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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; DR. MICHAEL UECHI, and THE OUTDOOR CIRCLE, Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION; LESLIE	Case No. 11-00307 AWT **PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Hon. A. Wallace Tashima Action Filed: May 12, 2011 Trial Date: None Set

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. Defendants. and FAITH ACTION FOR COMMUNITY EQUITY; THE PACIFIC RESOURCE PARTNERSHIP; MELVIN UESATO Intervenor Defendants.	

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Defendants have violated § 4(f), NEPA, and the NHPA. The following discussions address each of these, responding to Defendants' contrary arguments.

II. DEFENDANTS VIOLATED SECTION 4(f)

This case and the law, § 4(f) — governing it are quite simple, despite Defendants' attempts to convolute them.

- Section 4(f) requires that protected sites — which include parks, historic sites, Native Hawaiian burials, and other Traditional Cultural Properties ("TCPs") — must be avoided if there are "feasible and prudent alternatives.
- Defendants' Project would impact Section 4(f) protected sites.
- Feasible and prudent alternatives exist which would avoid the potential sites.
- Defendants have failed to avoid those sites, and, in so doing, they have violated Section 4(f).

In enacting Section 4(f), Congress declared a national policy that "special effort should be made to preserve…public park and recreation lands…and historic sites." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 404-406 n.1-2 (1971). The Supreme Court there held that this policy mandates that Section 4(f) resources (including both parks and historic sites) be "given paramount importance." *Overton Park*, 401 U.S. at 412-13.

But Section 4(f) is no mere declaration of policy. It requires federal

agencies to identify, survey, and evaluate parks and historic sites ***while*** project alternatives are under consideration and ***prior to*** project approval. *See N. Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1158-59 (9th Cir. 2008) (per curiam); *see also* 23 C.F.R. §§ 774.9(a),(b). Section 4(f) also imposes a substantive mandate on federal decisionmakers. *See* 49 U.S.C. § 303(c); *Citizens to Preserve Overton Park*, 401 U.S. at 411; *N. Idaho*, 545 F.3d at 1158.[1] Specifically, Section 4(f) prohibits federal agencies from funding or approving transportation projects requiring the use of a park or historic site unless (1) there is "no prudent and feasible alternative" and (2) the project includes "all possible planning to minimize harm." 49 U.S.C. § 303(c). The Supreme Court has declared that "only the most unusual situations" will satisfy these two exceptions. *Citizens to Preserve Overton Park*, 401 U.S. at 411. Thus, Section 4(f) represents "a plain and explicit bar" to the use of federal funds for projects impacting Section 4(f) resources. *Id*. Defendants must essentially claim they present a "most unusual situation" to overcome the "plain and explicit bar" of the statute. They have failed to surmount this high hurdle.

As explained in Plaintiffs' moving papers (ECF No. 109-1), Defendants violated Section 4(f) in three respects.

[1] In this respect section 4(f) differs from NEPA and NHPA, which are primarily procedural. *See North Idaho*, 545 F. 3d at 1158.

- Defendants failed to identify (or even look for) Native Hawaiian burials (known as "*iwi kupuna*" or "*iwi*") and Traditional Cultural Properties ("TCPs"), both of which are resources subject to Section 4(f). (Count 5 of the Complaint, discussed in section 2(A), below)
- Defendants failed properly to evaluate the Project's potential to use numerous parks and historic sites, all of which are resources subject to Section 4(f). (Count 6 of the Complaint, discussed in section 2(B), below)
- Defendants approved the Project without properly considering (and selecting) feasible and prudent alternatives capable of avoiding the use of Section 4(f) resources and without including "all possible planning" to minimize harm, both of which are explicitly required by law. (Count 7 of the Complaint, discussed in section 2(C), below)

For each of these three reasons, Plaintiffs are entitled to summary judgment on their Section 4(f) claims (counts 5, 6, and 7).

A. Defendants Failed To Identify And Evaluate The Project's Use Of Native Hawaiian Burials And Other Traditional Cultural Properties (TCPs) Before Approving The Project (Count 5)

Under Section 4(f), agencies within the Department of Transportation must identify and evaluate the potential for a proposed transportation project to use historic resources "as early as practicable in the development of the [project]" and when "alternatives to the proposed [project] are under study." 23 C.F.R. § 774.9(a). The study of alternatives must be completed prior to issuance of a final Section 4(f) approval. 23 C.F.R. § 774.3(a). A final Section 4(f) approval must be made no later than the time at which a Record of

Decision is issued. 23 C.F.R. § 774.9(b); *see also Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 700-01 (2d Cir. 1972) ("affirmative duty to minimize damage" to 4(f) resources is "a condition precedent to approval"). Thus, Section 4(f) requires Department of Transportation agencies to identify and evaluate historic resources prior to issuing a Record of Decision. Such historic resources include Native Hawaiian Burials and other TCPs.[2] 23 C.F.R. §§ 774.11(f), 774.13(b) (applicability of Section 4(f) to archaeological sites); *see also* 23 C.F.R. § 774.17 (definition of historic sites).

The FTA failed to comply with this requirement. As explained below, it impermissibly deferred the identification and evaluation of Native Hawaiian burials (referred to locally as *iwi kupuna* or *iwi*) and other TCPs until after the Record of Decision was issued and the Project approved. Accordingly, Plaintiffs are entitled to summary judgment on their fifth cause of action.

1. Defendants Failed Fully To Identify And Evaluate Native Hawaiian Burials Prior To Approving The Project, Thereby Violating Section 4(f)

As explained more fully in Plaintiffs' Motion for Summary Judgment, one of the core elements of Hawaiian culture is a belief that *iwi kupuna* provide a critical spiritual connection between the living, their ancestors, and the community as a whole. *See* Pl. MSJ at 15-16; AR 125000 at 125001. *Iwi*

[2] TCPs include, but are not limited to, Native Hawaiian burials.

kupuna are sacred and not to be disturbed. *Id*. The Oahu Island Burial Council ("OIBC"), a state agency with jurisdiction over historic properties of importance to the Native Hawaiian community, has vividly characterized the disruption of *iwi kupuna* as "akin to disrobing a living person and physically handling them against their will." *Id*.; *see also* Haw. Rev. Stat. § 6E-43.5 (OIBC jurisdiction); Haw. Code R. § 13-13-300 (same); AR 000030 at 0000092; AR 125000 at 125002.

The Section 4(f) regulations explicitly provide that "Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register of Historic Places" except for those "with minimal value for preservation in place." 23 C.F.R. §§ 774.11(f), 774.13(b). Native Hawaiian burials are eligible for inclusion on the National Register, they have significant value for preservation in place, and the City and FTA have recognized as much. *See, e.g.*, 36 C.F.R. § 60.4 (eligibility criteria); AR 000030 at 000085 (Programmatic Agreement treats burials as eligible); AR 072807 (FTA admits "[c]learly, the *iwi kupuna* merit preservation in place"). Therefore, the Section 4(f) evaluation for the Project should have included careful steps to identify, evaluate impacts on, and make sure that the Project will not use Native Hawaiian burials

However, the City and the FTA decided to defer those steps until after they approved the Project. As clearly stated in a preliminary technical report

approach is clearly set out in a preliminary technical report prepared at the City's direction in 2008: "the project proponents have proceeded with…the approach to defer most of the Project's archaeological resource identification and evaluation effort." AR 037676 at 037705. "***With this approach***," the Report continued, "***the bulk of the archaeological investigation, documentation, and associated mitigation decisions will be deferred and carried out subsequent to conclusion of the Project's federal environmental and historic preservation review***." *Id*. Defendants maintained that approach through the remainder of the environmental review process, as documented in the Record of Decision ("ROD") for the Project. *See* AR 000030 at 000085.

Although the 2008 Burials Report made it clear that efforts to identify and evaluate the Project's impacts on archaeological resources (including burials) along the entire rail line would not take place until after project approval, the Report did provide some initial, "provisional" estimates of the Project's "archaeological consequences." *See* AR 037676 at 037705 (deferral of evaluation); *id.* at 037686 (table of "consequences"); *id*. at 037806 (evaluation of consequences deemed "provisional"). Among other things, those initial estimates rate the Project's potential to impact archaeological resources as "high"[3] in the Downtown and Kaka'ako areas of Honolulu. In

[3] A "high" rating means that there is a reasonable potential to encounter archaeological resources in at least 50% of that area. AR 037676 at 037709; *see also* AR 000247 at 000619 (same information presented in FEIS).

short, the "provisional" ratings in the 2008 Burials Report were explicitly intended to be the beginning — not the end — of the process by which Defendants would identify and evaluate Native Hawaiian burials. The next step in that process was to have included the preparation of Archaeological Inventory Surveys ("AISs"), detailed studies involving a variety of different types of field work, for the entire length of the Project. AR 037676 at 037823-25; *see also* AR 059459-059932 (example of AIS).

In April, 2010, the City did prepare an AIS addressing the westernmost 7.4 miles of the 20-some mile rail line. AR 059459-059932 (example of AIS). But neither the City nor the FTA ever prepared AISs for the remainder of the rail line. Instead, the City and the FTA continued with their "phased" approach to identifying archaeological resources. AR 000030 at 000092-94. That is not to say they disclaimed the importance of completing the AISs; on the contrary, Defendants explicitly recognized that the AISs were required prerequisites to construction. AR 000030 at 000092-94.

As explained in detail in Plaintiffs' Motion for Summary Judgment, the City and the FTA had ample notice that the deferral of AISs until after project approval would violate Section 4(f). Pl. MSJ at 16-17. In 2009, more than a year before the Project was approved, the OIBC, the National Park Service, the National Trust for Historic Preservation, and even FTA's own staff expressed significant, strongly-worded concerns about Defendants' failure to complete

the AISs. *Id.* citing AR 125000 at 125005 (OIBC),[4] AR 125208 at 125210 (National Park Service (NPS)),[5] AR 124858 at 124858-59 (National Trust for Historic Preservation),[6] AR 124645 (FTA staff).[7] Ignoring those concerns,[8] Defendants nonetheless approved the Project without completing AISs. Un-surveyed areas included Downtown and Kaka'ako, both of which were rated areas of "high" archaeological consequences in the 2008 Burials Report**.**[9] AR 059459 at 059478-88 (scope of work for AIS); AR 037676 at 037686 (table of ratings).

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[4] The OIBC warned that the City "has needlessly placed iwi kupuna in harm's way and diminished the ability of laws such as [Section] 4(f) to protect them." AR 125000 at 125005.

[5] The Park Service demanded "wouldn't it be prudent to complete the [AIS] and know where burials are located ASAP?" AR 125208 at 125210.

[6] The National Trust expressed "extreme" concern about "the City's decision to defer detailed identification of historic properties" and cited Section 4(f) case law prohibiting such an approach. AR 124858 at 124858-59. The National Trust is a federally chartered nonprofit organization established by Congress in 1949 to serve as an historic preservation watchdog. *See* 16 U.S.C. §§ 468-468d.

[7] FTA staff characterized the Project's approach to burials as "casual" and "a quick once-over." AR 124645

[8] The City Defendants find it "outrageous" that the Plaintiffs pointed out Defendants' failure to undertake any additional studies during the year or so between the time at which they received the four comments referenced above (OIBC, NPS, NTHP, FTA staff) and the time at which they issued the ROD. City Mem. at 25. That outrage is misplaced. The City Defendants do not cite to any evidence contradicting Plaintiffs' factual statements. *Id*. The only document cited by the City is the 2008 Technical Report, a document which (1) was prepared well in advance of the four comments (and therefore could not have been a response to those comments) and (2) as described in great detail in this brief, was never designed to satisfy the requirements of Section 4(f). In fact, the manifest inadequacy of the 2008 Technical Report for Section 4(f) purposes was part of the impetus for the four comments Plaintiffs have cited.

[9] *See* Attachment A (map showing locations of Kaka'ako and Downtown)..

In approving the Project before completing the studies needed to identify Native Hawaiian burials, evaluate the potential use of those burials, and consider alternatives to avoid such use, Defendants blatantly violated Section 4(f). The Department of Transportation's Section 4(f) regulations, which are binding on the FTA, require that 4(f) resources be identified and evaluated "as early as practicable" and while "alternatives to the proposed action are under study," and, in any event, prior to project approval. *See* 23 C.F.R. §§ 774.9(a),(b). That means "an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its ROD." *North Idaho*, 545 F.3d at 1158-59. Relying on that fundamental principle, the Ninth Circuit has squarely rejected Defendants' phased approach to the identification and evaluation of 4(f) resources. *Id*. Plaintiffs respectfully submit that this Court should do the same.

To be clear: This is not the sort of violation that turns on a "battle of the experts" or the interpretation of some technical detail buried in a scientific report. Plaintiffs are not alleging that Defendants failed to complete an exotic or speculative analysis. Defendants have admitted that the studies here at issue (*i.e.*, the AISs) must be completed prior to construction. AR 000030 at 000092-94. But those studies should have been completed ***before*** the Project was approved, so that the results of the studies could have been used to ensure that the Project will avoid using Native Hawaiian burials, as mandated by

Section 4(f), its implementing regulations, and binding Circuit precedent. 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.9(a),(b); *North Idaho*, 545 F.3d at 1158-59.

In response , Defendants offer a series of five inconsistent — and, indeed, irreconcilable — explanations purporting to justify their decision to defer efforts to identify and evaluate Native Hawaiian burials until after the Project was approved. Sections II.A.1.a through II.A.1.b, below, explain in detail why each of Defendants' five arguments with respect to *iwi kupuna* should be rejected. Before plunging into that explanation, however, it is worth noting a more general point: Defendants have failed to articulate anything approximating a coherent position with respect to what was studied, when it was studied, and how the timing and content of those "efforts" comply with Section 4(f). For example:

- Defendants claim to have properly deferred a portion of their Section 4(f) evaluation until after the ROD, but also claim that a full Section 4(f) evaluation preceded the ROD.
- Defendants claim to have fully evaluated burials prior to approving the Project, but also assert that they were not allowed to fully evaluate burials until after the Project was approved.
- Defendants suggest that Native Hawaiian burials are not necessarily important enough to qualify for protection under Section 4(f), but also that such burials are so important that it would have been improper to risk disturbing them with a Section 4(f) evaluation.

In short, it appears that Defendants will say anything to try to get around the

plain requirements of Section 4(f). But *post hoc* rationalizations cannot compensate for the predecisional analysis required by Section 4(f).

a) Defendants Improperly Deferred Their Analysis Of Native Hawaiian Burials Under Section 4(f) Until After Project Approval

Defendants argue assert that the City and the FTA properly deferred their identification and Section 4(f) evaluation of Native Hawaiian burials until after project approval. Those arguments are unsupported by law and must be rejected.

