrast with the landscaping features of the park, it would not block views of that landscaping, and therefore would not substantially impair these features. *Id.* Indeed, the Project "would not affect any of the property's physical features or further diminish the property's expression of its historic character." AR2:00039555 at 39866. The conclusion that the Project would not constitute a constructive use of Irwin Park is reasonable. *See* 23 C.F.R. § 774.15.

National Trust simply ignored this evidence and analysis in favor of its own unsupported opinion that "affected" inland views were sufficient to constitute constructive use. Am.Br. at 23-24. As established above, the Lead Agencies reasonably concluded that the Project would not constitute a constructive use of Irwin Park.

4. Mother Waldron Neighborhood Park

Mother Waldron Neighborhood Park is a nearly two-acre park located in the mixed-use areas of Kaka'ako. AR1:00000247 at 747. It is surrounded by open lots, a large surface parking lot, warehouses, and tall apartment buildings. AR1:00000247 at 732; AR3:00062630-62635. The park is eligible for listing in the National Register for its playground and Art Deco architectural design and landscape elements. AR1:00000247 at 747, AR2:00039555 at 39909.

The Project will not eliminate primary views of the historic playground at the park. AR1:00000247 at 747, AR2:00039555 at 39910-39911. It will only

introduce a new visual element to the highly urbanized view corridor area. AR2:00033496 at 33599; AR2:00033601. The Project also will not substantially impair the park's design elements, including its Art Deco/Air Moderne-style comfort station, which is more than 150 feet makai of the alignment. AR1:0000030 at 185, AR1:00000247 at 747. National Trust claims an interference with "connecting with nature" at the park, but provides no reason – apart from its own opinion (denoted "common sense") – that the construction of the Project *outside* the park, in an area that it already highly urbanized, will affect users' ability to connect with the park's natural features. Am.Br. at 20.

Because the views of the industrial area are not the visual elements that contribute to the Park's eligibility for the National Register, the altered view of the heavily developed area does not constitute a constructive use of the park. *See* 23 C.F.R. § 774.15 (Impacts are not "so severe" that they substantially diminish the features that made the site eligible for listing).

City defendants join in the federal defendants' memorandum, which shows the Plaintifffs are wrong that the Project's noise impacts were not addressed. The Final EIS shows that the Project would result in an audible noise level, but that this noise level is below the FTA noise standard for this site. AR1:00000247 at 561; AR2:00033642 at 33668. "No noise impacts are predicted at . . . the park." AR4:00072897 at 72920.

VI. THE FTA'S FINDING THAT THERE WERE NO FEASIBLE AND PRUDENT ALTERNATIVES IS NOT ARBITRARY AND CAPRICIOUS

An alternative that does not meet the purpose and need of the project may be rejected as not prudent. *See*, *e.g.*, *Alaska Ctr. for the Envt. v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997); *Ariz. Past and Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983). Additionally, a project is not prudent "if it involves multiple factors . . . that while individually minor, cumulatively cause unique problems or impacts of an extraordinary magnitude." 23 C.F.R. § 774.17. Where a proposed alternative does not meet the purpose and need of a project, the agency is not required to conduct further analysis. *See Alaska Ctr. for the Envt.*, 131 F.3d at 1288.

The City conducted an extensive process for screening alternative transportation modes, technologies, and alignments for the Project. AR1:00000247 at 319-331; AR1:00009434-9555' AR1:00009556-9683. This eliminated several alternatives from consideration due to failure to meet the purpose and need of the Project. *Id*. These alternatives included: (1) the MLA; (2) a downtown tunnel; and (3) Alternative Transit Technologies. *Id.* This process identified the Fixed Guideway Alternative as the only alternative that met the Project's purpose and need. *Id.*

A. Managed Lane Alternatives

Plaintiffs contend that the Lead Agencies rejected the MLA without having ever determined that it was "infeasible" or "imprudent" as defined by the Section 4(f) regulations. Pl.Br. at 40. Once again, Plaintiffs mischaracterize the record. In fact, two versions of the MLA were evaluated during the AA. AR1:00009434 at 9469-9470. Indeed, the evaluation was expanded to include an alternative that was substantially similar to the alternative proposed in the Honolulutraffic.com comment. AR1:00009434 at 9469-9470. Section VIII.A.3.c below responds to Plaintiffs' claims that FTA's evaluation of the two MLAs was arbitrary and capricious.

The AA concluded that the MLA would not meet the Project's purpose and need. AR1:00000247 at 324-327; AR1:00009434-9555. Specifically, the MLA would not improve corridor mobility, would only minimally encourage patterns of smart growth and economic development, and would not improve service or access to transit for transit-dependent communities. AR1:00009434 at 9541-9544.

FTA was not required to formally state that it found the MLA "not prudent." FTA adopted the City's conclusion that the MLA would not accomplish the purpose and need for the Project. AR1:00000247 at 319-331; AR1:00000030 at 36. Plaintiffs were informed of FTA's decision in its response to Plaintiffs' comments on the Draft EIS. AR1:00000855 at 2025-2093. Because the MLA would not meet the purpose and need of the Project, the MLA is not a prudent

alternative to avoid use of Section 4(f) resources. *See*, *e.g.*, *Alaska Ctr. for the Envt.*, 131 F.3d at 1288; *Ariz. Past and Future Found., Inc.*, 722 F.2d at 1428.

Plaintiffs incorrectly assert, in this argument (Pl.Br. at 43) and in their NEPA argument, that the planning process was arbitrary and capricious because "FTA was not involved." This is flat out wrong, as documented in detail in the NEPA argument. *See* Section VIII.A.3 below. Here, as in their NEPA argument, Plaintiffs simply ignore FTA's approval of the ROD, which incorporates FTA's determinations regarding Section 4(f) issues. AR1:0000030 at 41-42. And finally, Plaintiffs ignore FTA's determination that the MLA would not meet purpose and need. AR1:00000247 at 319-331; AR1:00000030 at 34-36.

The Lead Agencies conducted extensive studies and were entitled to rely on the conclusions of their experts. *See Marsh*, 490 U.S. at 378; *Lands Council*, 537 F.3d at 987. Because FTA determined that the MLA was not prudent, no further analysis was required. *See Alaska Ctr. for the Envt.*, 131 F.3d at 1288.

B. Downtown Tunnel

The Lead Agencies evaluated four separate alignment alternatives that would have involved downtown tunnels to avoid Section 4(f) resources. AR3:00065304 at 65309. Plaintiffs identify the King Street Tunnel and the Beretania Tunnel (both part of this evaluation) as potential alternatives. The King Street Tunnel would have run through the central portion of Chinatown and

downtown. AR3:00065304 at 65309-65311. The Beretania alignment was located on the mountain side of Chinatown and downtown. *Id*.

Given Plaintiffs' expressed concern about the potential impact of an ***elevated*** guideway on unidentified burials, it is ironic that they now claim that the construction of a tunnel through downtown is a "prudent" alternative to an elevated guideway. Tunneling beneath downtown poses a risk of significant damage to burials and other TCPs.

A downtown tunnel would have potentially caused significant disturbance to below ground cultural resources in an area where such resources are likely to occur. AR2:00037676; AR9:00125000 at 125005; AR3:00051561 at 51595. In addition, the construction of entrances and exits, stations, air vents, stations access points and utilities would require enormous disturbance of large surface areas. AR3:00061160 at 61171; AR3:00065304 at 65321, 65326-65330, 65333-65334.

Studies of downtown tunnel alignments also documented that the pervious soil and elevated water table downtown create material risks of ground displacement and settlement of above-ground structures. Tunneling would encounter ground water, and the potential for settlement during construction could damage buildings in the Chinatown, Merchant Street, and Capital Historic Districts. AR3:00065304 at 65321.

In addition, the construction of a tunnel through downtown would also increase the cost of the Project by an extraordinary magnitude: $650 million in

2006 dollars, (AR1:00000247 at 719; AR3:00065304 at 65306, or $793 million to the year of expenditure (AR1:00000247 at 705; AR1:00009434 at 9523; AR3:000653304 at 65365-65378; AR3:00067416 at 67428-67429). Extending the tunnel west to include Dillingham Boulevard to avoid Section 4(f) Properties would increase the cost by more than $1 billion in 2006 dollars. *Id.* These cost estimates do not include the added costs of maintaining the underground tunnels. The Lead Agencies determined that the additional construction costs would be of an extraordinary magnitude beyond what could be funded. AR1:00000247 at 705. The downtown tunnel was therefore not a prudent alternative. *See* 23 C.F.R. § 774.17.

While the Beretania Tunnel would have cost less than the King Street alignment, it would not serve the Project's purpose and need and would greatly increase the overall Project costs because of the shift it would have required in the alignment. AR1:00009434 at 9540. Because the Beretania Tunnel would connect to King Street east of the Capital District, it could not be routed to Ala Moana Center and would have had to continue to the University of Hawai‘i Manoa. AR1:00000247 at 709. The ridership demand for the Beretania alignment was lower than for the Locally Preferred Alternative because it would serve the fewest residents and jobs. AR1:00009434 at 9520. Thus, the Beretania Tunnel alignment would not serve the Project's purpose and need, and the overall cost would have increased greatly. AR3:00067416 at 67427-67429.

These tunnel alternatives were also not prudent because the funding sources available in the financial plan would not be capable of covering an increase to Project costs of this magnitude. AR1:00000247 at 756-759. An alternative is not "prudent" if it prevents the completion of the Project. 23 C.F.R. § 774.17 (alternative is imprudent if it "compromises the project to a degree that it is unreasonable to proceed with the project").

The importance of cost in FTA's assessment of the Project is well documented in the record. AR1:00000247 at 238-239; 291, 317-319, 756-759; AR3:00055625 at 55626; AR3:00056639; AR6:00099809; AR8:00120677-120678; AR8:00133206. 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 of one billion dollars or more, to say nothing of the added maintenance costs, would have made it unreasonable to proceed with the Project. AR4:00074598-74688.

Plaintiffs assert that the cost increase of the tunnel alternatives is not enough to permit the rejection of those alternatives. However, "[e]xtraordinarily high costs, unacceptable or severe environmental impacts, or both, [] are sufficient foundations for finding that the alternatives were imprudent." *Citizens for Smart Growth v. Secretary of Dept. of Transp.*, 669 F.3d 1203, 1217 (11th Cir. 2012). 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. *See* 23 C.F.R. § 774.17.

Plaintiffs appear to base their argument on the claim that the FTA regulations require a balancing of harms and benefits in weighing various alternatives. 23 C.F.R. § 774.17 (definition of "feasible and prudent avoidance alternative). This regulation cited actually supports the Lead Agencies' conclusion that the downtown tunnel alternatives were not prudent.

When it adopted the regulation FTA made it clear that cost plays a role in determining whether an alternative is or is not "prudent."

> We understand that deciding what amount constitutes a reasonable public expenditure for avoiding the use of a Section 4(f) property may not be simple. Nevertheless, it is not appropriate to set a single dollar amount or even a percentage of total project cost as the threshold. The decision must take into account multiple factors including the type, function, and significance of the Section 4(f) property.

See 73 Fed. Reg. 13,368 *at* 13,392 (March 12, 2008).

FTA further has the discretion to consider the magnitude of impacts when it determines whether a material increase in cost renders an alternative imprudent. *See* 23 C.F.R. § 774.17 (Definition of "feasible and prudent" avoidance alternative); 73 Fed. Reg. at 13,392. Plaintiffs nonetheless challenge FTA's determination that the downtown tunnel was not a prudent alternative to the Project's "use" of the Chinatown Historic District and Dillingham Transportation

Building. Pl.Br. at 42-43. The "use" of these properties is minor. However, none of the contributing buildings that qualify these properties for Section 4(f) protection are taken or even modified. AR1:00000247 at 718-727. FTA's determination was not arbitrary and capricious.

C. Alternative Transit Technologies

Plaintiffs also contend that the record demonstrates that alternative transit technologies[11] could avoid some or all of the Project's use of Section 4(f) resources. For the same reasons the MLAs were rejected as not prudent, however, the alternative transit technologies are not prudent.

The Alternatives Screening process evaluated the types of technologies Plaintiffs point to and found that several do not meet the Project's purpose and need. AR1:00009434 at 9587-9599. They are thus imprudent. *See*, *e.g.*, *Alaska Ctr. for the Envt.*, 131 F.3d at 1288; *Ariz. Past and Future Found., Inc.*, 722 F.2d at 1428. The remaining technologies that were evaluated by the expert panel (section VIII.A.3.e) would all have had similar guideway requirements, and would not have provided an avoidance alternative to the selected rail technology. AR3:00055203 at 55208-55209; 55222-55226.

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[11] The technologies included conventional bus, guided bus, light rail transit (LRT), personal rapid transit, people movers, monorail, magnetic levitation (MAGLEV), rapid rail, commuter rail, other emerging rail concepts, and waterborne ferry service. AR1:00009556 at 9587.

FTA approved the methodology and results of the City's AA. *See* AR1:00000030 at 34-37; AR1:00000247 at 319-329. Because Lead Agencies found that alternative transit technologies did not accomplish the purpose and need of the Project, no further analysis was required. *See Alaska Ctr. for the Envt.*, 131 F.3d at 1288.

VII. THE CITY AND THE FTA ENGAGED IN ALL POSSIBLE PLANNING TO MINIMIZE HARM, AS REQUIRED BY SECTION 4(f)

The Lead Agencies complied with the "all possible planning" requirement. They identified the Airport Alternative as causing the least overall harm in light of Section 4(f)'s purpose. AR1:00000247 at 749-750. For the available Project alignment alternatives, the Section 4(f) uses would be the same, except where the two alignments diverge in the center of the corridor between Aloha Stadium and Kalihi. *Id*. at 749. In this segment of the corridor, the Airport Alternative will result in the least overall harm. *Id*.

The City, FTA, the SHPO, the U.S. Navy, and the Advisory Council entered into a PA that detailed specific mitigation measures from the Project's Mitigation Monitoring Program to minimize impacts on Section 4(f) historic Properties that may be impacted by the Project. AR1:00000030 at 45-228. FTA's regulations expressly state that the NHPA 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").

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 to these resources. 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 the Chinatown Historic District. AR1:00000247 at 719. Moreover, the guideway runs along Nimitz Highway along the makai edge (toward the ocean) of the district, and it does not use any contributing resources in the district. *Id.*

With regard to Aloha Tower, 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.

VIII. THE FTA COMPLIED WITH NEPA

A. The Definition of Purpose and Need Complies With NEPA and Ensures Consideration of Reasonable Alternatives

The Project's purpose and need is related to the consideration of reasonable alternatives under NEPA. As federal guidance entitled "Linking the Transportation and NEPA Processes" explains:

> There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start.

23 C.F.R. pt. 450 app. A at ¶ 11.[12] The rule is subject to *Chevron* deference. *Chevron U.S.A. Inc.*, 467 U.S. at 865-66.

Both purpose and need and the range of reasonable alternatives derive from the transportation planning process. 23 C.F.R. pt. 450 app. A at ¶ 11A. Plaintiffs' analysis of purpose and need simply ignores this principle. Their discussion of alternatives both misstates the applicable law and grossly distorts the record.