(1) 36 C.F.R. § 800.4(b)(2) Did Not Authorize Defendants To Defer Their Identification And Evaluation Of Native Hawaiian Burials Under Section 4(f)

All three groups of Defendants contend that ***Section 4(f)*** has been satisfied because regulations implementing ***the NHPA*** authorize a phased approach to the identification and evaluation of historic resources. *See* Fed. Mem. at 30; City Mem. at 26; Int. Mem. at 65. Each group of Defendants relies on 36 C.F.R. § 800.4(b)(2). *Id*. But the Ninth Circuit has explicitly held that 36 C.F.R. § 800.4(b)(2) does not authorize a phased approach to Section 4(f) compliance. *North Idaho*, 545 F.3d at 1158-59.

There is good reason to follow this binding circuit precedent. Section 4(f) (unlike the NHPA) imposes a substantive mandate prohibiting the approval of any Project that "uses" an historic resource unless there is no feasible and prudent alternative to doing so. 49 U.S.C. § 303(c); *see also*

Overton Park, 401 U.S. at 404-05 (§ 4(f) substantive mandate); *Te-Moak Tribe of Western Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010) (NHPA primarily procedural). For that reason, Section 4(f)'s implementing regulations (unlike those of the NHPA) explicitly require that all of the information needed for an agency to identify Section 4(f) resources, evaluate potential "uses" of such resources, and consider project alternatives be available prior to project approval. *Compare* 23 C.F.R. §§ 774.3(a), 774.9(a), 774.9(b) (Section 4(f) requires identification and evaluation prior to ROD) *with* 36 C.F.R. § 800.4(b)(2) (NHPA allows deferred identification and evaluation). If it were otherwise, project proponents could easily sidestep Section 4(f)'s substantive mandate by simply deferring their efforts to identify 4(f) resources until after an alternative has been approved.[10] To allow such an approach would be to effectively eviscerate the statute. This Court should reject Defendants' invitation to do so, and instead follow the binding Ninth Circuit precedent in *North Idaho*.

[10] To prevent that from happening, the Department of Transportation ("DOT"), of which all federal Defendants are a part, has long cautioned its constituent agencies against wholesale reliance on NHPA procedures for purposes of Section 4(f) compliance. During the rulemaking process for its earliest Section 4(f) regulations, DOT noted that "[s]everal comments suggested that for historic sites, Section 4(f) compliance could be achieved by relying entirely on…section 106 of the [NHPA]." 45 Fed. Reg. 71968, 71976 (Oct. 30, 1980). Responding to those comments, DOT took the following position: "Because of the differences in the substantive protective provisions of section 106 and section 4(f), it is not possible to completely combine the procedures for compliance with the two sections." *Id*.

(2) 23 C.F.R. § 774.9(e) Did Not Authorize Defendants To Defer Their Identification And Evaluation Of Native Hawaiian Burials Under Section 4(f)

The Federal Defendants argue that 23 C.F.R. § 774.9(e) authorized them to defer identification and evaluation of Native Hawaiian burials until after project approval. Fed. Mem. at 30. That argument fails for two reasons.

First of all, the administrative record clearly shows that 23 C.F.R. § 774.9(e) was not one of the bases for the Defendants' decision to defer their analysis of burials. *See, e.g.*, AR 000030 at 000085 (Programmatic Agreement refers to 36 C.F.R. § 800.4); AR 000247 at 000619 (same); AR 037676 at 037705 (2008 Burials Report). Therefore this argument is not properly before the Court. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (reviewing court not entitled to "supply a reasoned basis for agency action that the agency itself has not given"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Secondly, the text of 23 C.F.R. § 774.9(e) simply provides that Section 4(f) may apply to historic resources discovered during construction. 23 C.F.R. § 774.9(e). It does not authorize agencies to defer their identification of Section 4(f) resources until after construction is under way. *Id*. Indeed, subsection (a) of that same regulation (23 C.F.R. § 774.9) clearly mandates that historic resources be identified and evaluated "as early as practicable" and "when alternatives…are under study." 23 C.F.R. § 774.9(a). There is no way

to reconcile the Federal Defendants' (mis)interpretation of subsection (e) with the plain and explicit requirements of subsection (a). Accordingly, that interpretation should be rejected.

(3) The SHPO Did Not Authorize Defendants To Defer Their Identification And Evaluation Of *Iwi Kupuna* Under Section 4(f)

All three groups of Defendants contend that Hawaii's State Historic Preservation Officer (or "SHPO") properly authorized the City's and FTA's decision to defer identification and evaluation of Native Hawaiian burials until after project approval. Fed. Mem. at 31-32; City Mem. at 26-27; Int. Mem. at 66. Specifically, they assert that the SHPO's concurrence in the Project's Area of Potential Effect ("APE") and Programmatic Agreement ("PA") constitutes a determination that "the FTA's approach to the evaluation of potential archaeological sites was not arbitrary and capricious." *See* Fed. Mem. at 30-31. This is nonsense. Neither Section 4(f) (a Federal law) nor its implementing regulations provides SHPO (a State official) with any authority to decide the timing of a federal agency's compliance with Section 4(f). 49 U.S.C. § 303(c) (statute); 23 C.F.R. part 774 (implementing regulations).[11] As explained above, that issue is governed by the Section 4(f) regulations, which

[11] A SHPO's (non-Section 4(f)) authority to participate in determinations regarding eligibility for the National Register of Historic Places may have an impact on the Section 4(f) process. But the SHPO has no authority over the ***timing*** requirements governing a federal agency's compliance with Section 4(f).

provide that evaluations must take place "as early as practicable," while "alternatives to the project are under study," and prior to the issuance of a ROD. 23 C.F.R. §§ 774.9(a), 774.9(b); *see also North Idaho*, 545 F.3d at 1158-59.

In any event, the administrative record contains no evidence that SHPO's concurrences represented a determination of compliance with Section 4(f). *See, e.g.*, AR 000030 at 000083-124 (Programmatic Agreement). On the contrary, the ROD (the document explaining what was decided and why) explicitly states that the Programmatic Agreement (the document in which SHPO concurred) reflects "what the [] parties agreed is appropriate to comply with ***the NHPA and relevant state law***." AR 000030 at 000235 (emphasis added); *see also* 40 C.F.R. § 1505.2 (ROD memorializes agency decision). There is no mention of an equivalent determination with respect to Section 4(f). *Id*.[12]

(4) *City of Alexandria v. Slater* Does Not Authorize Defendants' Decision To Defer Their Identification And Evaluation Of *Iwi Kupuna* Under Section 4(f)

All three groups of Defendants also argue that *City of Alexandria v. Slater* authorizes the City's and FTA's decision to defer identification and evaluation of native Hawaiian burials until after project approval. Fed. Mem.

[12] As explained above, compliance with the NHPA is not sufficient to establish compliance with Section 4(f). *North Idaho*, 545 F.3d at 1158-59; *see also* 45

at 29-31; City Mem. at 34; Int. Mem. at 63-64. In *City of Alexandria*, the D.C. Circuit held that Section 4(f) did not require a federal agency to identify the precise locations of certain temporary "ancillary facilities" (essentially, construction staging yards) prior to approving the replacement of an existing bridge. *City of Alexandria v. Slater*, 198 F.3d 862, 872 (D.C. Cir. 1999). The *City of Alexandria* defendants had previously "identified historic properties along the entire project corridor and documented [their] findings prior to [project] approval." *City of Alexandria*, 198 F. 3d at 873. The only thing they deferred was "the identification of sites that might be impacted by a small number of ancillary activities." *Id*.

In contrast, this case concerns Defendants' decision to defer identification and evaluation of ***the impacts of the Project itself*** — not some ancillary activity. The *City of Alexandria* court clearly distinguished between the two situations. *Id.* at 873 (distinguishing agency's failure to identify and evaluate impacts of ancillary activities from agency's failure to identify impacts of the project itself). The Ninth Circuit has drawn the same distinction. *North Idaho*, 545 F.3d at 1159, n.8 (distinguishing failure to identify ancillary construction activities from impermissible phasing of 4(f) compliance). Plaintiffs respectfully submit that this Court should do so as well.

Fed. Reg. 71968, 71976 (Oct. 30, 1980).

To the extent that the Court is inclined to seek guidance from D.C. Circuit case law, *Corridor H Alternatives v. Slater* (and not *City of Alexandria*) is the most relevant authority. Like this case, *Corridor H* concerned a major, new linear transportation project.[13] *Corridor H Alternatives v. Slater*, 166 F.3d 368, 370-72 (D.C. Cir. 1999). Like this case, *Corridor H* involved a Programmatic Agreement dividing the project into multiple phases. *Id*. at 372. Like the Programmatic Agreement in this case, the *Corridor H* Programmatic Agreement purported to authorize a phased-by-phase approach to the identification and evaluation of historic resources under Section 4(f).[14] *Id*. And like the Defendants in this case, the *Corridor H* defendants relied on this phase-by-phase approach to defer their investigation of the impacts of the project on historic resources until after the project had been approved. *Id*.

Corridor H held this approach to be illegal, concluding that Section 4(f) does not permit federal agencies to adopt a phased method of identifying and evaluating project impacts. *Corridor H*, 166 F.3d at 372-74. The Ninth Circuit explicitly relied on *Corridor H* in deciding *North Idaho*. *North Idaho*,

[13] The project at issue in Corridor H was a new freeway.

[14] The City and the Federal Defendants seek to distinguish *Corridor H* as a case where the defendant agency deferred "the entire Section 4(f) and Section 106 analysis until after the ROD." City Mem. at 28; *see also* Fed. Mem. at 29 n.6. That is not accurate. The *Corridor H* opinion clearly states that (1) the project was modified prior to the ROD to avoid the constructive use (a concept unique to Section 4(f)) of two Civil War battlefields, and (2) the Corridor H defendants had made pre-ROD findings with respect to 4(f) compliance. *Corridor H*, 166 F.3d at 371, 373-74. Thus, the "entire analysis" had not been deferred.

545 F.3d at 1158-59. It would be appropriate for this Court to do the same.

b) Defendants Failed To Identify And Evaluate Native Hawaiian Burials Prior To Project Approval As Required By Section 4(f)

Perhaps recognizing the absence of legal authority supporting their decision to defer the preparation of AISs until after project approval, Defendants reverse course and argue that they did, in fact, prepare a full Section 4(f) evaluation of Native Hawaiian burials prior to approving the Project. *See* Fed. Mem. at 23; City Mem. at 21; Int. Mem. at 63-64. Specifically, they point to the 2008 Burials Report as evidence that the FTA and the City thoroughly identified and evaluated the Project's potential to use Native Hawaiian burials as required by Section 4(f). Fed. Mem. at 24-25; City Mem. at Int. Mem. at 64.

But the plain language of the 2008 Burials Report clearly states that it does not — and was never intended to — provide a detailed identification and evaluation of burials pursuant to Section 4(f).[15] For example:

- Describing the Project's approach to identifying Native Hawaiian burials and other archaeological resources, the Report notes that "the bulk of the archaeological investigation, documentation, and associated mitigation decisions will be deferred and carried out ***subsequent to*** conclusion of the Project's federal environmental and

[15] Therefore, this case is unlike *Valley Preservation Coalition v. Mineta*, 373 F.3d 1078 (10th Cir. 2004), where the agency defendants had done an extremely thorough job of identifying and evaluating the resources at issue. *Id*. at 1088-89.

historic preservation review." AR 037676 at 037705 (emphasis added).

- Describing their role in the Project, the authors of the Report explain that they "will work with project planners and engineers to work out the schedule of ***the Project's phased archaeological historic property/archaeological resource identification, evaluation, and mitigation effort***. This effort will be carried out prior to and in conjunction with construction." AR 037676 at 037713 (emphasis added).
- Regarding its initial "ratings" of archaeological consequences, the Report says "This discussion…should be considered ***provisional***. Additional information will become available as the Project's archaeological resource identification and significance evaluation effort is completed." AR 037676 at 037806 (emphasis added).
- The Report concludes that "the Project would require a substantial archaeological resource identification, evaluation, and mitigation effort" and notes that such an effort was deferred until after the Project approval. AR 037676 at 037822.

In short, the plain language of the 2008 Burials Report says that the identification and evaluation of Native Hawaiian burials (and other archaeological resources) required by federal law will be carried out at a later time.

It is hardly surprising, then, that the 2008 Burials Report does not actually contain anything in the way of a Section 4(f) evaluation. It does not discuss the provisions of the Section 4(f) regulations relating to archaeological

resources. *See, e.g.*, 23 C.F.R. §§ 774.9(e), 774.11(e), 774.11(f), 774.13(b), 774.17 (regulations relating to archaeological resources) AR 037676 at 037700-02 (discussing "historic preservation review process"). It does not apply those regulations to any Native Hawaiian burials. *See*, *e.g.*, AR 037676 at 037806-21 (discussion of "consequences"). It does not contain any sort of "use" analysis with respect to Native Hawaiian burials. *Id*. It does not discuss the prudence or feasibility of avoiding Native Hawaiian burials, nor the criteria for evaluating the prudence and feasibility of such avoidance. AR 037676 at 037822-36; 23 C.F.R. § 774.17 (prudence and feasibility definition). And it does not apply the Section 4(f) concept of "all possible planning to reduce harm" to Native Hawaiian burials. *Id*.; 23 C.F.R. §§ 774.3(a), 774.7 (requiring documentation of finding with respect to "all possible planning").

Furthermore, the geographic scope of the 2008 Burials Report does not (as Defendants misleadingly suggest) include "the ***entire Project.***" *See* City Mem. at 23 (italics and bold original); *see also* Fed. Mem. at 24. Because the Report synthesized existing research (rather than providing original fieldwork), its geographic scope was necessarily limited to areas previously studied by others. AR 037676 at 037709-12 (describing scope). Sections of the Project route had not previously been studied by others. *See* e.g., AR 037676 at 037834 (Report on Kaka'ako reflects "intensity of archaeological

studies in certain areas rather than the true distribution of burials").[16] Therefore, the 2008 Burials Report does not, in fact, cover "the ***entire Project***." City Mem. at 23 (italics and bold original).

In the end, it is very difficult to understand how Defendants can argue, with a straight face, that the 2008 Burials Report satisfies Section 4(f)'s requirements. The Report does not cover the entire Project, does not discuss or apply Section 4(f) requirements relevant to archaeological resources, and explicitly states that the identification and evaluation of Native Hawaiian burials will take place in another document, to be prepared after project approval. AR 037676 at 0376705, 037709-13, 0376806, 0376822.

Indeed, the only portion of the 2008 Burials Report even arguably resembling an "analysis" of archaeological resources is the series of "provisional" neighborhood-by-neighborhood "archaeological consequences" ratings. *See* 037676 at 037686, 037820. But if those ratings represent a full, Section 4(f)-compliant analysis (as Defendants now suggest), the City and FTA should have considered feasible and prudent ways to avoid those areas. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3. Defendants cannot have it both ways.