1. Standard of Review

A project's purpose and need briefly defines "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. While an agency cannot define its objectives in "unreasonably" narrow terms (*City of Carmel-by-the-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1995)), courts have afforded agencies considerable discretion to define the purpose and need of a project. *See Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004) (citing *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986)). This discretion is based on the courts' recognition that preparing an EIS "necessarily calls for judgment, and that judgment is the agency's." *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974). As a result, courts review purpose and need statements under a

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[12] This Appendix was included as part of a comprehensive revision of the transportation planning regulations, and was therefore subject to notice and comment rulemaking. *See* 72 Fed. Reg. 7224 (Feb. 14, 2007).

standard of reasonableness. *Westlands*, 376 F.3d at 865.

Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS. *City of New York v. U.S. Dep't of Transp*., 715 F.2d 732, 743 (2d Cir. 1983). A variation from a statutory mandate must be so significant as to be arbitrary and capricious before the purpose and need will be invalidated under NEPA. *Westlands*, 376 F.3d at 867.

2. <u>The Purpose and Need Statement Complies With NEPA</u>

The Final EIS defines the Project's "purpose" as "to provide high capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and UH Mānoa, ***as specified in the ORTP*** (O'ahu Metropolitan Planning Organization 2007)." AR1:00000247 at 312 (emphasis added). The "need" is to improve corridor mobility and travel reliability, improving access to planned development to support City policy to develop a second urban center, and improving transportation equity. *Id.*

These needs incorporate planning and community goals as well as transportation goals, as required by the legislation governing New Starts projects. 49 U.S.C. § 5309(c)(1). The Project will help to implement the City's General Plan, which calls for almost 50 percent of the growth projected for the entire island to occur in the 'Ewa Development Plan area. AR1:00000247 at 297, 313; AR1:00009696-9697. The Project supports the Plan because it ensures that this

area will be accessible to downtown and other parts of O‘ahu. AR1:00000247 at 312. The goal of transportation equity ensures that the mobility of low income and minority residents is not unduly burdened by congestion and the high cost of automobile operation. *Id*. The emphasis on the mobility of low income and minority residents directly reflects the statutory goal “to provide financial assistance to . . . help carry out national goals related to mobility for . . . economically disadvantaged individuals.” 49 U.S.C. § 5301(f)(4); *see also* 49 U.S.C. § 5301(b)(5) (relates affordable public transportation to the welfare of lower income individuals).

Plaintiffs’ conclusory argument that the purpose and need statement was too narrow relies on the assumption that the analysis of alternatives violated NEPA. As the following section shows, the EIS considered a reasonable range of alternatives.

Plaintiffs further ignore the purpose and need statement’s responsiveness to the statutory objectives governing the Project. The project ***must*** be “part of an approved transportation plan and program of projects.” 49 U.S.C. § 5309(c)(1)(A). The purpose and need statement is closely tied to the transportation planning process and therefore reflects reasonable public needs, preferences, and goals.

The Project’s purpose and need development began with a review of previous planning studies. The “Transportation for O‘ahu Plan,” or “TOP 2025,”

was the regional transportation plan[13] in effect in 2005, when planning for the Project's purpose and need began.

TOP 2025 was approved in April 2001, and the planning process occurs in five-year cycles. The planning process for the next regional transportation plan, approved in 2006, was therefore well underway when Project planning began. As stated in the Final EIS:

> As part of its work to update the Regional Transportation Plan to *the O'ahu Regional Transportation Plan 2030* (ORTP), the O'ahu Metropolitan Planning Organization (O'ahuMPO) surveyed O'ahu residents about transportation issues in 2004. ***The survey results identified traffic congestion during the commute period in the study corridor extending from 'Ewa and Central O'ahu to Downtown Honolulu as the biggest concern. By nearly a two-to-one margin, residents responded that improving transit was more important than building more roadways. Seventy percent of the respondents believed that rail rapid transit should be constructed*** as a long-term transportation solution, and 55 percent supported raising taxes to provide local funding for the system.

AR1:00000247 (emphasis added).

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[13] As explained in TOP 2025,

> [T]he O'ahu Metropolitan Planning Organization (OMPO) is responsible for carrying out the various requirements of the metropolitan transportation planning process [required by federal law including] . . . that each major urban area develops a multi-modal long-range plan that documents ground transportation projects selected for federal funding for a minimum time horizon of 20 years.

In December 2005, the FTA published a NOI to prepare an EIS and AA. AR1:00009700. The NOI invited comment on the purpose and need statement, project alternatives, and scope of the EIS. *Id.*

A new regional land use and transportation plan, the O'ahu Regional Transportation Plan 2030 ("ORTP"), was approved in April 2006 and amended in May 2007. AR2:00030423. ORTP emphasized the importance of the fixed guideway transit system, stating that it "will give priority to moving people rather than cars, will be a major factor in providing mobility options, and will work together with our land use policies in shaping our city." *Id*. at 30428.

Taking this system-wide plan into account, as well as public and agency comments during the scoping period, the City issued the Alternatives Report on November 1, 2006.[14] AR1:00009434. Following preparation of the Alternatives Report, the FTA published a second NOI to prepare an EIS.[15] AR1:00009696.

AR2:00050563 at 50570.

[14] The role of and legal basis for the AA are described in detail in section VIII.

[15] Two NOIs were published for this Project. AR1:00009700 (first NOI, 12/07/05); AR1:00009696 (second NOI, 03/15/07). The second NOI was published to conform to the FTA-authorized procedure of preparing the AA prior to the formal commencement of the NEPA process, 23 C.F.R. part 450, Appendix A, ¶ 12. The fact that two NOIs were published, with two full scoping periods, provided agencies and the public with additional opportunities to review and comment on the proposed Project, including the purpose and need statement. Both NOIs resulted in Scoping Reports addressing comments made during the scoping periods. *See* AR1:00016601 (4/6/06) and AR1:00017157 (5/30/07).

The NOI requested public and agency input on the scope of the EIS, including the purpose and need. The NOI described the proposed "purpose" as providing "high capacity, high-speed transit in the highly congested east-west transportation corridor . . . ." AR1:00009696-9697. The need was also discussed both in transportation terms and in terms of planning and the need for transportation equity for low and moderate income residents. AR1:00009696 at 9697-9698.

Through this public planning process, incorporating the transportation planning process as the basis for the NEPA process, the Lead Agencies obtained guidance about the needs of the community. These needs appropriately translated into the purpose and need statement. Plaintiffs' preferred transportation solution may not have been specified by the purpose and need statement, but the courts have consistently deferred to the expertise and discretion of the lead agency in focusing the statutory mandates to meet local conditions. *See Westlands*, 376 F.3d at 867 (EIS team's discretion upheld in limiting the range of measures considered in an EIS).

3. FTA Considered a Reasonable Range of Alternatives

Plaintiffs correctly observe that there are, literally, "hundreds" of potential alternatives to a project of this magnitude. Pl.Br. at 55. If NEPA required each of these alternatives to be examined in an EIS, Plaintiffs' goal of killing the Project unquestionably would be met, because the EIS process would be endless.

To avoid this result, the scope of the alternatives analysis is limited by the rule of reason. For transit projects, in particular, long-range planning helps to establish the alternatives to be evaluated. Plaintiffs fail to describe the applicable "rule of reason" and then proceed to ignore the entire planning process that resulted in the selection of alternatives. This process, outlined above (section VIII) to support the purpose and need, is further described below.

Plaintiffs also claim that "the City" acted as a rogue entity, outside the guidance or control of its federal co-lead agency, FTA – despite the fact that FTA's ROD opens with a finding that the requirements of NEPA "have been satisfied" for the Project (AR1:00000007), and despite copious evidence of FTA oversight and guidance throughout the decade-long span of the administrative record. Plaintiffs are simply wrong, as documented below.

a) Standard of Review

An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[i]dentify the agency's preferred alternative." 40 C.F.R. § 1502.14(a), (e). Judicial review of the range of alternatives considered by an agency is governed by a "rule of reason" that requires an agency to set forth only those alternatives necessary to permit a "reasoned choice." *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). "[T]he statute should not be employed as a crutch for chronic faultfinding." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973) (upheld EIS where all three action alternatives consisted of

variations on runway concepts and configurations).

The Ninth Circuit has summarized the appropriate standard of review as follows:

> Under the rule of reason, the EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones." [citations omitted] ***Nor is an agency required to undertake a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences."***

Westlands, 376 F.3d at 868 (emphasis added).

The choice of alternatives is "bounded by some notion of feasibility." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). The "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." *The Laguna Greenbelt, Inc.*, 42 F.3d at 524. ***An agency is not required to "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.***" *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180 (9th Cir. 1990) (emphasis added). Federal agencies may rely on prior state and federal environmental studies to select alternatives for detailed evaluation in an EIS. *The Laguna Greenbelt*, *Inc. v. U.S. Department of Transportation,* 42 F.3d 517. 524-25 (9th Cir. 1994) (upheld EIS that restricted alternatives to two build alternatives based on prior state environmental studies). "NEPA mandates state and federal coordination of environmental review." *Id*. at 524 n.6.

As discussed below, none of the cases cited by Plaintiffs supports their argument that the EIS should have "mixed and matched" many different options within "three categories of options," allegedly resulting in the obligation to consider "hundreds of reasonable possibilities" in the EIS. Pl.Br. at 55. The Final EIS complies with NEPA by considering a reasonable range of alternatives.

b) <u>The EIS Appropriately Considered Planning Efforts, Including the Alternatives Analysis Integrated with NEPA Under the Federal "New Starts" Program Governing Transit Guideway Investments</u>

Plaintiffs incorrectly characterize the New Starts scheme and base their opposition on a selective, incomplete portrayal of the record.

Under the New Starts program, the Locally Preferred Alternative is required to emerge from an AA conducted by local transit operators, metropolitan planning organizations, the State Department of Transportation, or other local transportation and public agencies. 49 U.S.C. §§ 5309(a)(1), 5309(e)(3). The AA was required to include an assessment of a wide range of public transportation alternatives designed to address a transportation problem in a corridor or subarea. *Id*. at § 5309(a)(1).

Before 2005, the New Starts and NEPA analyses were often conducted *de novo*, disconnected from each other. 23 C.F.R. pt. 450 app. A. In 2005, Congress enacted SAFETEA-LU, which included extensive amendments to the federal

transportation planning process, and provisions designed to accelerate the NEPA process. SAFETEA-LU § 6002 (codified at 23 U.S.C. § 139).

Under 23 U.S.C. § 139(f)(4), the lead agency (in this case, FTA and the City) establishes the range of alternatives for consideration in the EIS. This process occurs ***before*** the issuance of the draft EIS. FTA has expressly linked the planning and NEPA process to comply with the environmental streamlining requirement of 23 U.S.C. § 139. FTA encourages project sponsors to use the Alternative Analysis to focus the alternatives examined in the draft EIS. *See* 23 C.F.R. § 450.318(d) ("The Alternatives Analysis may or may not be combined with the preparation of a NEPA document (e.g., a draft EIS). When an Alternatives Analysis is separate from the preparation of a NEPA document, the results of the Alternatives Analysis may be used during a subsequent environmental review process").

FTA guidance explaining the connection between the Alternative Analysis and the NEPA process states:

> [U]nder FTA's Capital Investment Grant Program, the alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by 49 U.S.C. § 5309(e) is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No-Build (No Action) alternative and the Locally Preferred Alternative.

23 C.F.R. pt. 450 app. A at ¶ 12.

Plaintiffs largely ignore this important legal authority, aside from a perplexing assertion that FTA did not guide, independently evaluate, or approve the AA process. Pl.Br. at 58. They allege a violation of 23 U.S.C. § 139(c)(3), which provides that the City, as Project sponsor, may prepare any document

> in support of any action or approval by the Secretary if the Federal lead agency furnishes guidance in such preparation and independently evaluates such document ***and the document is approved and adopted by the Secretary*** prior to the Secretary taking any subsequent action or making any approval based on such document.

(Emphasis added).

Plaintiffs ***provide no support for their claim of violation***. They merely refer to the documents themselves. They ignore the ROD, which affirms the FTA's independent approval of the NEPA documents and process. AR1:000000030 at 32-34 ("In accordance with FTA guidance," the AA screened alternatives); *id*. at 34 ("FTA and the City considered a broad range of alternatives in various studies prior to the initiation of the NEPA process").

Plaintiffs further fail to discuss the ***hundreds*** of documents in the record memorializing the painstaking inter- and intra-agency review that both preceded and followed the adoption of the Alternatives Report. The FTA reviewed, sometimes disagreed with, challenged, revised, and eventually agreed with the Alternatives Report and the subsequent NOI for the NEPA process. *See, e.g*., AR11:00150766 (intra-FTA discussion of relationship between NOI, AA and Draft

EIS, 3/28/06); AR10:00150602 (minutes of FTA-City meeting, including discussion of AA and plans to further address the AA, 3/28/06); AR10:00150548 (FTA-City meeting agenda, 5/17/06); AR10:00150146 (FTA-City Meeting Agenda regarding the AA, 10/10/06); AR10:00150107 (City checked with FTA to ensure accuracy of information in the Alternatives Report, 10/23/06); AR10:00150091 (FTA received the draft Alternatives Report to review, 11/6/06); AR10:00149741, AR10:00149742-149747 (City revised NOI following Alternatives Report in response to FTA comments, 2/5/07); AR10:00149493 (FTA addressed responses to comments submitted by Honolulutraffic.com and revised description of purpose and need in the draft NOI, 3/7/07); AR10:000148869 (FTA considered the MLA, 10/26/06); AR10:00148624 (FTA-City cooperation on technical issues regarding response to Honolulutraffic.com letter, 5/16/07); AR10:00148578 (FTA received City's draft scoping report, 5/17/07); AR10:00148102 (City confirmed FTA approval of the Scoping Report before posting it, 6/14/07).

Plaintiffs further claim that the AA was not "subjected to public and interagency review during the EIS scoping process." Pl.Br. at 58. In fact, the NOI that preceded the scoping process states:

> The planning Alternatives Analysis is available for public and agency review on the project Web site at http://www.honolulutransit.org. It is also available for inspection at the project office by calling (808) 566-2299 or by e-mailing info@honolulutransit.org.

AR1:00009696 at 9699. In light of the fact that Plaintiffs cited this very page of

the record (Pl.Br. at 58), their failure to disclose this information is puzzling. Plaintiffs clearly intend to create the impression that the Lead Agencies simply foreclosed any opportunity for the public to comment on the AA or to provide additional evidence relating to alternatives considered by the AA. The NOI actually states: "Other reasonable alternatives suggested during the scoping process may be added if they were not previously evaluated and eliminated for good cause on the basis of the Alternatives Analysis and are consistent with the project's purpose and need." AR1:00009696 at 9699.

Far from saying "no comments on the Alternatives Analysis documents, please," as Plaintiffs inaccurately claim, the scoping notice provides an opportunity to assess the alternatives considered by the AA and states that they may be added if they were not eliminated for good cause through the Alternatives Analysis process. *See also* AR1:00000855 at 2085 ("Because no new information was provided that would have changed the findings of the Alternatives Analysis regarding the MLA, it was not included in the Draft EIS for further consideration.").