[16] The cited paragraph provides a good illustration of the limits of the 2008 Burials Report: "In this sub-area, burials have been found in two clusters … These clusers probably reflect the intensity of archaeological studies in certain areas rather than the true distribution of burials. It is highly likely that additional burials would be found … especially between Cooke and Kamake'e Streets which have not been the subject of intensive archaeological subsurface investigations." AR 037676 at 037834.

If the 2008 Burials Report was a 4(f)-compliant analysis of Native Hawaiian burials (and other archaeological resources), the Defendants violated the law by failing to consider alternatives to routing the Project through the Downtown and Kaka'ako areas, both of which was deemed to have "high archaeological consequences." On the other hand, if the 2008 Burials Report was not a 4(f)-compliant analysis of Native Hawaiian burials, Defendants impermissibly deferred their analysis until after project approval. Either way, Plaintiffs are entitled to summary judgment.

c) Defendants Were Not Precluded From Properly Identifying And Evaluating Impact On Native Hawaiian Burials Under Section 4(f) Prior To Project Approval

In an effort to escape this bind, Defendants claim that they were precluded from properly identifying and evaluating Native Hawaiian burials prior to issuing the ROD. Fed. Mem. at 27; City Mem. at 25, 30-31; Int. Mem. at 65. Specifically, they contend that (1) it is not possible to identify and evaluate the Project's potential use of burials until the precise locations for each guideway support column have been determined, (2) such determinations cannot be made until the "final design" stage of the Project, and (3) final design cannot take place prior to the issuance of a ROD. *Id*.

Defendants' position is fundamentally flawed. First of all, the Administrative Record demonstrates that the City and FTA can — and, for at least one small segment, ***did*** — complete an AIS prior to final design. *See,*

e.g., AR 059459-059932 (AIS for Phase 1 completed prior to ROD); AR 000030 at 000093 (AIS for Phase 4 to be completed "prior to beginning final design"). Second, even if Defendants did not know the precise location of each post, pole, and pillar before issuing the ROD, they ***did*** know the locations of the rail stations, park-and-ride lots, and transit centers along the route, and could therefore have completed AISs for those locations. *See, e.g.,* AR 000247 at 000350-57. Third, Defendants' interpretation of the law would excuse federal agencies from identifying any archaeological resources (always located underground) before approving a transportation project, a proposition for which there is no support in Section 4(f) or its implementing regulations.

d) Defendants' "Level Of Effort" Does Not Justify Their Failure To Identify And Evaluate Impacts On *Iwi Kupuna* Under Section 4(f) Prior To Project Approval

Citing a host of concerns about cost and convenience, all three groups of Defendants suggest that the City's and FTA's approach to identifying and evaluating Native Hawaiian burials under Section 4(f) should be upheld because it constitutes an appropriate "level of effort." Fed. Mem. at 26-28; City Mem. at 29-30; Int. Mem. at 64-65. This is a red herring. Notwithstanding Defendants' best efforts to re-cast this case as a series of petty methodological disagreements (presumably in an effort to seek deference where none is due), this is ***not*** a dispute about "appropriate levels of effort." There is broad agreement that the "appropriate" way to identify *iwi kupuna* is

by preparing complete AISs for the entire Project route. *See, e.g.,* AR 000030 at 000092-93 (Programmatic Agreement requires AISs); AR 037676 at 037823-25, 037827-35 (2008 Burials Report recommends AISs). The dispute between the parties concerns the ***timing*** of those AISs.

If the Court is nonetheless inclined to explore the issue of "appropriate levels of effort," Plaintiffs invite attention to the City's own 2008 Burials Report. *See* AR 037676-037882 (complete 2008 Burials Report). That Report explicitly states that an AIS is the "appropriate level of effort" for identifying *iwi*, evaluating the Project's potential to impact *iwi*, and determining appropriate options to avoid and mitigate such impacts. AR 037676 at 037823-27.[17] It is undisputed that the Defendants did not complete AISs for the entire Project route prior to issuing the ROD. Therefore, Defendants' "appropriate level of effort" arguments should be rejected.

When considering the "appropriateness" of various "levels of effort," it is also important to bear in mind the purpose of Section 4(f). The Supreme Court has concluded that Section 4(f) gives historic resources (including archaeological resources like burials) "paramount importance." *Overton Park*,

[17] The Report also identifies certain types of research activities needed to prepare a proper AIS — that is to say, the specific components of an appropriate "level of effort." *See, e.g.,* AR 037676 at 037824-27 (generally identifying research activities); *id*. at 037832-34 (activities required for adequate assessment of Downtown area); *id*. at 037834-35 (activities required for adequate assessment of Kaka'ako area). These activities were not completed (or even started) prior to Defendants' approval of the Project.

401 U.S. at 411. That being so, Defendants' cost and convenience concerns must yield to the "paramount importance" of identifying and evaluating Native Hawaiian burials prior to project approval, so that all feasible and prudent alternatives and all appropriate planning to minimize harm can properly be considered. *Overton Park*, 401 U.S. at 412-13; *see also* 73 Fed. Reg. 13368, 13391 (March 12, 2008) (FTA affirms, in context of alternatives analysis, that *Overton Park* found "cost…and community disruption should not be considered on an equal footing" with Section 4(f)'s preservation purposes).

e) Native Hawaiian Burials Must Be Identified And Evaluated Under Section 4(f)

The City Defendants argue that "Plaintiffs and National Trust are simply wrong in claiming that unknown and unidentified Native Hawaiian burials are automatically eligible for listing on the National Register without a specific eligibility determination." City Mem. at 32. Presumably, the City means to suggest that Native Hawaiian burials are not "historic resources" within the meaning of Section 4(f).

If that is the City's position, it is a poor one. The Section 4(f) regulations explicitly provide that "Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register" except for those "with minimal value for preservation in place." 23 C.F.R. §§ 774.11(f), 774.13(b). The Programmatic Agreement treats archaeological sites as eligible for listing in the National Register. AR 000030 at 000085. And the FTA has admitted that

"[c]learly, the *iwi kupuna* merit preservation in place." AR 072807. Therefore, Native Hawaiian burials and their significance should have been addressed in the FTA's Section 4(f) evaluation.

More fundamentally, the City Defendants' apparent concerns about the extent to which Section 4(f) applies to Native Hawaiian burials do not excuse their failure to identify and evaluate those burials in the first place. In fact, the City's "argument" neatly highlights the problems associated that failure. Despite knowing that the Project would traverse areas likely to contain Native Hawaiian burials, the City and the FTA did not complete AISs prior to approving the Project. As a result, the FTA made its project approval without knowing whether the Project would "use" 4(f) resources, without knowing whether there might be feasible and prudent alternatives to such use, and without knowing whether the Project had incorporated "all possible planning" to minimize harm. Essentially, Defendants refused to look for historic resources and then justified their approval of the Project by concluding that nothing had been found. This blinkered, "head in the sand" approach to Section 4(f) flies in the face of clearly-expressed Congressional intent, unambiguous regulatory requirements, binding circuit precedent, and all common sense. *See Overton Park*, 401 U.S. at 404-406 n.1-2 (finding Congressional intent to provide substantive protection for 4(f) resources); 23 C.F.R. §§ 774.3(a), 774.9(a), 774.9(b) (requiring that 4(f) resources be

identified and evaluated prior to project approval); *North Idaho*, 545 F.3d at 1158-59 ("an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its ROD"). It must be rejected.

f) Defendants' Stated Interest In Preventing The Disturbance Of Native Hawaiian Burials Does Not Justify Their Failure To Comply With Section 4(f)

Finally, all three groups of Defendants cynically assert that City's and FTA's failure to identify, evaluate, and avoid impacts on Native Hawaiian burials prior to approving the Project was somehow justified by the importance of protecting those burials from harm. Fed. Mem. at 27; City Mem. at 32; Int. Mem. at 64. Borrowing a phrase from the *City of Alexandria* court, "to set forth the logic of this argument is to refute it." *City of Alexandria*, 198 F.3d at 872, n.9.

Undeterred, the City Defendants press the argument further by suggesting that their failure to identify, evaluate, and take steps to avoid *iwi kupuna* is justified by an Advisory Council on Historic Preservation guidance document calling for the ***protection*** of burial sites (the "Burials Policy").[18] City Mem. at 33. Presumably, Defendants mean to rely on Principle 4 of the Burials Policy, which provides that burial sites should not be intentionally

[18] The City Defendants seem to be under the mis-impression that all efforts to identify, evaluate, and avoid burial sites involve significant ground disturbance. That is not the case. The City's own 2008 Burials Report identifies several methods of collecting additional information with materially disturbing above- or below-ground resources. *See*, *e.g.*, 037676 at 037823-26 (discussing ground penetrating radar and small soil samples).

disturbed while a Project is being built. Fed. Mem., Miller Dec., Ex. B. But Principle 4 does not say anything about the type of studies at issue in this case — namely, studies providing federal decisionmakers with the information needed to avoid identify, evaluate, and ***avoid*** burial sites before approving a project. *Id*. It is also worth noting that the Burials Policy is designed to be a guide for Section 106 compliance; the Policy does not address the timing of Section 4(f) evaluations.[19] And, in any event, the Burials Policy is neither part of the Administrative Record nor referenced within the Programmatic Agreement, both of which facts suggest that it was never part of the decisionmaking process for the Project. AR 000030 at 000092-95 (no reference to burials policy in Programmatic Agreement).

To the extent that the Burials Policy is relevant here, it is because the Policy directs federal agencies to "utilize the special expertise of…Native Hawaiian organizations in the documentation and treatment of their ancestors." Fed. Mem., Miller Dec., Ex. B. By law, the OIBC is a "Native Hawaiian organization" charged with providing "special expertise" on the treatment of *iwi*. *See* AR 000300 at 000092, AR 125000 at 125002.[20] The OIBC told the Defendants that complete AISs identifying and evaluating *iwi* should be

[19] As explained several times already, compliance with § 106 is necessary, but not sufficient, for 4(f) compliance.

[20] It is worth noting that the Intervenor Defendants appear to concede (albeit implicitly) the OIBC's "special expertise" in the treatment of *iwi*. Int. Mem. at 67.

prepared prior to project approval. AR 125000 at 125000-01, 125004-07. Defendants' failure to "utilize the special expertise" offered by the OIBC exposes the City's newfound interest in the Burials Policy for what it is: Grasping at straws.

2. Defendants Failed Fully To Identify And Evaluate TCPs Prior To Approving The Project, Thereby Violating Section 4(f)

TCPs are resources which may be "eligible for inclusion in the National Register because of [] association with cultural practices or beliefs of a living community that (a) are rooted in the community's history, and (b) are important in maintaining the continuing cultural identity of the community." *See* Parker and King, *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* ("Bulletin 38") at 1-2.[21] The FTA and the City conducted "preliminary" research on TCPs before approving the Project. *See* AR 000030 at 000091; 000247 at 000623. But they deferred a complete "study to identify and evaluate the [Project's Area of Potential Effect] for the presence of traditional cultural properties" until after project approval. *Id.*

The City's and FTA's decision to defer further analysis is memorialized

[21] Indeed, it is worth noting that Bulletin 38 appears nowhere in the Administrative Record, suggesting that it was not consulted by the Defendants despite being the Federal Government's guidance on the subject of TCPs. It is, however, readily available online at: http://www.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm#tcp agency public

in the FEIS and in the Programmatic Agreement. AR 000247 at 000632; 000030 at 000091. The FEIS explicitly states that Chinatown has been evaluated as a TCP, but "further investigation for TCPs is being completed as stipulated in the [Programmatic Agreement]." AR 000247 at 000632. The relevant provision of the Programmatic Agreement provides that the City must undertake further "studies to evaluate [] TCPs for NRHP eligibility in accordance with guidance in National Register Bulletin 38." AR 000030 at 000091.[22] In short, the City and the FTA adopted a phased approach whereby efforts to identify and evaluate TCPs were deferred until after approval of the Project.

For the same reasons explained above (in the context of Native Hawaiian burials), such an approach violates Section 4(f). *See* II.A.1.a; *see also* 23 C.F.R. §§ 774.3(a), 774.9(a),(b) (identification, analysis, and consideration of alternatives to use of historic resources must precede project approval). Studies identifying and evaluating TCPs should have been completed ***before*** the Project was approved, so that the results of the studies could have been used to ensure that the Project will avoid using TCPs, as mandated by Section

[22] The Programmatic Agreement also specified that all "fieldwork, eligibility and effects determination, and consultation to develop [] treatment measures" for those studies was required to be completed prior to the beginning of construction. *Id.* The Programmatic Agreement also specified that all "fieldwork, eligibility and effects determination, and consultation to develop [] treatment measures" for those studies was required to be completed prior to the beginning of construction. AR 000030 at 000091.

4(f), its implementing regulations, and binding Circuit precedent. 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.9(a),(b); *North Idaho*, 545 F.3d at 1158-59.

Defendants' responses to that contention are, to put it charitably, quite minimal. The Federal Defendants limit their argument to a pair of footnotes. *See* Fed. Mem. at 25 n.4, 26 n.5. The City Defendants devote just a page and a half of their 95-page brief to the issue. City Mem. at 35-36. The Intervenors do not address TCPs at all. Int. Mem. at 42-66.

Defendants may be under the impression that the issues relevant to TCPs are precisely the same as those relevant to Native Hawaiian burials. *See, e.g.*, City Mem. at 35 (describing TCP claims as "a restatement of [] arguments regarding…burials"). But that is only half true: Section 4(f)'s prohibition on phased compliance applies equally to *iwi* and to other TCPs; but because TCPs are not necessarily subterranean, Defendants' arguments with respect to engineering constraints, appropriate levels of effort, and prevention of damage do not apply.

Neither the Federal Defendants nor the City Defendants make any specific argument in favor of their phased approach to the identification and evaluation of TCPs. Fed. Mem. at 25 n.4, 26 n.5; City Mem. at 35-36. Instead, they generally assert that a "Cultural Resources Technical Report" prepared in 2008 (the "2008 Cultural Report") satisfies Section 4(f)'s mandate to identify and evaluate the Project's potential use of TCPs.

While the 2008 Cultural Technical Report identifies a number of cultural resources in the Project's path, it does not contain any Section 4(f) ***analysis***. *See, e.g.,* AR 038098 at 038160-38170 (listing resources). Among other things, the Report does not actually apply the TCP criteria set forth in relevant guidance (including, most notably, Bulletin 38). Nor does it explain whether and how the Project will "use" the identified cultural resources identified. *See* AR 038098 at 038173 (Report applies § 106 "adverse impact" criteria rather than § 4(f) "use" criteria), *id*. at 03817393 (discussion of "consequences" does not evaluate "use" pursuant to Section 4(f)); *see also* 23 C.F.R. § 774.9(a) (requiring evaluation of use). Nor does it identify or discuss the feasibility or prudence of alternatives capable of avoiding any such use. *Id*.; *see also* AR 038098 at 38194-99 (no discussion of feasible/prudent alternatives); 23 C.F.R. § 774.3(a) (requiring findings with respect to feasible/prudent alternatives).

Moreover, the material in the 2008 Cultural Report was never incorporated into the FTA's final §4(f) evaluation for the Project. For example:

- The 2008 Cultural Report found that Irwin Park contains (or perhaps constitutes) certain types of cultural resources, some of which will be affected by the Project. AR 038098 at 038153, 038181, 038192. But the final §4(f) evaluation does not address those cultural aspects of Irwin Park. *See* AR 000247 at 000731-32, 000746-47.
- The 2008 Cultural Report concluded that Chinatown is a cultural

> resource, a conclusion that is repeated, without further analysis, in the "archaeological, cultural, and historic resources" section of the FEIS. *See* AR 000247 at 000632. But the Final §4(f) Evaluation does not address the TCP aspects of Chinatown, explain whether they will be "used" by the Project, or (if so) identify feasible or prudent alternatives to such use. *See* AR 000247 at 000718-21.[23]

In short, the 2008 Cultural Report fails to establish that the FTA and the City evaluated the Project's potential to use TCPs prior to issuing the ROD.

The City Defendants (but not the Federal Defendants) also assert that TCPs were properly addressed because no one "has come forward with evidence of the existence of any other TCP on the Project alignment other than Chinatown." City Mem. at 35. In doing so, they seem to ignore the contents of their own 2008 Cultural Report, which provides a long list of cultural resources. AR 038098 at 038160-38170. The fact that Defendants never evaluated those resources against the criteria for identifying TCPs does not establish the absence of any culturally important resources in Honolulu; rather it is further evidence of the Defendants' impermissible "head in the sand" approach to Section 4(f).

B. Defendants Arbitrarily And Capriciously Evaluated The Project's Use Of Section 4(f) Resources (Count 6)

Under Section 4(f), the term "use" is construed broadly, and is not

[23] The Final § 4(f) Evaluation for Chinatown focuses only on the potential use occasioned by the location of the rail station's entrance. AR 000247 at 000718-21.

limited to the concept of a physical taking. 23 C.F.R. § 774.17 (definition of "use"); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 445 (9th Cir. 1976) (finding "use" where freeway would "pass near" a Native Hawaiian cultural site); *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) ("the word 'use' is to be construed broadly"). In recognition of that principle, the Section 4(f) regulations provide that a "constructive use" occurs whenever a "transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired." 23 C.F.R. § 774.15(a).

Department of Transportation agencies are responsible for determining whether their proposed projects will constructively use Section 4(f) resources. 23 C.F.R. § 774.15. The Section 4(f) regulations set out strict requirements governing the process and substance of an agency's constructive use determination. *See* § 23 C.F.R. § 774.15. As relevant here, those requirements mandate that a constructive use determination ***must***:

- Identify the attributes of the property which qualify for protection under Section 4(f) (23 C.F.R. § 774.15(d)(1));
- Analyze the proximity impacts of the proposed project on those attributes (23 C.F.R. § 774.15(d)(2)); and
- Apply the specific constructive use examples set forth in 23 C.F.R. § 774.15(e).

In applying these mandatory elements of a constructive use determination, the agency is (of course) allowed a certain amount of reasonable reliance on technical experts. But there are limits. The agency cannot refuse to perform the required analyses, cannot ignore "an important aspect of [a] problem," and cannot reach conclusions unsupported by (or contrary to) the evidence. *Motor Vehicle*, 463 U.S. a 43; *see also see North Idaho*, 545 F.3d at 1158-59 (agency cannot refuse to perform analysis required by Section 4(f) regulations).

Defendants' constructive use determinations for Aloha Tower, Walker Park, Irwin Park, and Mother Waldron Park violate each one of these commandments. In each case, Defendants failed to perform the analyses required by the 4(f) regulations, ignored important aspects of a significant problem, and/or reached conclusions unsupported by — and often contrary to — the evidence. In short, their constructive use determinations are arbitrary and capricious.

1. Defendants' Constructive Use Determination With Respect To Aloha Tower Was Arbitrary And Capricious

Aloha Tower is an Art Deco landmark located on the downtown Honolulu waterfront. It is one of the defining architectural elements of the Honolulu skyline. *See* AR 152826 at 152827. Defendants admit that Aloha Tower is historically and architecturally significant in several respects,

including "as a local landmark [viewed] from the inland area." AR 000247 at 000745-46. These views "from the inland area" are the primary views of Aloha Tower, both in the sense that most of the people who see the Tower each day do so while on land (rather than at sea) and in the sense that the views from inland define the building as a "local landmark." *See* AR 000247 at 000745-46.

The Section 4(f) regulations explicitly provide that a constructive use occurs whenever "a proposed transportation facility…obstructs or eliminates the primary views of an architecturally significant historical building." 23 C.F.R. § 774.15(e)(2). Therefore, in determining whether the Project will constructively use Aloha Tower, it is important to consider whether "views from the inland area" will be "obstruct[ed] or eliminate[ed]." AR 000247 at 000745-46; 23 C.F.R. § 774.15(e)(2).

Defendants' constructive use evaluation of Aloha Tower (contained in Chapter 5 of the FEIS) does not specifically consider whether the Project will "obstruct[] or eliminate[]" views of Aloha Tower from "the inland area." *See* AR 000247 at 000745-46. Instead, the evaluation concludes, in a general way, that "the Project will not block views, although some will be altered." AR 000247 at 000746. The §4(f) Evaluation does not identify the specific views this statement is intended to describe. *Id.* Nor does provide any specific information about what sorts of alterations will occur. *Id.*

Other evidence in the FEIS ***does*** provide a more specific evaluation of the extent to which the Project will obstruct or eliminate views of Aloha Tower from the inland area. For example, the FEIS describes the impacts of the Project on views from Fort Street toward Aloha Tower[24] as follows: "The guideway and columns will reduce the open character of the streetscape…and ***block*** portions of makai views."[25] AR 000247 at 000540 (emphasis added).[26] Likewise, the Project would also block views toward Aloha Tower from Bishop and Bethel Streets.[27] AR 000247 at 000540.

In short, Defendants' own analyses say that the Project will block views toward Aloha Tower from "the inland area." This make sense —after all, the Project would place a 40- to 50-foot tall concrete structure directly between Aloha Tower and "the inland area." *See* AR 039555 at 039979-80 (showing height of Project in downtown area). Under these circumstances, the Section 4(f) regulations dictate a finding of constructive use. *See* 23 C.F.R. § 774.15(e)(2) (obstruction of primary views).

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[24] Fort Street is aligned such that any view toward the Harbor would necessarily be a view of Aloha Tower. The Project would pass directly between the viewer and Aloha Tower. *See* Attachment B.

[25] "Makai" refers to views toward the sea. In this case, it means views toward Aloha Tower.

[26] A table within Section 4.8 describes the impacts of the Project differently (and in less colorful terms), but nonetheless concludes that "the guideway structure will partially ***block*** a view of the Aloha Tower." AR 000247 at 000512 (emphasis added).

[27] Aloha Tower is also within the Makai viewshed from these vantage points. *See* Attachment B.

The Federal Defendants respond that Plaintiffs' argument takes statements from the EIS out of context. *See* Fed. Mem. at 35. Presumably, they are reacting to Plaintiffs' reliance on information from Chapter 4.8 of the EIS (Visual and Aesthetic Conditions) for purposes of identifying inadequacies in the constructive use evaluation. But there is nothing improper about that. 40 CFR § 1502.25(a).

The City Defendants go further, arguing that the Project "will not impact ***any*** of the historically significant views of Aloha Tower." City Mem. at 43 (emphasis original). As explained above, their own EIS found otherwise. AR 000247 at 000540. Moreover, before the City became invested in defending the approved Project, it had a very different opinion about the potential impacts of an elevated rail line on Aloha Tower. During AA process, for example, the City concluded that such a project "would have severe visual impacts for Aloha Tower and should be avoided if there are other viable alternatives." *Compare* City Mem. at 43 (no impact to views) *with* AR 009556 at 009623 ("severe impact" and recommendation to choose another route).

Under these circumstances Defendants' constructive use determination for Aloha Tower was arbitrary and capricious

2. Defendants' Constructive Use Determination With Respect To Walker Park Was Arbitrary And Capricious

Walker Park is a public park in downtown Honolulu offering seating, a

fountain, a grove of palm trees, and open views toward Honolulu harbor and Aloha Tower. AR 000247 at 000731, 000744. It is also an historic resource eligible for listing in the National Register. AR 000247 at 000744. For both reasons, Walker Park is entitled to protection under Section 4(f). The City and FTA determined that the Project will not constructively use Walker Park. That determination was arbitrary and capricious in three respects, each of which is detailed below.

a) Defendants' Evaluation Of Walker Park's Historic Attributes Was Arbitrary And Capricious

All constructive use determinations must include an evaluation of the "activities, features, or attributes…which qualify for protection under Section 4(f)" and potential impacts on those attributes. 23 C.F.R. §§ 774.15(a), 775.15(d). For historic resources, the features which "qualify for protection under Section 4(f)" are the features of the property eligible for listing in the National Register. Walker Park is an historic resource. AR 000247 at 000744. It is eligible for listing in the National Register as "an early example of created greenspace" in downtown Honolulu. AR 000247 at 000744. Therefore, Defendants' constructive use analysis was required to evaluate the impact of the Project on Walker Park's status as an historic greenspace. 23 C.F.R. § 774.15(d).

As explained in Plaintiffs' moving papers, the FTA and the City failed to

undertake this analysis. Pl. MSJ at 26. The entirety of their "analysis" of the Project's potential impacts on the historic attributes of Walker Park is contained in two circular, conclusory sentences:

> Walker Park is eligible for inclusion in the [National Register] for its historic associations and as an early example of greenspace in the Central Business District. The Project will not substantially impair the park's historic associations, which are the features and attributes that contribute to its [National Register] eligibility; therefore, there will be no constructive use of Walker Park.

AR 000247 at 000744. That is not an analysis. It is simply a conclusion — and an unsupported one, at that. As Plaintiffs previously noted, there is no evidence that the Defendants ever evaluated the original (historic) plans for the park or determined whether the Project might interfere with the park attributes identified in those plans. *See* Pl. MSJ at 28.

In the nine weeks since Plaintiffs filed their Motion for Summary Judgment, Defendants have twice supplemented the Administrative Record. *See* ECF Doc. Nos. 121, 142. The supplements contained information about some of the historic resources at issue in this case, including basic reference forms, such as National Register nominations and inventory sheets. *See, e.g.,* . But the supplements do not contain any information regarding the historic attributes of Walker Park. *Id*. It seems clear, then, that those attributes were never actually evaluated by the FTA or by the City as part of the constructive use analysis for the Project. That failure is arbitrary and capricious. 23 C.F.R.

§ 774.15(d)(1),(2).

Neither the Federal Defendants nor the City makes a serious effort to dispute Plaintiffs' claims. The Federal Defendants simply reiterate the conclusory assertions found in their constructive use evaluation. *See* Fed. Mem. at 37 ("The Section 4(f) Evaluation notes that the Project will not substantially impair Walker Park's historic associations, which are the features that contribute to its National Register Eligibility"). The City Defendants do the same (the only difference being that the City Defendants use ***bold italics*** for emphasis). *See* City Mem. at 45. Accordingly, Plaintiffs are entitled to summary judgment.

b) Defendants' Evaluation Of Noise Impacts On Walker Park Was Arbitrary And Capricious

Defendants' constructive use evaluation does not evaluate the Project's potential noise impacts at Walker Park. AR 000247 at 000731, 000744. That failure was arbitrary and capricious in and of itself. 23 C.F.R. § 774.15(d)(1),(2).

Analyses of potential noise impacts found elsewhere in the Administrative Record suggest that the "reference Sound Exposure Level" (or "SEL") for the Project would be 82 decibels within 50 feet from the rail line. AR 072897 at 072898. The Project would be located within 50 feet of Walker Park. AR 000247 at 000744. But, as noted in Plaintiffs' moving papers,

Defendants estimate that the Project will only result in 65 decibels of noise at Walker Park. Pl. MSJ at 27 n.15 (citing AR 072897 at 072926). In other words, Defendants' conclusions was contrary to the evidence. For that reason, too, it was arbitrary and capricious.

The Federal Defendants do not provide any explanation for the discrepancy between the 82 decibels estimated for Walker Park in Defendants' noise study and the 65 decibels estimated for Walker Park in Defendants' Section 4(f) Evaluation. *See* Fed. Mem. at 38-39 (describing various studies without addressing Plaintiffs' argument). And the City Defendants simply state that "the Final EIS/Section 4(f) Evaluation notes that there are no adverse noise and vibration impacts to any Section 4(f) resource." City Mem. at 45. Neither of these "arguments" addresses or disputes Plaintiffs' contentions. Therefore, Plaintiffs are entitled to summary judgment.

c) Defendants' Evaluation Of Visual Impacts On Walker Park Was Arbitrary And Capricious

Defendants' ROD says that Walker Park is "an important visual signpost at the edge of Honolulu's central business district, and a complement and gateway from downtown to historic Irwin Park and Aloha Tower." AR 000030 at 000225. But their constructive use evaluation fails to analyze the impact of the Project on these visual qualities. AR 000247 at 000511-12. For that reason alone, Defendants' analysis was arbitrary and capricious. 23

C.F.R.. § 774.15(d)(1),(2); *Motor Vehicle*, 463 U.S. at 43 (failure to consider "an important aspect of the problem" is arbitrary and capricious).

After noting Defendants' failure to complete a visual or aesthetic impact analysis specific to Walker Park, Plaintiffs' moving papers observed that "to the extent [] the visual impact analyses in the Administrative Record can reasonably be extrapolated to Walker Park, those analyses undermine Defendants' conclusions," and provided multiple quotations from the Final EIS in support of that observation. Pl. MSJ at 27.[28] The Federal Defendants attack Plaintiffs' appropriately-qualified and well-supported assertion as a "mischaracterization[] of the record" and suggest that Plaintiffs have "no evidence whatsoever." Fed. Mem. at 38. The City Defendants make similar assertions, using similar language. City Mem. at 44 ("no evidence whatsoever").

The fact of the matter is that Plaintiffs have accurately quoted portions of the EIS describing the visual impacts of the portions of the Project running along the downtown Honolulu waterfront, adjacent to Walker Park. Pl. Mem. at 27(citing AR 000247 at 000512, 000540-41). Those portions of the EIS conclude that the visual impacts of the Project will be quite substantial. *Id*.