Plaintiffs' failure to address the importance of the transportation planning process from which the AA derived is exacerbated by the cases that they cite. In each case, the preliminary planning, compliance with statutory intent, and detailed and well-supported justification of alternatives that characterize the Project's NEPA process were absent, rendering those cases entirely inapposite. *See Se. Alaska Conservation Council v. FHWA*, 649 F.3d 1050, 1057 (9th Cir. 2011) (no

finding that alternative proposed in comments "was inconsistent with the project and statutory mandates," and none of the features of the proposed alternative had been incorporated into an alternative that was analyzed in the EIS); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038-39 (9th Cir. 2008) (because all alternatives in the EIS were based on a planning framework that the court had invalidated, the alternatives did not provide an informed choice); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006) (when a planning level programmatic EIS failed to consider any locations outside of Hawai'i for the "transformation" of a brigade located in Hawai'i, the subsequent, site-specific EIS did not evaluate sufficient alternatives); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806-07, 814 (9th Cir. 2005) (the Forest Service's conceded error in interpreting the data that formed the basis of alternatives resulted in the failure to consider a viable alternative); *California v. Block*, 690 F.2d 753, 767 (the Draft EIS for the Forest Service's management plan 62 million acres of the national forest system did not provided a reasoned choice when all alternatives assumed that at least 37% of roadless areas should be developed and where "[n]o justification is given for this fundamental premise or the trade-off it reflects").

In the Final EIS for the Project, alternatives are clearly justified and derived from a careful planning process. The EIS contains a reasonable range of alternatives.

c) The Contention that the EIS Failed to Consider a "Managed Lanes Alternative" is Wrong

From the start of the process, Honolutraffic.com proposed a High Occupancy Toll ("HOT") Lane Alternative, which the Lead Agencies took very seriously and made every effort to address. AR11:00151243 (e-mail: City provides Cliff Slater with a draft copy of the Project purpose and need, 12/6/05); AR11:00150974 (City Department of Transportation Services will add an alternative that responds directly to Slater's proposal, 1/25/06); AR10:00150627 at 150628 (The FTA ensures that the Honolulutraffic.com alternative will be considered, 4/6/06); AR1:00005600 at 5920-5921 (Final EIS App. G, Scoping Report [2006], stating that an additional variation of the MLA will be added to the AA, as requested by Honolulutraffic.com); AR1:00009556 (Alternatives Screening Memo, 10/24/06); AR1:00009556 at 9564-9565 (MLA will be carried forward, including two design and operational variations); AR1:00009556 at 9655 ("Based on scoping comments, a second operational option was included under the [MLA]"); AR1:00009556 at 9672-9674 (Tables assessing the MLA along with other alternatives); AR1:00009434-9555 (Alternatives Report: evaluates four alternatives, including two variations of the MLA, 11/1/06). Plaintiffs have no grounds for their claim that the NEPA process did not fully and fairly evaluate the MLA.

Plaintiffs again fail to disclose the most significant information in the record.

The Lead Agencies' response to Honolulutraffic.com's comments devotes ten full pages to the MLA, explaining the reasons that the alternative was not included in the EIS and responding to every concern. AR1:00000855 at 2084-2093. The response explains the process of screening alternatives and notes that a reversible MLA was fully evaluated, but that it performed poorly on a broad range of metrics. AR1:00000855 at 2085-2086; *see also* AR1:00000247 at 798-800. The response explains all of the reasons that the MLA "would not have achieved project goals and objectives, would not result in substantially fewer environmental impacts, and would not be financially feasible." AR1:00000855 at 2089; *see also* AR1:00000247 at 800-801. The Final EIS also added substantial additional information to Chapters 2 and 8 to explain why the MLA was not included in the EIS. AR1:00000855 at 2085 (noting that the MLA "performed poorly compared to the Fixed Guideway Alternative on a broad range of metrics"); AR1:00000247 at 327 (Final EIS Ch. 2, finding, *inter alia*, that the MLA did not meet purpose and need); AR1:00000247 at 798-802 (Final EIS Ch. 8, explaining the decision not to include or revisit the MLA).

The Final EIS and the response to comments also addresses Plaintiffs' claim that NEPA was violated because the ***precise form*** of the MLA proposed by the Plaintiffs was not addressed. Pl.Br. at 60. The Final EIS states:

> Comments received about the [MLA] referenced in the Draft EIS suggested there were significant differences between the alternative studied in the Alternatives

> Analysis and an ideal managed lane option. However, there was no substantial difference between the alternatives proposed in comments and those studied in the Alternatives Analysis that would have resulted in a different outcome.

AR1:00000247 at 801-802; AR1:00000855 at 2089. The Final EIS further discusses issues of apparent divergence, explaining that concerns about access points did not really represent divergence between the AA and the proposed "ideal" alternative and that the proposal for a congestion pricing system was encompassed by the fact that the MLA did evaluate a pricing option. AR1:00000247 at 802; AR1:00000855 at 2089-2090. The response concluded that "[w]hile there may be some minor details of the proposed alternatives that differ from the AA alternatives, the evaluation assesses the concept fairly in the context of the Project's Purpose and Need." AR1:00000247 at 802; AR1:00000855 at 2090. The Final 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." *Westlands*, 376 F.3d at 868.

Moreoever, the lead agency is not required to consider an alternative that is inconsistent with the basic policy objective governing the project. *The Laguna Greenbelt*, 42 F.3d at 524-25 (Ninth Circuit upheld an EIS that did not incorporate an alternative proposed by opponents, based on the lead agency's determination that the alternative would not accomplish the project goal of reducing congestion). Here, it was found that the MLA would actually "increase transit travel times,"

rather than reducing transit travel times, and therefore would not meet the basic policy objective governing the Project. AR1:00000855 at 2088; *see also* AR1:00000030 at 36 (ROD: the MLA "failed to meet the Project's purpose and need as it would not have improved corridor mobility or travel reliability"). In addition, the MLA would generate the greatest amount of air pollution, require the greatest amount of energy for transportation use, and result in the largest number of noise impacts. Significantly, the MLA would provide little community benefit, because it would not substantially improve transit access to the corridor. AR1:00000855 at 2089. Fundamentally, the MLA simply does not meet the important project goal of improved transit access for lower income populations.

Plaintiffs additionally list a scattershot series of grievances (Pl.Br. at 60), supported only by record citations to their own letters and ignoring the evidence in the record that establishes a full and fair evaluation of the MLA. Plaintiffs' list includes:

(1) "Removal" of carpool lanes: In fact, High Occupancy Vehicle ("HOV") lanes were included, and the lead agencies adjusted carpool lane factors over time in order to improve the MLA's performance. *See* AR1:00009434 at 9469; AR1:00000855 at 2086-2087, 2090-2091, 2093.

(2) "Wild" overestimates of costs: The Final EIS responds to this claim at AR1:00000855 at 2091-2093, summarizing the evidence, including a 2007 Cost Validation Analysis and Report prepared by the FTA's Project Management

Oversight Contractor in response to concerns that the MLA had not been assessed property. The Final EIS concludes that the cost estimate for the MLA followed the same methodology as every other alternative. *See also* AR10:00144634, 144635; AR9:00124633 (City's efforts to verify Cliff Slater's estimate of MLA cost).

(3) "Refusal" to implement the recommendations of the Transit Task Force: As stated in the Final EIS, the Task Force found the AA presentation and assessment of the MLA to be "fair and accurate," and suggested operational variations on the MLA. AR1:00000855 at 2090. The lead agencies assessed these variations and concluded that "the suggestions of the Task Force were not substantive in improving the MLA overall and would not have resulted in a change in the relative merits of the alternatives evaluated." *Id*.