[28] Defendants' visual impact analyses admit that the portion of the Project adjacent to Walker Park would be "dominant in views," would "contrast substantially" with park trees, would "change the visual character of the streetscape," would create "light and glare," and would be "prominent in [] views of Honolulu Harbor, partially blocking views of the sky." AR 000247 at 000512, 000540-41.

And in light of Defendants' failure to prepare a visual impact analysis specific to Walker Park, that is all there is to go on.

The Federal Defendants disagree. They claim that "[t]he analysis relevant to Walker Park shows that the Project will not substantially impair views of the Park." Fed. Mem. at 38. In support of that claim, they cite a one-page table presenting brief analyses of the Project's visual impacts on 10 locations. *Id*. (citing AR 000247 at 000512). None of the ten locations is within Walker Park. AR 000247 at 000512. And it is impossible to know which of the ten locations the Federal Defendants consider to be "relevant to Walker Park." *Id*.

In the end, the parties' arguments with respect to proper extrapolation of visual analyses effectively highlight Defendants' failure to prepare a site-specific analysis of visual impacts on Walker Park. And because of that failure, their constructive use determination regarding Walker Park must be rejected as arbitrary and capricious. *Motor Vehicle*, 463 U.S. at 43 (failure to consider "an important aspect of the problem" is arbitrary and capricious); *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 435-36 n.14 (5th Cir. 1985) (constructive use determination invalid where there was "no showing as to how [the agency] arrived at that conclusion").

3. Defendants' Constructive Use Determination With Respect To Irwin Park Was Arbitrary And Capricious

Irwin Park is a public park in downtown Honolulu. It is located next to Aloha Tower, across the street from the Dillingham Transportation Building and Walker Park, and in the immediate vicinity of several other historic sites and parks. See Attachment B. The City and FTA determined that the Project will not constructively use Irwin Park. That determination was arbitrary and capricious in two respects, as detailed below.

a) Defendants' Evaluation Of Irwin Park's Historic Attributes Was Arbitrary And Capricious

Irwin Park is an historic resource and is eligible for listing in the National Register as "an example of the work of a leading local landscape architect." AR 000247 at 000746-47. Therefore, the constructive use analysis for the Project was required to evaluate the impact of the Project on Irwin Park's historic landscape and landscaping. 23 C.F.R. § 774.15(d).

As explained in Plaintiffs' moving papers, the FTA and the City failed to undertake this analysis. Pl. MSJ at 32. To the extent Defendants addressed Irwin Park's landscaping at all, it was by way of an admission that (1) the Project would "contrast substantially" with trees in the park and (2) the overall effect of the Project on the Irwin Park area would create a "substantial change" to sensitive resources. AR 000247 at 000509 (substantial change), 000511 (substantial contrast). In other words, the only relevant analysis identified a

substantial conflict between that landscaping and the Project. *Id*. Under these circumstances, Defendants' constructive use analysis was arbitrary and capricious. 23 C.F.R. § 774.15(d)(1),(2); *Motor Vehicle*, 463 U.S. at 43 (failure to consider "an important aspect of the problem" is arbitrary and capricious; conclusions not supported by the record arbitrary and capricious); *Citizen Advocates for Responsible Expansion*, 770 F.2d at 435-36 n.14 (invalidating constructive use determination unsupported by evidence).

The Federal Defendants respond that they did, in fact, assess "Project impacts on protected landscape features." Fed. Mem. at 40-41. But the analyses they cite refer to the obstruction of views, not the aesthetics of landscaping. *Id*.

Taking a more creative approach, the City Defendants pretend that an analysis of viewsheds ***is*** an analysis of landscape aesthetics: "while the Project would add a visual element that may contrast with the landscaping features of the park, it would not block views of the landscaping and therefore would not substantially impair these features." City Mem. at 46-47. That is ridiculous. The relevant question is whether the Project would conflict with Irwin Park's landscaping in such a way that the historic values of the landscape are substantially impaired; it does not matter whether views of the newly-impaired landscaping will be blocked or not. *See* 23 C.F.R. § 774.15. As noted above, the relevant record evidence concluded that there would be a "substantial

contrast" between the Project and Irwin Park's historic landscaping. AR 000247 at 000509 (substantial change), 000511 (substantial contrast).

b) Defendants' Evaluation Of Noise Impacts On Irwin Park Was Arbitrary And Capricious

Defendants' Section 4(f) Evaluation concludes that the Project will have no adverse noise…impacts at [Irwin] Park." AR 000247 at 746. But, as explained in Plaintiffs' moving papers, Defendants never studied noise impacts on Irwin Park; instead, they evaluated potential noise impacts on the Aloha Tower Marketplace, a busy shopping area hundreds of feet removed from both the park and the Project. Pl. MSJ at 31 (citing AR 033642 at 033695, AR 072897 at 072919). For that reason, Defendants' evaluation of the Project's noise impacts on Irwin Park was arbitrary and capricious.

The Federal Defendants claim that it was appropriate to study noise at Aloha Tower Marketplace rather than Irwin Park because the Marketplace is representative of noise levels within the park. Fed. Mem. at 40. A marketplace is not a park. Understandably, they cite no support for their counterintuitive proposition. *Id*. And in the absence of some sort of evidentiary support, it is simply not possible to believe that background ambient noise levels in a shopping arcade are "representative of" those in a park.[29]

[29] The Federal Defendants claim that this is a non-issue because the noise from the Project would not be noticeable above existing ambient levels. Fed. Mem.

4. Defendants' Constructive Use Determination With Respect To Mother Waldron Neighborhood Park Was Arbitrary And Capricious

Mother Waldron Neighborhood Park is a public park in downtown Honolulu. It is also an historic resource eligible for listing in the National Register for its historic Art Deco architecture and its landscape design. AR 000247 at 000747. The Project would be built along Halekauwila Street, just 10 feet from the edge of Mother Waldron Park and 40 feet high. AR 000247 at 000747 (10 feet from edge of park); AR 039555 at 039980 (40 feet high). The City and FTA nonetheless determined that the Project will not constructively use Mother Waldron Park. *Id.*; *see also* 000247 at 000732. That determination was arbitrary and capricious in two respects, as detailed below.

a) Defendants' Evaluation Of Mother Waldron Neighborhood Park's Historic And Aesthetic Attributes Was Arbitrary And Capricious

All constructive use determinations must include an evaluation of the "activities, features, or attributes…which qualify for protection under Section 4(f)" and potential impacts on those attributes. 23 C.F.R. §§ 774.15(a), 775.15(d). For historic resources, the features which "qualify for protection under Section 4(f)" are the features of the property eligible for listing in the

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at 40. But that claim also appears to be based on the facially unreasonable assumption that existing ambient noise levels at a shopping arcade are equivalent to those at a park. *Id*.

National Register. Mother Waldron Neighborhood Park is an historic resource. AR 000247 at 000747. Aspects of the Park's historic significance include the following: (1) a distinctive Art Deco perimeter wall and (2) an overall design deemed "perhaps the best" to have been created by well-known local architect. AR 153157 at 153158-59. It is also worth noting that Mother Waldron Park is one of the last two of Honolulu's numerous art deco playgrounds to retain "historic integrity." AR 153157 at 153169.

As noted above, the Project would be built along Halekauwila Street, just 10 feet from the edge of Mother Waldron Park. AR 000247 at 000747 (10 feet from edge of park); AR 039555 at 039980 (40 feet high). The portion of Mother Waldron Park to which the Project is adjacent contains some of the site's distinctive Art Deco walls (one of the design features qualifying the Park for the National Register). AR 153157 at 153158-59, 153167. In other words, the Project will result in a 40-foot concrete structure looming over an historic feature of a public park significant for its "historic integrity." That is the epitome of a constructive use. *Citizen Advocates for Responsible Expansion*, 770 F.2d at 435-36 (constructive use where elevated, concrete freeway structure would loom over a public park, "detracting from its carefully-conceived design").

Defendants' response focuses heavily on the urbanized character of the neighborhood surrounding Mother Waldron Park. Fed. Mem. at 41-42; City

Mem. at 48. But there is no reason to believe that Section 4(f) should not apply in urban neighborhoods. The Project's 40 foot tall concrete structure conflicts with urban resources just as surely as it conflicts with rural resources.

b) Defendants' Evaluation Of Noise Impacts On Mother Waldron Neighborhood Park Was Arbitrary And Capricious

As noted above, the Project would pass approximately 10 feet from Mother Waldron Park. AR 000247 at 000747. As noted above, the reference SEL for the Project is 82 decibels at 50 feet. And the City's own noise technical report admits that noise above 67 decibels would cause a severe "impact." AR 072897 at 072920. Despite all of this, Defendants' Section 4(f) Evaluation does not contain any information about the Project's noise impacts on Mother Waldron Park, a failure which is arbitrary and capricious in and of itself. *Motor Vehicle*, 463 U.S. at 43 (failure to consider "an important aspect of the problem" is arbitrary and capricious).

Also arbitrary and capricious is the Federal Defendants' suggestion that the estimated noise impacts of he Project will actually be lower than current ambient levels. *See* Fed. Mem. at 42. That conclusion is "so implausible that it [cannot] be ascribed to…agency expertise." *Motor Vehicle*, 463 U.S. at 43; *New York v. Nuclear Regulating Commission*, 2012 WL 2053581 at *10 (D.C. Cir. June 8, 2012) (even where technical expertise demands 'most deferential' treatment by the courts, agency failing to apply proper standards "has failed to

conduct a thorough enough analysis here to merit [] deference."). In short, it is arbitrary and capricious.

C. Defendants Approved The Project In Violation Of Section 4(f) (Count 7)

Section 4(f) prohibits the approval of a transportation project that uses 4(f) Resources unless (1) there is no feasible and prudent alternative **and** (2) the project includes all possible planning to minimize harm. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3. There is no dispute that the Project will use 4(f) Resources. AR 000247 at 000680-752. Therefore, Defendants were required to comply with the requirements described above. They failed to do so. Accordingly, Plaintiffs are entitled to summary judgment.

1. Defendants Failed To Demonstrate The Absence Of Prudent And Feasible Alternatives To The Project's Use Of Section 4(f) Resources

Defendants failed properly to determine that there were no feasible and prudent alternatives to the Project's use of Section 4(f) resources. As explained below, they failed to evaluate the prudence and feasibility of the MLA, they arbitrarily and capriciously evaluated the prudence and feasibility of a downtown tunnel, and they did not meaningfully consider alternative transit technologies.

a) The Managed Lanes Alternative Is A Prudent And Feasible Alternative To The Project's Use Of Section 4(f) Resources, And Defendants Failed To Demonstrate Otherwise

Downtown Honolulu contains a significant concentration of 4(f)

resources. *See* AR 000247 at 000689. Although there is a dispute between the parties as to the extent of the Project's use of downtown 4(f) resources, all parties agree that the Project would use at least two of them — namely, the Chinatown Historic District and the Dillingham Transportation Building. *See* AR 00247 at 680-752 (entire Section 4(f) evaluation), *id*. at 000718-27 (section addressing Chinatown and Dillingham building).[30]

The use of 4(f) resources in downtown Honolulu could be avoided by implementing a Managed Lanes Alternative ("MLA").[31] Essentially, the MLA would be a new 2- or 3-lane roadway for use by express buses, vanpools, and carpools traveling in the corridor connecting Honolulu and Kapolei (the same corridor in which the Project would be located).[32] While a portion of the roadway would be elevated, that segment would terminate at Pier 16, west of the downtown area and avoiding impacts to downtown historic sites.

The MLA was eliminated from consideration as a Project alternative (1) on the basis of the City's AA, (2) on the ground that the MLA was (allegedly)

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[30] As explained above, Plaintiffs also assert that the Project would constructively use Aloha Tower, Walker Park, Irwin Park, and Mother Waldron Park, all of which are in the downtown area. *See* § IIB. In addition, the Project was approved without ever evaluating its potential to use Native Hawaiian burials, the presence of which is deemed "likely" in downtown Honolulu. AR 037676 at 037820.

[31] There is no dispute among the parties as to this point. *See* Pl. MSJ at 41-42 (arguing that MLA would avoid impacts); Fed. Mem. at 46-47 (failing to dispute argument); City Mem. at 50-51 (same); Int. Mem. at 55-63 (same).

[32] Relevant Section 4(f) resources avoided by the MLA include the following: Chinatown Historic District, Walker Park, Irwin Park, Aloha Tower, Dillingham Transportation Building, and Mother Waldron Park.

inconsistent with the purposes of the Project, and (3) prior to the preparation of an EIS for the Project.[33] As explained in Plaintiffs' moving papers, that decision was arbitrary, capricious, and violated Section 4(f) in three[34] distinct (but related) ways:

- The City's AA was not an appropriate basis on which to reject 4(f) alternatives (section (1), below);
- In any event, the City's AA did not find that that the MLA was infeasible or imprudent within the meaning of Section 4(f) (section (2), below); and
- The MLA is, in fact, feasible and prudent within the meaning of Section 4(f). (section (3), below).

Each of those defects provides an independent basis for granting summary judgment to Plaintiffs.

(1) The City's AA Was An Impermissible Basis On Which To Reject Section 4(f) Alternatives

The MLA was eliminated from consideration as a Section 4(f) alternative on the basis of the City's AA. SAFETEA-LU allows local agencies to prepare certain ***NEPA*** analyses as part of an AA (so long as there is close federal oversight of the process). *See* 23 U.S.C. § 139(c)(3). NEPA and

[33] There is no dispute among the parties as to these points. *See* Pl. MSJ at 41-45; Fed. Mem. at 46-47, 63-69 (failing to dispute); City Mem. at 50-51 (same); Int. Mem. at 60-61.

[34] As a point of clarification, we note that Plaintiffs originally divided their position into six parts. *See* Pl. MSJ at 42-45. For the sake of simplicity, brevity and a cleaner page layout, we have now grouped those six points under three headings. The substance of the arguments remains the same.

Section 4(f) each require federal agencies to consider alternatives to proposed projects. 49 U.S.C. § 303(c); 42 U.S.C. § 4332(2)(C). But the specific requirements of the two statutes are not the same. One area in which the statutes differ is the standard for rejecting project alternatives. Under NEPA, an alternative can generally be eliminated from consideration if it is not reasonable. 40 C.F.R. § 1502.14. Under Section 4(f) an alternative must be infeasible or imprudent — a higher standard — before it can be eliminated from consideration. 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.3, 774.17. Thus, in Defendant FTA's own words "it is possible for an alternative that was examined but dismissed during the preliminary ***NEPA*** screening process to still be a feasible and prudent avoidance alternative under ***Section 4(f)***."[35] AR 021938 at 021946 (emphasis added). And, for that reason, it was arbitrary, capricious, and a violation of Section 4(f) for the MLA to be eliminated from consideration as a Section 4(f) alternative on the basis of the City's NEPA AA.[36]

These arguments were clearly set forth in Plaintiffs' moving papers. Pl. MSJ at 43-44. None of the Defendants has disputed them. Fed. Mem. at 46-

[35] This language comes from the "Section 4(f) Policy Paper." a guidance document followed by FTA, relied on by the Federal Defendants for purposes of this Project, and part of the Administrative Record for this case.

[36] In noting the higher standard for dismissal of an alternative under 4(f) than under NEPA Plaintiffs in no way concede that the dismissals were permissible under NEPA. They weren't. It is simply that the dismissals were still more egregious under § 4(f).

47 (4(f) discussion of MLA); City Mem. at 50-51; Int. Mem. at 55-63. Further opposition has now been waived.

The FTA and the City do defend their reliance on the AA for ***NEPA*** purposes. *See* Fed. Mem. at 59-74; City Mem. at 64-81. But those NEPA arguments do not address Section 4(f), do not address the Section 4(f) regulations governing feasibility and prudence, and do not apply the Section 4(f) standards of feasibility and prudence to the MLA. *See id.* Instead, Defendants assert that the Project complies with NEPA by evaluating "reasonable alternatives." *Id*. But, as explained above, compliance with NEPA is insufficient to demonstrate compliance with Section 4(f). Therefore, Plaintiffs are entitled to summary judgment.

(2) The City's AA Did Not Find The MLA Infeasible Or Imprudent

The parties agree that the MLA would avoid the use of Section 4(f) resources in downtown Honolulu. Such an alternative cannot be eliminated from consideration unless it determined to be infeasible or imprudent. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3. In 2005, Congress directed the Department of Transportation to promulgate regulations concerning "standards to be applied in determining the prudence and feasibility of alternatives" under Section 4(f). *See* 73 Fed. Reg. 13368, 13391 (March 12, 2008). Those regulations were issued in 2008, and became effective in April of that year. *See id*. at 13368. The Project was not approved until January, 2011. AR

000300. Therefore, all determinations regarding the feasibility and prudence of alternatives to the Project were required to follow the Section 4(f) regulations.

The Section 4(f) regulations impose strict requirements on determinations regarding the feasibility and prudence of alternatives. *See* 23 C.F.R. §§ 774.3, 774.7, 774.17. To properly determine that an alternative is imprudent, an agency must take five steps:

- The agency must determine that the alternative meets at least one of six detailed criteria defining imprudence. *See* 23 C.F.R. § 774.17 (definition of feasible and prudent avoidance alternative, parts (3)(i) to 3(vi)).
- The agency must weigh the problems caused by the alternative against the importance of protecting the Section 4(f) property at issue. *See* 23 C.F.R. § 774.17 (definition of feasible and prudent avoidance alternative, part (1)).
- The agency must determine that the problems caused by the alternative "substantially outweigh" the importance of protecting the Section 4(f) property at issue. *See* 23 C.F.R. § 774.17 (definition of feasible and prudent avoidance alternative, part (1)).
- The agency must document its finding of imprudence in a Section 4(f) evaluation. *See* 23 C.F.R. §§ 774.3(a), 774.7(a).
- The agency's Section 4(f) evaluation must contain "sufficient supporting documentation to demonstrate" why the alternative is imprudent. *See* 23 C.F.R. § 774.7(a).

Defendants claim that the City's AA properly eliminated the MLA from

consideration as an alternative. Specifically, they assert that the AA established that the MLA is inconsistent with Project purposes, and is therefore imprudent. But the AA did not meet any of the five mandatory requirements for a determination of imprudence set forth above:

- The AA did not determine that the MLA met any of the six criteria defining imprudence (including, as relevant here, the criterion of "compromis[ing] the project to a degree that it is unreasonable to proceed with the project in light of its stated goal" (*see* 23 C.F.R. § 774.17 (definition of feasible and prudent avoidance alternative, part (3)(i))).
- The AA did not weigh the problems allegedly caused by the MLA against the importance of avoiding the use of Section 4(f) properties. In fact, the AA predated Defendants' determinations regarding the Project's use of 4(f) properties; therefore, no such weighing was possible.
- The AA did not reach any conclusions about whether the problems associated with the MLA "substantially outweighed" the value of avoiding use of 4(f) properties. As noted above, no such analysis was possible because Defendants had not completed their Section 4(f) use determinations at the time of the AA.
- Defendants did not address the MLA in their Section 4(f) evaluation. *See* AR 000247 at 000680-752.
- Defendants' Section 4(f) evaluation did not contain any documentation supporting a finding that the MLA is imprudent.

In short, the AA does not meet the detailed regulatory requirements for a

finding of infeasibility that were in effect at the time the Project was approved. *See* 23 C.F.R. §§ 774.3(a), 774.7(a), 774.17 (regulatory requirements). For that reason, it was not a reasonable basis for eliminating the MLA from consideration as a 4(f) alternative.

The City Defendants and the Intervenors suggest that Plaintiffs' claims should be dismissed as elevating form over substance. For example, the City suggests, without citation or support, that "FTA was not required to formally state that it found the MLA 'not prudent.'" City Mem. at 50. That represents a significant change of position for the City, which has spend much of the last 9 months insisting that Section 4(f) demands an elevated level of linguistic precision. *See, e.g* , ECF Nos. 37, 86, 95 (motions alleging need for specific 4(f) analysis). In light of the City's prior insistence on ever-so-precise Section 4(f) terminology, their current contention that "no formal statement was required" rings hollow.

The City's "no formal statement" assertion is also inaccurate. The Section 4(f) regulations clearly require that determinations regarding the prudence and feasibility of an alternative be formally documented in a Section 4(f) evaluation. *See* 23 C.F.R. § 774.7(a). A Section 4(f) evaluation must include sufficient information to "demonstrate why there is no feasible and prudent avoidance alternative." *Id*. By any reasonable account, that is a "formal statement." Defendants' failure to provide one with respect to the

MLA violates Section 4(f). *Id*.; *see also* 23 C.F.R. § 774.3(a).

Nor is Defendants' failure to evaluate the prudence and feasibility of the MLA merely a matter of "form." This is not a case where an agency conducted the proper analysis but failed to use "magic words."[37] This is a case where an agency failed to conduct the proper analysis. That failure was an important one because the concepts of prudence and feasibility are at the core of Section 4(f)'s ***substantive*** mandate to avoid the use of historic sites and parklands. 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.3(a), 774.17. That being so, Defendants' failure to evaluate the prudence and feasibility of an alternative cannot be brushed aside as a question of "form over substance."

Finally, we note that the City's position with respect to the MLA is at odds with its treatment of downtown tunnel alternatives (discussed in section [II,C,1,b, below). Like the MLA, various downtown tunnel options were discussed during the City's AA. AR 009556 at 009620 (listing tunnel alternatives). Unlike the MLA, the tunnel options were later evaluated for prudence and feasibility in Defendants' Section 4(f) evaluation. If the

[37] For that reason, the three Section 4(f) decisions cited on pages 58 and 59 of the Intervenors' brief can readily be distinguished from this case. All three cases rejected "magic words" claims against a Department of Transportation agency. See *Citizens for Smart Growth v. Secretary of Transportation*, 669 F.3d 1203 (11th Cir. 2012); *Committee to Preserve Boomer Lake v. United States Department of Transportation*, 4 F.3d 1543, 1550-51 (10th Cir. 1993); *Hickory Neighborhood Defense League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990). In this case, on the other hand, Defendants have not simply failed to use "magic words" or special terms — instead, they have failed to undertake the analysis from which the terms are drawn.

Defendants truly believed that the AA resolved questions of prudence and feasibility, they would not have felt the need to evaluate the tunnel alternatives in their Section 4(f) evaluation.

(3) The MLA Is, In Fact, Prudent And Feasible

Defendants' failure to evaluate the MLA under Section 4(f) was not a harmless error, for unrebutted evidence in the administrative record indicates that the MLA is both prudent and feasible. On November 4, 2009, Plaintiff Honolulutraffic.com sent a letter to Defendant Leslie Rogers, FTA Regional Administrator, discussing and applying to the MLA the feasibility and prudence requirements set forth in the Section 4(f) regulations to the MLA. *See* AR 071958.

Honolulutraffic.com explained that the MLA is, in fact, feasible and prudent. It is feasible in the sense that it is possible to build. AR 071958 at 071959; *see also* 23 C.F.R. § 744.17 (definition of feasible and prudent avoidance activity, part (2)). As Honolulutraffic.com noted, there exists a similar facility in Tampa. *See* AR 071958.

Honolulutraffic.com's letter also explained that the MLA meets relevant Section 4(f) regulatory criteria for prudence. AR 071958 at 071959-60. Among other things, the letter reviewed the ways in which the MLA is consistent with the fundamental purpose of the Project — namely, to promote transit and reduce traffic congestion. *Id.* Specifically, the MLA would (1)

increase transit ridership; (2) increase transit riders' ability to get a "door-to-door" ride; (3) reduce highway congestion by 35%;[38] (4) create a system of express buses capable of carrying passengers at average speeds faster than rail; (5) significantly reduce the City's capital costs and operating subsidies; and (6) avoid 4(f) resources in downtown Honolulu. AR 071958 at 071958-60.

The administrative record does not contain any other document explicitly applying the Section 4(f) regulations to the MLA. Nor does it contain any evidence that the Defendants sent a response to Honolulutrffic.com's November 4, 2009 letter. In other words, unrebutted evidence in the administrative record confirms that the MLA is both prudent and feasible. Accordingly, Plaintiffs are entitled to summary judgment.

b) Downtown Tunnel

The Project's use of 4(f) resources in downtown Honolulu could also be avoided by routing the Project through a tunnel. *See, e.g.*, AR 000247 at 000719 (tunnel would avoid impacts on Chinatown Historic District), 000721-22 (avoidance of impacts on Dillingham Transportation Building); 000720 (map showing that tunnel would also avoid impacts to Walker Park, Irwin Park, Aloha Tower, and Mother Waldron Park). Defendants admit that there are at least two different locations where such a tunnel could be built: King

[38] This was not a rough estimate or a back-of-the-envelope calculation. Honolulutraffic.com's traffic analyses for the MLA were prepared by a Professor of Traffic Engineering at the University of Hawaii. AR 071958 at 071959.

Street and Beretania Street. *See* AR 000247 at 000719. The King Street alignment would require a longer tunnel than the Beretania Street alignment. AR 000247 at 000719.

Defendants rejected a downtown tunnel as too expensive. AR 000247 at 000719. Specifically, Defendants' 4(f) evaluation asserts, without citation or detailed explanation, that that a tunnel "would increase the cost of the Project by more than $650 million (2006 dollars), which is beyond the funding provided in the financial plan," and, for that reason, "it would result in additional construction cost of an extraordinary magnitude." *Id*.

As explained in Plaintiffs' moving papers, that finding was arbitrary and capricious in several respects. Pl. MSJ at 45-47. First, the finding was based on a cost estimate for the King Street tunnel, not the shorter (and presumably less expensive) Beretania Street tunnel. The City Defendants respond that a Beretania Street alignment was rejected during the City's AA process. City Mem. at 53. But that does not mean Section 4(f) has been satisfied. As explained above, it would have been arbitrary, and capricious for the FTA to rely on the City's AA process for purposes of Section 4(f) compliance. II,C,a,(1). And, in any event, the City's AA process did not result in an FTA determination that the Beretania Street alignment would be infeasible or imprudent under Section 4(f) — rather, it resulted in the City's determination

that the current Project route is the locally ***preferable*** alternative.[39] *See* AR 009434 at 009435 (AA process defined "by the need to make an intelligent selection of a preferred mode and general alignment"). A preference is not the same as a determination of infeasibility or imprudence, and it cannot satisfy Section 4(f)'s mandate to avoid historic resources. *Overton Park*, 401 U.S. at 411 ("only the most unusual situations" will be imprudent).

Plaintiffs' moving papers also noted that the Defendants impermissibly relied on a 2006 cost estimate, rather than newer information. Pl. MSJ at 46. None of the Defendants has addressed that claim, thereby waiving further argument. Fed. Mem. at 47-50; City Mem. at 51-56; Int. Mem. at 42-70. It is worth noting, however, that (1) the administrative record does contain a 2007 technical report containing cost estimates for several downtown tunnel alternatives; (2) those estimates were prepared at the direction of the City and FTA; (3) the 2007 report set the cost of the King Street tunnel at $118 million (less than 20% of the $650 million estimated in 2006); and (4) the 2007 report set the cost of the Beretania Street tunnel at $96.7 million. AR 065304 at 065305 (prepared for City and FTA), 065335-36 (estimates). It was arbitrary and capricious for Defendants to base their determination about downtown

[39] The City's lengthy discussion of the (perceived) drawbacks of a Beretania Street route to the University of Hawaii at Manoa is irrelevant. *See* City Mem. at 53. None of the factors raised in that discussion (ridership, jobs, etc.) was included in the FTA's determination that a downtown tunnel is infeasible. *See* AR 000247 at 000719.

tunnel alternatives on the 2006 estimates when the 2007 report, prepared at their direction, was (1) available and (2) contained significantly (80%, or $532 million) lower estimates.[40]

That is particularly true in light of Defendants' continued insistence on the importance of cost in determining the viability of the Project. *See* Fed. Mem. at 48-49; City Mem. at 54. For example, both the Federal Defendants and the City Defendants argue that a downtown tunnel is not a prudent alternative because (1) transportation projects require a solid financial plan and (2) a tunnel is not in the financial plan for the Project. *Id*. But this focus on sound financial planning only serves to highlight the arbitrary and capricious nature of Defendants' decisionmaking. If cost control was their primary concern,[41] they should have based their decision on their own 2007 report, not the 2006 estimates cited in the final Section 4(f) evaluation.[42] And they should have considered ***their own*** studies showing that the cost of the King Street

[40] In a case of history repeating itself, both the Federal Defendants and the City Defendants ignore these cost estimates despite citing to the document in which they appear. *See* Fed. Mem. at 49-50, City Mem. at 52 (both citing to document AR 065304.

[41] It should not have been. As explained elsewhere, the Congress, the Supreme Court, and the FTA have all recognized that Section 4(f) gives primacy to the protection of historic and parkland resources. 49 U.S.C. § 303(c); *Overton Park*, 401 U.S. at 402, 411; 73 Fed. Reg. 13368, 13391 (March 12, 2008).