(4) "Three-lane" MLA: Plaintiffs apparently first mentioned the three-lane MLA in conjunction with their promotion of Tampa's system as a model for Honolulu. The reasons that the Tampa system was not adopted are addressed at AR1:00000855 at 2082, 2091-2093. The three lane option also was part of the EZWay proposal made by a mayoral candidate who opposed transit. *See* AR1:00000855 at 2032. The reasons for not considering the EZWay project are described at AR1:00000855 at 2093-2094. The Final EIS documents the consideration of variations on the MLA in Chapter 8. AR1:00000247 at 801-802.

(5) Eligibility for federal funding: Plaintiffs assert that the MLA would be eligible for "federal" funding, although no source is identified. The Alternatives

Report states that the MLA "would not be eligible for New Starts funding because of use by toll-paying single-occupancy vehicles, which are excluded from the statutory definition of 'fixed guideway' (49 U.S.C. Section 5302)." AR1:00009434 at 9526. *See also* AR10:00147469 (8/23/07 e-mail from Honolulutraffic.com recognizing that MLAs could not be funded without a change in the law, which did not occur; the FTA withdrew the amendment discussed in the e-mail, *see* 74 Fed. Reg. 7388 (Feb. 27, 2009)); AR10:00150107 (10/24/06 e-mail from the FTA to City: MLA not eligible for New Starts funding). The financial feasibility assessment of the MLA was based on the fact that the alternative was not eligible for surcharge revenues. Therefore, the financial feasibility of the capital investment was assessed based on existing local bond funding and toll revenues. AR1:00009434 at 9530-9531.

As the Final EIS states, the fact that "no funding sources were identified" for the MLA (AR1:00000247 at 327) was the last of a long list of reasons that the alternative was not advanced past the AA. The MLA was rejected because it would not moderate traffic congestion and did not meet purpose and need. AR1:00000247 at 327.

A substantial portion of the Plaintiffs' argument is dedicated to statements made by an official with the Tampa-Hillsborough (Florida) Authority, apparently responding to a City official's comments as reported in a newspaper. Pl.Br. at 61-62. The opinion of one commenter with no authority over the Project is not

entitled to any deference. Plaintiffs fail to disclose that Honolulutraffic.com discussed the Tampa example at length in its comments on the Draft EIS (AR1:00000855 at 2016, 2023-2029, 2073-2074, 2079), including a discussion of the very article that Plaintiffs cite in their brief. AR1:00000855 at 2026. Consistent with Plaintiffs' practice of citing selected portions of the record, Plaintiffs failed to disclose the full and reasoned response to their claims about Tampa, which showed that there was no "misrepresentation" of costs or operations of the Tampa project. AR1:00000855 at 2091-2093; *see also* AR3:00055308 at 55311 (Task Force concluded that the projects are sufficiently different to make a cost comparison unreasonable). A fair review of the whole record demonstrates that the comments reported in the newspaper did not withstand analysis.

d) No Substantial Evidence in the Record Supports the Need to Reconsider the Managed Lane Alternatives

Plaintiffs' claim that the MLA should have been "reconsidered" is based primarily on four e-mails sent by various FTA staffers during the first two months of ***2006*** – prior to the preparation of the ***Draft*** EIS and ***four years before*** the Final EIS was completed. The cited e-mails are part of the same series of e-mails described above (section c), which resulted in the consideration of the MLA in the AA. They provide no support for the claim that the MLA should have been "reconsidered" following its through consideration in the AA, as documented in the Final EIS. AR1:00000247 at 327.

In any case, staff discussion hardly constitutes FTA's is "conclusions" or "recommendations."[16] In the course of FTA's robust, ***years***-long review of the alternatives process, various staff disagreed with each other and with the City. Individual staff remarks, taken out of context and with no reference to chronology, do not establish that FTA's approval of the Final EIS and the Project was "arbitrary and capricious." An objective review of the ***whole record*** demonstrates that FTA fully evaluated the MLA promoted by Honolulutraffic.com and that FTA exercised its independent judgment in its evaluation – and rejection – of the MLA. FTA's position is represented by its ultimate approval of the NEPA process, which is stated on the first page of the ROD.

Plaintiffs also claim that the City's Transit Advisory Task Force supports its position. Pl.Br at 63. Plaintiffs fail to mention, however, that the Task Force's recommendations were addressed and that the Final EIS responds to a similar

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[16] For example, one e-mail cited by Plaintiffs states, explicitly: "***Let [me] emphasize: I don't speak for the FTA Region 9***." AR11:00150902 (emphasis added). Plaintiffs neglected to cite FTA staff e-mails clarifying a statement that the MLA ("Slater") alternative was "reasonable." One such e-mail from the FTA to the City states: "I would like to clarify the second bullet to avoid a possible misunderstanding. Rather than saying that the Slater alternative is reasonable (for inclusion in the AA), I meant to say that the Slater alternative has not been proven to be unreasonable and therefore, it should be a fully evaluated alternative during the AA." AR10:00150627 at 50628 (Sukys (FTA) to Miyamoto (City), 4/14/06). *See also* AR10:00150627 (Bausch (FTA) to Fisher (FTA), 4/14/06: "I do not think it is necessary at this stage of development to characterize an alternative as 'reasonable.' It's simply an alternative that will be examined to determine whether or not it is practical or feasible from a technical and economic standpoint.").

comment by Honolulutraffic.com. The Final EIS response concludes that "the suggestions of the Task Force were not substantive in improving the MLA overall and would not have resulted in a change in the relative merits of the alternatives evaluated." AR1:00000855 at 2090. The decision not to "reconsider" the MLA was not arbitrary or capricious.

e) The Selection of Steel Wheel on Steel Rail Technology Complies with NEPA

Plaintiffs err in claiming that NEPA was violated because the "environmental advantages" of alternative rail technologies were not evaluated. While their claim is vague, they apparently intend to refer to the evaluation of potential noise impacts. *See* Pl.Br. at 63-64 (claiming that "there is evidence" that other technologies have lower noise levels).[17] In fact, the Final EIS documents that no noise impacts to residents or businesses will occur with mitigation. AR1:00000855 at 1811, 3461-3462; AR1:00000247 at 562-563. The required mitigation measures, including wheels skirts, sound absorptive materials, and other measures are included in Project costs. AR1:00000855 at 1829. Plaintiffs' comments did not show that there would be a significant environmental impact that

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[17] Plaintiffs' sole source of evidence is a slight variation in decibel levels reported in a single chart in a FTA report on *generic* – not Project-specific – transit noise. AR1:00022575 at 22682. The report states that "a solid data base is not available and notes that the generic noise levels cited by Plaintiffs require individual measurement for accurate evaluation. AR1:00022565 at 22679.

was not evaluated, and there is no requirement to conduct additional review. 23 C.F.R. § 771.130(a)(2).

Inaccurately characterizing the decision process as "a limited, technical review," Plaintiffs also contend that the "approach" used to evaluate the technology to be incorporated in the Locally Preferred Alternative violated NEPA. Pl.Br. at 64. In fact, the process of evaluating potential technologies was characterized by public participation and informed decision-making. The issue was before the public throughout the EIS scoping process.

Following the AA process and the selection of a fixed guideway transit system as the Locally Preferred Alternative, the March 15, 2007 NOI for the Draft EIS proposed consideration of the No Build alternative and two Fixed Guideway alternatives. Five technologies were proposed for evaluation: light rail transit, rapid rail transit, rubber tired guided vehicles, magnetic levitation, and monorail. AR1:00009696 at 9698. Comments on alternative technologies were received at public scoping meetings and in writing. AR1:00017157 at 17160-17161.