[42] To be clear: Plaintiffs do not contend that the APA imposes a blanket rule requiring that agencies use the most recent information available. But where cost is identified as the most important factor in an agency's decision (and is used as the sole basis for rejecting an alternative course of action), it is arbitrary and capricious for the agency to ignore its own relevant cost reports.

tunnel would be $118 million, not the $650 million originally estimated.[43]

Plaintiffs' moving papers also explained that even if $650 million were an appropriate cost estimate, Defendants' decision to reject the downtown tunnel alternative was nonetheless arbitrary and capricious. Pl. MSJ at 46-47. The Section 4(f) regulations provide that an alternative can only be dismissed for financial reasons if "[i]t results in additional construction, maintenance, or operational costs of an extraordinary magnitude." 23 C.F.R. § 774.17 (definition of "prudent," part (iv)). By focusing on the "magnitude" of "additional…costs," the regulation directs agencies to consider prudence and feasibility in the context of total project cost. *Id*. The Defendants failed to undertake such an analysis. AR 000247 at 000719. They simply concluded that $650 million was too much, then moved on. *Id*. Had they considered that figure in the context of the total cost of the Project, they would have seen that $650 million represented just 15%[44] of total project cost.[45] And they never

[43] We note that the Defendants have represented that the $650 million figure on which their finding of infeasibility is based refers to construction costs. Fed. Mem. at 47 (King Street tunnel would have "increased construction costs by $650 million in 2006 dollars"); City Mem. at 53 (referring to $650 estimate as "additional construction costs" and noting that maintenance costs were not included). The City's and FTA's more recent $118 million estimate also refers to construction costs. *See* AR 065304 at 065334 (2007 estimates). Therefore, it is appropriate to compare them.

[44] The Federal Defendants refer to this cost increase as "approaching 20% of the total project." Fed. Mem. at 49. As a matter of basic arithmetic, that is simply untrue.

[45] Using 2007 report's cost estimate for the King Street tunnel ($118 million), the figure would be just 3% of total project cost.

evaluated whether 15% represents a cost increase "of extraordinary magnitude" in the context of this Project.

Defendants' evaluation of downtown tunnel alternatives also violated the Section 4(f) regulations by failing to balance costs against the importance of avoiding historic resources in downtown Honolulu. *See* 23 C.F.R. § 774.17 (definition of feasible and prudent, part (1)); AR 000247 at 000719 (no balancing or weighing). The regulations explicitly require such an analysis. *Id*. (alternative not imprudent unless it causes "problems of a magnitude that substantially ***outweighs*** the importance of protecting the Section 4(f) property") (emphasis added); *see also* 73 Fed. Reg. 13391 (March 12, 2008) ("this final rule…clarif[ies] that the balancing test is weighted in favor of avoiding the use of Section 4(f) properties"). The weighing analysis "must begin with a thumb on the scale on the side of avoiding the Section 4(f) property." 73 Fed. Reg. 13391 (March 12, 2008). Here, the Defendants used neither the scale nor the thumb. AR 000247 at 000719. Therefore, their analysis was arbitrary and capricious.[46]

[46] The City Defendants suggest that regulatory language supports their position. City Mem. at 55. They are mistaken. The language cited by the City Defendants requires that a weighing process "tak[ing] into account multiple factors including the type function, and importance of the Section 4(f) property" be undertaken, by the FTA, prior to Project approval. *Id*. That analysis never happened. And the *post hoc* rationalizations set forth in the City Defendants' briefing cannot cure that legal mistake. Moreover, the City Defendants have cited just a fragment of the relevant guidance on the issue of cost increases. That guidance also includes the following: "If increased cost alone is the only downside to an avoidance alternative, the preservation purpose of Section 4(f) requires that the increased cost reach an extraordinary

Defendants also suggest that their rejection of a downtown tunnel can reasonably be justified on pragmatic grounds, citing concerns about groundwater intrusion, utilities, and above-ground disruption. City Mem. at 52. But none of those things formed the basis of the FTA's finding that a downtown tunnel would be imprudent. AR 000247 at 000719. That finding was solely based on Defendants' (inaccurate) $650 million cost estimate. *Id*. Moreover the documents cited by the Defendants as evidence of groundwater, utility, and problems do not support a finding that the Project would present problems of a magnitude that substantially outweighs the importance of protecting Section 4(f) resources.[47] 23 C.F.R. § 774.17 (definition of feasible and prudent, part (1)). In short, Defendants' newly-articulated concerns about groundwater utilities, and surface disturbance are unsupported *post hoc* rationalizations, and, as such, should be dismissed.

Relying on another *post hoc* rationalization, the Defendants contend that

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magnitude before it would outweigh the protection of Section 4(f) property. ***Merely a substantial cost increase is not enough***." 73 Fed. Reg. 13368, 13392 (March 12, 2008) (emphasis added).

[47] Document AR 061160 (cited in City Mem. at 52) is a draft Programmatic Agreement that does not appear to address the possibility of a tunnel. *See* AR 061160. And document AR 065304 (cited in Fed. Mem. at 49 and City Mem. at 52) concludes that a downtown tunnel is both feasible and less expensive that previously anticipated. AR 065304 at 065324 (explaining that advances in tunnel technology have made it feasible to address the conditions in downtown Honolulu), 065335 (cost estimates). There is no support for Defendants' assertions about the "disturbance of large surface areas" (City Mem. at 52) and "large scale construction above ground" (Fed. Mem. at 49). Indeed, their own studies clearly state that a tunnel "would be excavated using a tunnel boring machine, which would not disturb the surface." AR 050082 at 005017

a downtown tunnel is imprudent because it would harm Native Hawaiian burials and other TCPs. Fed. Mem. at 49-50; City Mem. at 52. It's hard to understand how Defendants can possibly make such an argument, given that they postponed detailed surveys for burials and other TCPs until after project approval. *See* IIA. Essentially, Defendants are asking the Court to decide that Native Hawaiian burials are important enough to justify the rejection of a Project alternative (an alternative designed to protect other historic resources, no less), but not important enough to justify detailed surveys of their own. That is arbitrary and capricious on its face.

Moreover, the City's own studies say that a downtown tunnel is very unlikely to disturb burials and other cultural resources: "The [] tunnel alignments…would be excavated using a tunnel boring machine, which would not disturb the surface and would dig at a depth generally below where burials are located." AR 050082 at 005017.[48] For this reason, too, Defendants' *post hoc* rationalizations regarding burials should be rejected.

c) Alternative Transit Technologies

As explained in Plaintiffs' moving papers, the Administrative Record contains evidence that alternative transit technologies such as light rail or Bus

[48] Although this document ("*Environmental Consequences: Supporting Information*") bears the word "draft" on its cover, it appears to be the final version of the City's analysis. There is no other version of the document in the record, and the record index (prepared by Defendants) does not identify the document as preliminary or incomplete.

Rapid Transit could avoid some or all of the Project's use of 4(f) Resources.

For example, light rail could be placed at grade for much of the Project's route, thereby preserving views of historic resources, maintaining the aesthetics of historic districts, and significantly reducing the impact of overhead rail stations on historic areas. *See, e.g.,* AR 000247 at 000968 (EPA questions exclusion of light rail from EIS); AR 072134 at 072138 (Honolulu City Councilmen request consideration of light rail).

Alternatively, a Bus Rapid Transit program would reduce or eliminate the need for new construction in historic areas and would be compatible with infrastructure such as the MLA. *See* AR 071958. Indeed, just months before its AA process began, the City deemed Bus Rapid Transit an effective way to promote public transit in the very same corridor within which the Project is now proposed. *See, e.g.,* AR 047927 at 047953-80 (summary of Bus Rapid Transit EIS).

Unfortunately, the City rejected these options (and others)[49] before they could properly be evaluated under Section 4(f). That decision was arbitrary, capricious, and in violation of Section 4(f) for many of the same reasons explained above:

[49] Transportation technologies eliminated from consideration during the early planning process included commuter rail, ferries, and (expansion of) the existing bus system. *See* AR 000247 at 000321. Other technology options improperly rejected (including by the 2008 Panel of Experts) include maglev, light rail, and monorail.

- The City never evaluated the feasibility and prudence of the alternative technologies or actually determined that they were infeasible or imprudent. *See* AR 009434-009555 (AA Report); AR 009556-009683 (AA Screening Memo); AR 049484-049731 (AA Definition of Alternatives); AR 009319-32 (Panel of Experts presentation).
- In any event, the City did not have authority to make Section 4(f) findings regarding feasibility, prudence, or the existence of feasible and prudent alternatives without FTA's participation. 23 U.S.C. § 139.
- Defendants failed to address the alternative technologies in their final Section 4(f) evaluation. AR 000247 at 000680-752; 23 C.F.R. § 774.3(a), 774.7(a).
- Defendants never weighed the feasibility and prudence of the alternative technologies together with the importance of preserving 4(f) resources. 23 C.F.R. § 774.17.

For each of these reasons, the rejection of alternative transit technologies under Section 4(f) was arbitrary and capricious.

The Federal Defendants do not provide a meaningful response to these claims. *See* Fed. Mem. at 50. They halfheartedly assert that no non-rail transit technologies would "provide increased corridor mobility or…a reliable means of public transit to disadvantaged communities." Fed. Mem. at 50. But the record does not support this counter-intuitive proposition. As noted above, a BRT system paired with the MLA would reduce highway traffic congestion by 35%. AR 071958 at 071958-60. And there is no record evidence that buses (or light rail or other technologies) are inherently unsuitable for serving

disadvantaged communities.

The City Defendants' "response" are more substantive, but even less accurate. The City claims that alternative transit technologies were found imprudent "for the same reasons" as the MLA. But, as explained above, the MLA was never found to be imprudent. Moreover, the documents on which the City relies do not say anything about the prudence or feasibility of alternatives like BRT or light rail. Indeed, several of the City's documents seem to confirm that these technologies are prudent alternatives. *See, e.g.,* AR 009434 at 009598 (recommending that light rail be "retained for further study").

In sum, Defendants fail to dispute the majority of Plaintiffs' Section 4(f) claims regarding transportation alternatives. To the extent that they have responded at all, their responses are cursory and inaccurate. Therefore, Plaintiffs are entitled to summary judgment.

2. Defendants Failed To Include All Possible Planning To Minimize Harm To Section 4(f) Resources

Section 4(f) prohibits the approval of any transportation project that uses parkland or historic sites unless the project includes all possible planning to minimize harm. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3. This requirement applies whether or not there is a feasible and prudent alternative to the project. 23 C.F.R. § 774.3(c). Defendants admit that the Project would use historic

sites. Therefore, Defendants were obligated to "include all possible planning to minimize harm" in their project approval. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3.

Defendants' failure to comply with this mandate took two different forms. First, by inappropriately limiting their analysis of the Chinatown Historic District to the Project's use land for the Chinatown Rail Station, Defendants failed to address other respects in which the Project would use Chinatown. *See* AR 000030 at 000091 (noting that Chinatown is a TCP); AR 000030 at 000048-82 (no mitigation specified for TCP impacts).[50] As a consequence, they did not include in the Project "all appropriate planning" to address those issues.

Second, by inappropriately, arbitrarily, and capriciously failing to determine that the Project would constructively use Aloha Tower, Defendants failed to include in the Project measures to minimize harm to the building. *See, e.g.*, AR 000030 at 000050-53, 000060-62, 000074-82 (mitigation measures do not address Aloha Tower).

Defendants claim that they complied with the "all possible planning" by

[50] The Federal Defendants halfheartedly suggest that the "all possible planning" requirement has been met with respect to Chinatown because the City will make sure that the guideway structure is as narrow as possible. City Mem. at 58. Such an "assurance" is hardly responsive to the Project's impacts on the core elements of Chinatown's historic and cultural importance. *See* AR 000247 at 000718 (connection to harbor an important part of Chinatown's historic identity); 039555 at 039837 ("Chinatown is one of the few areas of Honolulu which has maintained a sense of identity over the years").

entering a Programmatic Agreement, and that the Section 4(f) regulations "explicitly state that this [] provides for all possible planning." Fed. Mem. at 51; *see also* City Mem. at 57. Defendants have it backwards. The cited regulation says that the "all possible planning" requirement normally serves as a method by which agencies can implement measures set forth in a Programmatic Agreement. *See* 23 C.F.R. § 774.17. The regulation does not say that the mere existence of a Programmatic Agreement is enough to meet the "all possible planning" requirement. *Id*.

In any event (and as explained more fully above), the Programmatic Agreement for the Project does not contain measures to minimize (1) impacts to Chinatown related to that area's acknowledged status as a TCP and its historically-significant links to Honolulu harbor or (2) impacts to Aloha Tower (previously acknowledged by the City to be "severe"). AR 000030 at 000083-112 (absence of mitigation); AR 0009556 at 009623 (impacts to Aloha Tower would be "severe" and another viable route should be found). Accordingly, Defendants failed to include all possible planning to minimize harm.

III. DEFENDANTS VIOLATED NEPA

NEPA is "our basic national charter for the protection of the environment" (40 CFR 1500.1(a)), and Defendants have violated it. In a result-driven effort to win approval for their heavy rail project, they – the Federal and City Defendants – have tortured the NEPA process:

- The Defendants began with a 2005 Notice of Intent ("NOI") to prepare an EIS "on a proposal by the City – to implement traffic improvements that potentially include ***high-capacity transit service*** in a 25-mile travel corridor between Kapolei and the University of Hawaii at Manoa and Waikiki." AR 009700 at 009701 (emphasis added).
    - No EIS was then prepared pursuant to this NOI.
- Rather than preparing an EIS, the City then embarked on a process of considering various transit options, ultimately deciding that its "locally preferred alternative" was an elevated fixed guideway system serving a specific route.
- The Defendants then set about manipulating the scope of their NEPA process so as to ensure that the City's preference would be the only real option considered, a process which resulted in a 2007 NOI to prepare an EIS "on a proposal by the City – to implement a ***fixed-guideway transit system*** in the corridor between Kapolei and the University of Hawaii at Manoa with a branch to Waikiki." AR 009696 at 009697-98. (emphasis added),
    - The NOI continues to state that "The EIS will be prepared to satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations." *Id*.
    - The EIS which resulted from this second NOI is the one currently under review by this court.
- The 2007 NOI promised the public that the Defendants would consider five different technologies (including light rail, rapid rail, rubber-tierd vehicles, magnetic levitation, and monorail) in their EIS; AR 009696 at 009697-98.

- Defendants' EIS did not do this. Instead they narrowed the purpose still further. The City convened a "Panel of Experts" which determined, outside of the NEPA public review and comment process, that a heavy steel wheel on steel rail technology should be used for the Project.
- Defendants then restricted the EIS to this technology.
- In a further effort to minimize to hide potential impacts, Defendants then segmented the proposal to exclude planned extensions.
- Not surprisingly, all of this manipulation resulted in a narrow, stunted EIS in which Defendants did not evaluate "all reasonable alternatives," but rather a narrow range of three virtually-identical options.