The NEPA process is intended to generate alternatives that may potentially yield real solutions to the problem at hand. 23 C.F.R. pt. 450 app. A. Because comments on alternative technologies did not provide the information necessary to ensure that the alternatives evaluated were realistic and potentially feasible (AR1:00000247 at 330), the City Council authorized the issuance of a Request for Information ("RFI") from the transit technology industry. It further authorized the

creation of a five-member panel to help evaluate the technical information received through the RFI process. AR1:00009392; AR3:00055298-55302.

The RFI process resulted in twelve submittals. The technical panel reviewed the information and concluded that steel wheel on steel rail technology should be selected because it was the only technology that had been proven to be safe, reliable, economical, and non-proprietary. The public had the opportunity to testify at panel meetings. AR1:00009319; AR1:00009333. In February 2008, the City Council voted to approve the panel's recommendation (AR1:00000247 at 331) – a preference confirmed by a vote of a majority of Honolulu voters. AR3:00055181 at 55182.

The issue of steel wheel technology was one of the common comments received on the Draft EIS (AR1:00000247 at 789), and comments raising issues regarding the choice of technology received thorough responses. The Final EIS responds to Plaintiffs' claim that evidence shows that other technologies have fewer noise impacts. The Final EIS points out that magnetic levitation, or maglev, technology is unproven, and that steel-wheel systems can be designed to match the noise level of magnetic levitation when in operation. AR1:00000247 at 321, 791-792; AR1:00000855 at 1803-1804.

The Final EIS is the product of thorough and transparent process to determine reasonable and feasible technologies. NEPA does not require an EIS to consider an infinite range of alternatives. The EIS documents that FTA considered

alternative technologies and reasonably concluded that alternative technologies were not preferable to the proven steel-wheel system. This is another classic example of a technical determination by the agency with expertise and to which the courts are required to defer. *Marsh,* 490 U.S. at 378; *Lands Council*, 537 F.3d at 987.

f) The EIS Did Not Eliminate Any Reasonable Alternative "Because" It Required Action by the Honolulu City Council, as Alleged By Plaintiffs

Plaintiffs inaccurately contend that Defendants refused to consider Project alternatives requiring action by the Honolulu City Council, referring specifically to the Project's route past the Federal office building housing the District Court for the District of Hawai'i. Pl.Br. at 65.

This allegation is based on a partial and misleading characterization of the record. Plaintiffs refer to a letter which, "among other things," "reports a conversation" with the Chief of the City's Rapid Transit Division. Plaintiffs inaccurately claim that this individual said "that alternative alignment were unlikely to be considered ***because*** they would require approval from the Honolulu City Council." Pl.Br. at 66 (emphasis in original). Plaintiffs contend that this reported statement establishes that the EIS failed to consider the proposed alternative solely because it is not within the jurisdiction of the lead agency. *Id.* (citing 40 C.F.R. § 1502.14(c)).

In the sentence that is the entire basis of Plaintiffs' claim, ***the word "because" is missing***. AR1:00000855 at 931. The letter actually states: "He informed us that he did not feel there are any viable alternatives to Halekauwila Street and that any change would be highly unlikely ***and*** would require Honolulu City Council approval." *Id*. (emphasis added).

This single reported sentence by a single city employee does not say that an alternative would not be considered "because" it would require City Council approval. It merely reports the need for such approval.

The response to this letter explains that an alternative alignment on Queen Street was considered at two stages during the analysis, but it was determined that the alignment would have significant visual impacts, impacts on historic properties, possible impacts on burials, impacts on street traffic, and severe engineering constraints. AR1:00000855 at 883-884.

FTA's consideration of these factors, not Plaintiffs' isolated and misleading references to one e-mail, establishes the reasons that this alignment was rejected.

4. The Final EIS Analyzed the Environmental Consequences of the Project and the Alternatives

The Final EIS complies with NEPA's requirements to consider the environmental effects of alternatives. In determining whether an EIS meets NEPA's goal of "informed agency action," the Ninth Circuit has emphasized that a court "need not 'fly-speck' the [environmental] document and 'hold it insufficient

on the basis of inconsequential, technical deficiencies,' but will instead employ a 'rule of reason' in evaluating an EIS." *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996) (quoting *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)). A court will approve an EIS if it contains "a reasonably thorough discussion." (*S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1093 (9th Cir. 2010). The Final EIS's thorough analysis of impacts clearly meets this standard.

Plaintiffs' challenge to the Final EIS's analysis of construction phase impacts on air quality (Pl.Br. at 67), which was raised for the first time in this litigation (and is therefore waived), relies on nothing more than a citation to the ***wrong*** section of the Final EIS. Plaintiffs cite the section analyzing air quality impacts during ***operation*** (AR1:00000247 at 551-554) and fail to identify the section analyzing air quality impacts from ***construction*** in section 4.18, "Construction Phase Effects." AR1:00000247 at 640-642, 645; s*ee also* AR1:00004453-59.

The only remotely similar concern raised in comments on the Draft EIS referred to "impacts associated with the construction of concrete," and requested a "life cycle approach to estimating environmental impacts over time." AR1:00000855 at 1179. This comment received a full response, which explained that "the amount of material for the various Build Alternatives is approximately the same so that a life-cycle approach does not differentiate between alternatives."

AR1:00000855 at 1195. If Plaintiffs intended to refer to air pollution issues during construction, mitigation is further addressed in the construction contract and Environmental Compliance Plan that implements NEPA mitigation obligations. AR3:00054243.

Plaintiffs' failure to base their challenge on comments in the record violates the requirement to "'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). Plaintiffs have not identified a flaw in the Final EIS that was "so obvious" that no comment was necessary. Rather, exactly as in *Public Citizen*, they "fail to identify any evidence that shows that any effect from these possible actions would be significant, or even noticeable, for air-quality purposes." 541 U.S. at 765. The Final EIS adequately assesses construction impacts, and Plaintiffs have failed to reveal any potential air quality impacts that would be significant, or even noticeable.

Plaintiffs further make a unsupported assertion that the Final EIS "does not provide meaningful information about how [the Project's influence on development] will affect environmental resources." Pl.Br. at 67. Plaintiffs do not specify particular "environmental resources" that allegedly have not been addressed, and they fail to provide references to the many pages of the record that

show that such impacts have been addressed. *See* AR1:00000247 at 655-674 (Final EIS section addressing "Indirect and Cumulative Effects"); *see also, e.g.,* AR1:00000855 at 1931-1964.

Plaintiffs' only support is (1) a reference to the Purpose and Need statement—although Plaintiffs fail to disclose that the Project's goal of providing access for planned growth is "[c]onsistent with the Honolulu General Plan"[18] (AR1:00000247 at 313), and (2) a single statement from the Final EIS's lengthy analysis of growth inducement, disclosing the fact that the Project will influence the distribution of development (AR1:00000247 at 657). Neither of these references supports the Plaintiffs' summary conclusion that the Final EIS fails to provide "meaningful" information on "environmental resources."[19] When put in context, the Final EIS indeed provides that "[a]fter completion of construction, the Project will not decrease or increase regional population or the number of jobs; however, it will influence the distribution, rate, density, and intensity of development in the study corridor. Without the Project, growth is more likely to

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[18] The Final EIS's evaluation of consistency with land use plans, policies, and goals shows that the Project supports the objectives of ensuring that growth occurs in urban areas and away from agricultural lands, thereby helping to reduce impacts on agricultural resources. AR1:00007108 at 7139, 7152, 7161, 7172.

[19] The Final EIS was expanded to include information on cumulative impacts on specific resources identified by commentators. *See, e.g.*, AR1:00000855 at 857 (water resources), 902 (historic resources), 1932 (air quality impacts take into

be dispersed outside of the study corridor . . . ." *Id*. The Final EIS further provides that "[i]t is not expected that the Project would lead to an increase in the overall level of growth allowed or expected in the study corridor." AR1:00000855 at 1061-1062. This level of evaluation is sufficient to comply with NEPA. *The Laguna Greenbelt*, 42 F.3d at 525 (evaluation of growth-inducement complied with NEPA where the "EIS relied upon evidence that Orange County has already experienced substantial growth, and that the county is expected to continue to grow in the future"); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1462 (9th Cir. 1984). In *Stop H-3 Association,* the Ninth Circuit affirmed that the FHWA's evaluation of the potential secondary impacts of a highway in Honolulu complied with NEPA where the EIS relied on "conclusions and data developed by the City and County of Honolulu" in connection with the update of the O'ahu General Plan. *Id.*

5. <u>The NEPA Analysis Is Not Segmented</u>

Plaintiffs incorrectly contend that the University of Hawai'i Manoa and Waikiki rail lines are part of the "Project" and that the Final EIS violated NEPA because it evaluated these lines in the cumulative impacts section of the Final EIS, rather than including them within the definition of the "Project." Plaintiffs again fail to direct the Court to relevant information in the record. The record establishes that Plaintiffs' assertion is factually and legally wrong.

FTA's NEPA regulations provide that the "action" evaluated in an EIS must:

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account predicted changes in travel patterns due to the Project).

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f)(1)-(3).

The Project meets all of these requirements. The Project is included in the ORTP, with logical termini at East Kapolei and Ala Moana Center. AR1:00000855 at 2096-2098. It has independent utility because it will be usable even if no additional transportation improvements in the area are made. The Project will connect multiple activity centers, provide cost-effective transit user benefits, and meet the Purpose and Need whether or not the planned extensions are built. AR1:00000247 at 361-364; AR1:00000855 at 2098.

Plaintiffs' segmentation argument fails, first and foremost, because they do not even make an effort to claim that the Project does not have logical termini and independent utility. Instead, it appears that they believe that the ***proposed extensions*** must have "independent utility." *See* Pl.Br. at 69. The issue, of course, is whether the Project that was the subject of environmental review has independent utility, not whether potential future extensions could be stand-alone projects. Nobody has ever suggested that the extensions would ever be evaluated as stand-alone projects, and the Plaintiffs' argument is contrary to the FTA's long-

established regulation and well-established case law governing the definition of a transportation project.

Construction of the Project will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. The Project will not preclude development of other projects identified in the ORTP. *Id*. Plaintiffs have no support for their bare factual assertion that "there will not be any real alternative to using elevated heavy rail" (Pl.Br. at 70) – it is merely their own supposition, unsupported by the record.

Finally, the 20-mile length of the Project is sufficient to ensure that environmental matters are evaluated on a broad scope. To the extent feasible, without foreclosing the analysis of alternatives to these proposed extensions, the Final EIS evaluates these planned extensions in its Cumulative Impacts section. AR1:00000247 at 660-673. Plaintiffs' claims that the Final EIS "fails to evaluate" air emissions and noise impacts represents a fundamental misunderstanding of cumulative impact analysis. The air assessment is based on models that incorporate future travel demand, including transportation projects in the constrained long-range plan. AR1:00000247 at 552-553. Cumulative noise is addressed qualitatively, because the assumption of specific other noise sources in the corridor would be speculative. AR1:00000247 at 670-671.

Plaintiffs further assert that there was no "meaningful" attempt to disclose the visual impacts of the future extensions to the Project, but ***fail to disclose the***

fact that Final EIS Figures 4-79 and 4-80 "show simulated views of the planned UH Manoa and Waikiki extensions." AR1:00000247 at 670-671. These figures, in conjunction with the careful analysis of visual impacts in the Final EIS provide decisionmakers and the public with meaningful information about the visual impacts of the possible future extensions. *See* AR1:00000247 at 501-551.

Plaintiffs' inability to support their claim may be demonstrated most vividly by their reliance, once again, on an isolated record reference to the opinions of several individuals. Without even providing the entire quote, which begins with the phrase "We believe," the Plaintiffs attempt to rely on an opinion stated in a letter from ***two*** City Council members, regarding the ***Draft*** EIS, as proof that the City administration "intentionally" left information out of the EIS. Pl.Br. at 70 (citing AR4:00072134 at 72137). The paucity of this "evidence," in the context of the whole record, lays bare the absence of support for Plaintiffs' claim.

In fact, the definition of the "Project" complies fully with NEPA. The Ninth Circuit has repeatedly upheld Projects that include logical termini and independent utility. *See*, *e.g.*, *Adler v. Lewis*, 675 F.2d at 1096-7 (EIS on 7-mile length of interstate not segmentation because "able to serve its purposes without the construction of additional facilities"); *Lange v. Brinegar*, 625 F.2d 812, 815-16 (9th Cir. 1980) (42-mile segment of 1-82 properly considered in independent EIS because it has logical termini, has independent utility and will serve local needs because 25% of traffic is local and will relieve congestion); *Daly v. Volpe*, 514

F.2d 1106 (9th Cir. 1975) (approving EIS on seven mile segment of interstate highway). Where there is a reasonable basis for concluding that a project is of independent utility, courts will not interfere with an agency's discretion to define the scope of its environmental analysis. *Nw. Res. Info. Ctr. v. NMFS*, 56 F.3d 1060, 1067-1069 (9th Cir. l995) ("Agencies should be given 'considerable discretion' in defining the scope of an EIS"). These cases all support the conclusion that the definition of the "Project" complies with NEPA.

IX. FTA COMPLIED WITH THE NATIONAL HISTORIC PRESERVATION ACT – CITY DEFENDANTS JOIN IN THE FEDERAL DEFENDANTS MEMORANDUM

The City Defendants hereby, and through the Notice of Joinder, join in the Federal Defendants' memorandum regarding the Defendants' compliance with the NHPA.

X. ADDITIONAL PROCEEDINGS WOULD BE NECESSARY TO DETERMINE AN APPROPRIATE REMEDY

If the Court determines that FTA erred in its approval of the Project, additional briefing would be required for the Court to identify an appropriate remedy. Courts retain equitable powers to shape appropriate remedies. *See W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). Equitable considerations are appropriate in reviewing agency decisions under the APA. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (decision to grant relief under the APA is controlled by principles of equity); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989) ("Our inquiry into the district court's authority to

order equitable relief begins with the well-established principle that 'while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939))). It is well-settled that, when equity demands, courts may choose not to vacate agency decisions upon remand to the agency for further proceedings. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 1405 (9th Cir. 1995); *see also ICORE, Inc. v. FCC*, 985 F.2d 1075, 1081 (D.C. Cir. 1982).

Violations of NEPA, Section 4(f) and Section 106 do not trigger an injunction as a matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). Where a plaintiff seeks an injunction to remedy an environmental violation, the traditional four-factor test (irreparable injury, inadequate remedies at law, balance of hardships, and public interest) applies. *Mansanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). Courts may consider evidence outside of the record to fashion an appropriate remedy. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1025-26 (9th Cir. 1980).

Substantial evidence relevant to any injunction remedy is not in the Administrative Record because the evidence post-dates the FTA ROD. This evidence includes the results of the additional post-ROD surveys for potential burials and other archaeological resources required by the PA with the Advisory

Counsel and the SHPO, financial, economic and environmental impacts, and other important facts relevant to the determination of an appropriate remedy.

XI. CONCLUSION

For all of the above reasons, the City Defendants respectfully request the Court to grant the City Defendants' Motions for Summary Judgment and deny the Plaintiffs' Motion for Summary Judgment.

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/s/ Robert D. Thornton

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