The analysis of alternatives "is the heart of the environmental impact statement" (40 CFR 1502.14). NEPA § 102(2) (including, most conspicuously, § 102(2)(C), the EIS requirement) contains the "action-forcing" provisions of NEPA, forcing action "to make sure that Federal agencies act according to the letter and spirit of the Act" (40 CFR 1500.1(a)).By manipulating a purported NEPA process to exclude "reasonable alternatives" from an EIS, Defendants sought to manipulate themselves out of NEPA's strictures and public benefits. And in doing so, they violated four of the statute's basic mandates:

- to properly define and disclose the fundamental purposes of proposed actions so that alternatives can be identified (40 CFR 1502.13);
- to evaluate "all reasonable alternatives" in an EIS (40 CFR 1502.14(a)) below); and

- to properly evaluate the environmental effects of a proposed action and specify the "environmentally preferable" alternative considered in the EIS (40 CFR § 1505.2(b); *see* 40 CFR § 1505.2(c)).

A. Defendants Defined The Purpose And Need For The Project So Narrowly As To Preclude Consideration Of Reasonable Alternatives (Count 1)

As outlined above, Defendants' impermissible narrowing of their project purpose is dramatically illustrated in their two — and conflicting — notices to the public. Quite simply, the narrowing of purpose between the 2005 NOI and the 2007 NOI (for the EIS that "will be prepared to satisfy . . . NEPA") encapsulates the unlawful narrowing of purpose prior to preparation of the EIS. The 2005 purpose approached adequacy. The 2007 purpose did not.

An EIS must "briefly specify the underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13. While agencies enjoy some discretion to define the purposes of their proposed actions, they cannot define their objectives in unreasonably narrow terms. *National Parks & Conservation Ass'n v. U.S. Dep't of Interior*, 606 F.3d 1058, 1070 (9th Cir. 2010) *cert denied* 130 S. Ct. 1783 (2011); *see also Davis v. Mineta*, 302 F.3d 1104, 1118-1120 (10th Cir. 2002) (invalidating purpose and need drawn so narrowly as to mandate construction of a highway bridge); *Simmons v. United States Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997) (invalidating narrowly-drawn statement of purpose which excluded reasonable alternatives

from consideration).

The Ninth Circuit has held that "[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action." *National Parks*, 606 F.3d at 1070 (9th Cir. 2010). Otherwise, the results of an EIS "would become a foreordained formality." *Id*. That is precisely what Defendants have done in this case — they have defined the purpose of the Project in terms so specific that only the Project can satisfy them, thereby rendering the EIS a mere "formality."

As explained in Plaintiffs' moving papers, Defendants' statement of purpose is not the brief statement of underlying objectives called for by NEPA.[51] *See* Pl. MSJ at 40 citing C.F.R. § 1502.13. Rather, it is a long list of requirements and caveats, seemingly drafted with an eye toward justifying the rejection of any option other than the construction of Defendants' preferred Project. *See* AR 000247 at 000312. For example, the very first paragraph of Defendants' statement of purpose stipulates no fewer than eight highly-specific requirements: (1) providing high-capacity rapid transit, (2) providing

[51] A reasonable statement might be something along the lines of "enhancing transportation and public transit between Honolulu and Kapolei" or "reducing traffic congestion in the Honolulu - Kapolei corridor" — statements of objectives which are broad enough to encompass a range of reasonable alternatives. 40 C.F.R. §§ 1502.13, 1502.14.

transit that is faster than existing buses, (3) providing transit that is more reliable than existing buses because it does not operate in mixed traffic, (4) providing an alternative to private automobiles, (5) serving a specific transportation corridor, (6) serving specific development areas within that transportation corridor, and (7) increasing links between different forms of transit within that corridor, and (8) serving specific areas and demographics. *Id*.

By defining their purpose and need in such a narrow way, Defendants purported to eliminate from consideration anything that was not the Project. Indeed, the EIS considers just three virtually-indistinguishable alternatives. AR 000247 at 000333-337. Those three alternatives use identical technology (heavy rail), identical designs (elevated fixed guideways), and nearly-identical routes (routes identical for approximately 16 of 20 miles). AR 000247 at 000333-37. The Ninth Circuit has squarely rejected this means of "gaming" the NEPA process. *See National Parks*, 606 F.3d at 1070-72 (invalidating EIS where statement of purpose and need was so narrow that six of seven alternatives would have resulted in the development of a landfill).

The Defendants devote much of their briefing to a series of arguments asserting that the purpose and need for the Project was properly derived from a transportation planning process created by SAFETEA-LU.[52] See City Mem. at

[52] The City Defendants refer to DOT's "New Starts" funding program rather

60-64, 67-72; Int. Mem. at 47-55. Essentially, they contend that the City's AA complies with those transportation planning provisions, and, for that reason, a statement of purpose and need based on the AA necessarily satisfies NEPA. Not so. The FTA's own "*SAFETEA-LU Environmental Review Process Final Guidance*" clearly states that "SAFETEA-LU does not substantively change the concept of purpose and need" established by NEPA's implementing regulations. AR 022836 at 022858.[53] In other words, the relevant question is not "was the Project's statement of purpose and need properly derived from the City's AA?" (as Defendants would have it), but rather "does the statement of purpose and need for the Project satisfy NEPA?"

In their attempts to answer that question, Defendants suggest that the Project's statement of purpose and need must have been broad enough because the administrative record contains information about numerous alternatives. But the EIS notes that those very same alternatives were rejected for (their alleged) failure to meet the Project purpose and need. *See, e.g.*, AR 000247 at

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than SAFETEA-LU. The provisions of the "New Starts" program on which they rely come from SAFETEA-LU. For the sake of consistency, we refer to SAFETEA-LU rather than "New Starts."

[53] The full sentence reads "SAFETEA-LU does not substantively change the concept of purpose and need established by CEQ." "CEQ" refers to the President's Council on Environmental Quality, the organization charged with promulgating NEPA's implementing regulations and overseeing federal agencies' NEPA compliance. Mr. Yost, counsel for Plaintiffs, served as General Counsel for CEQ, and, in that capacity was the primary draftsperson of NEPA's implementing regulations (including the regulation addressing project purpose and need, referenced in the *SAFETEA-LU Environmental Review Process Final Guidance*).

000321 (Table 2-1); City Mem. at 49 (Alternatives Analysis was an extensive process, but fixed guideway was "the only alternative that met the Project's purpose and need"). Again, Defendants cannot have it both ways. If their statement of purpose and need was broad enough to allow consideration of alternatives, Defendants should not have dismissed those alternatives for failing to meet the Project's purposes. On the other hand, if all alternatives were properly dismissed as incompatible with the Project, Defendants' purpose and need was too narrow. Either way, Plaintiffs are entitled to summary judgment.

Perhaps recognizing this fundamental, irreconcilable conflict between their position on NEPA's purpose and need requirements and their position on NEPA's mandate to consider reasonable alternatives, the City Defendants (but not the Federal Defendants or the Intervenors), argue that "where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide to determining the reasonableness" of a statement of purpose and need. City Mem. at 60. That argument is fundamentally flawed:

- The Project is not being taken "pursuant to a specific statute."[54]

[54] For this reason, the cases on which the City relies are readily distinguishable. *City of New York v. Dep't of Transp.* (cited in City Mem. at 60) involved a set of federal regulations promulgated pursuant to — and for the specific purpose of implementing — the Hazardous Materials Transportation Act. *City of New York v. Dep't of Transp*, 715 F.2d 732, 741-45 (2d. Cir. 1983). *Westlands Water Dist. v. U.S. Dep't of the Interior* (cited in City Mem. at 62 and 64) involved a project designed to carry out a statute mandating the restoration of a specific California river. *Westlands Water Dist. v. U.S. Dep't of the Interior* 376 F.3d 853, 866-67 (9th Cir. 2004). In contrast, the Project was not

- In any event, Defendants have not identified a statutory provision specifically authorizing or requiring the Project.
- Even if the Project were implementing a specific federal statute, Defendants would not be exempt from NEPA's purpose and need requirements.

Tellingly, the Federal Defendants do not join in the City Defendants' "federal statutory purposes" argument; instead, they (but not the City Defendants or the Intervenors) attempt to distinguish *National Parks*. Fed. Mem. at 57. Specifically, the Federal Defendants argue that the holding of National Parks is limited to the proper relationship between public and private objectives. *Id*. That is an overly-narrow reading of the Ninth Circuit's decision. While the project at issue in *National Parks* was proposed by a private entity, the holding of the case focused on the extent to which the federal agency's statement of purpose and need was broad enough to permit consideration of a range of alternatives (as distinguished from the extent to which the goals of the project served the public interest). *See National Parks*, 606 F. 3d 1058 at 1072.[55] Indeed, the court defined the scope of its holding as

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designed in response to, and does not implement, a specific Congressional directive; it is not, as the City Defendants would have it, "an action [] taken pursuant to a specific statute." Rather, the Project is a regular (albeit unusually costly) development proposal by a non-federal project proponent. The fact that the project proponent is applying for a portion of the federal funds generally made available for new transportation projects does not alter NEPA's requirements.

[55] Moreover, even if the Federal Defendants are right about the scope of *National Parks* (and, as explained above, they most certainly are not), the Project's statement of purpose and need violated NEPA. In the Federal

follows: "Our task is to determine whether the BLM's purpose and need properly states the [federal agency's] purpose and need, against the background of a private need, ***in a manner broad enough to allow the consideration of a reasonable range of alternatives***." *National Parks*, 606 F.3d at 1071 (emphasis added).

Next, the Federal Defendants and the Intervenors (but not the City Defendants) invite the Court to ignore the Ninth Circuit precedent in *National Parks* in favor of *Audubon Naturalist Society v. Department of Transportation*, a case from the United States District Court for the District of Maryland. *See* Fed. Mem. at 58-59; Int. Mem at 49. The Federal Defendants and the Intervenors claim that *Audubon Naturalist* stands for the proposition that a federal agency can limit its statement of purpose and need to a single mode of transportation (*e.g.*, "highway" or "rail"). *See id*. But that does not fully resolve the problems with the Defendants' purpose and need statement for the Project. As explained above, Defendants' statement of purpose and need goes far beyond specifying a single mode of transportation (*i.e.*, rail) for investigation: it also specifies that the Project be operate at certain speeds, that

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Defendants' view, *National Parks* stands for the proposition that non-federal objectives in a federal agency's statement of purpose and need do not provide a reasonable basis for the agency to eliminate alternatives from consideration. Fed. Mem. at 57-58. But that is exactly what Defendants have done in this case. The Project's statement of purpose and need is primarily composed of non-federal objectives, such as encouraging growth in certain areas of Honolulu and creating consistency with local transportation plans. See AR 000247 at 000312-13.

the Project not involve buses, that the Project serve certain specific areas, that the Project stimulate urban growth, that the Project not induce private automobile use, that the Project not include buses, that the Project serve specific demographic groups, and that the Project be separated from "mixed flow traffic. AR 000247 at 000312. *Audubon Naturalist* does not address such a narrow project definition, and therefore cannot authorize Defendants' statement of purpose and need for the Project. *Audubon Naturalist Society v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 663-64 (D. Md. 2007).

The Federal Defendants (but not the City Defendants or the Intervenors) also suggest that the Plaintiffs have admitted that the FTA "framed its purpose and need statement in a manner that allowed it to consider various transportation alternatives." Fed. Mem. at 59. They are just grasping at straws. Plaintiffs have not admitted that the FTA framed its purpose and need statement in a manner that permitted consideration of various transportation alternatives. On the contrary, Plaintiffs' Moving Papers explicitly state that Defendants "have defined the purpose of the Project in terms so specific that only the Project can satisfy them, thereby rendering the EIS a mere 'formality'" and violating NEPA. Pl. MSJ at 52. The language on which the Federal Defendants rely comes from a passage in which the Plaintiffs explain how Defendants ***could have*** defined the purpose and need for — and alternatives to — the Project in an appropriate fashion. (Of course, the

Defendants did not, in fact, define the Project in the terms Plaintiffs suggested.) In the end, the Federal Defendants' discussion of "admissions" says more about the FTA than it does about Plaintiffs' arguments.

Finally, Federal Defendants quote a DOT Appendix to a regulation purporting to interpret what is meant by the term Purpose and Need (a term created by CEQ (40 CFR § 1502.13)) and then claim it is entitled to Chevron deference. Fed. Mem. at 58-59. That, quite simply, is wrong. It is to CEQ that "substantial deference" is due in interpreting NEPA. *Andrus v. Sierra Club*, 44 U.S. 347, 357-58 (1979). No deference is due to other agencies' interpretations of NEPA. *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144, 1155 (D.C. Cir. 2001); *American Airlines v. Department of Transportation*, 202 F.3d 755, 803 (5th Cir. 2000); *Alaska Center for the Environment v. West*, 31 F. Supp. 2d 714, 721 (D. Alaska, 1998), *aff'd* 157 F.3d 680 (9th Cir. 1998). This rule against deference make complete sense. The agencies undertaking the action that is the subject of the NEPA analysis are the very agencies being regulated by NEPA – hardly the agencies to which to defer in interpreting the statute.

B. Defendants Failed To Consider Reasonable Alternatives To The Project (Count 2)

An EIS must identify, describe, and evaluate alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14. A rigorous and objective evaluation of **all** reasonable alternatives analysis is "the heart" of an

EIS. 40 C.F.R. § 1502.14.[56] Failure to address a reasonable alternative renders an EIS inadequate. *See, e.g., Southeast Alaska Conservation Council v. Federal Highway Administration*, 649 F.3d 1050, 1056-57 (9th Cir. 2011); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *'Ilio'ulaokaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006); *Natural Resources Defense Council v. United States Forest Service*, 421 F.3d 797, 813 (9th Cir. 2005).

The availability of reasonable alternatives to a proposed action depends, to a certain degree, on the breadth of the proposed action itself. *See, e.g., Friends of Yosemite Valley*, 520 F.3d at 1038 (range of reasonable alternatives is "dictated by the nature and scope of the proposed action"); *'Ilio'ulaokaokalani Coalition*, 464 F.3d at 1097-98 (recognizing connection between breadth of action and breadth of alternatives). As explained in Plaintiffs' moving papers, the fundamental purpose for government action in Honolulu was a broad one — to improve transportation and transit (or, in

[56] Indeed, the analysis of alternatives is central to the very idea on which NEPA is based. As the Ninth Circuit has recognized on multiple occasions, "The goal of the statute is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values. The consideration of alternatives furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project…which would alter the environmental impact and the cost-benefit balance…Informed and meaningful consideration of alternatives - including the no action alternative - is … an integral part of the statutory scheme." *Alaska Wilderness Recreation and Tourism Association v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) *cert denied* 489 U.S. 1066 (1989).

agency-speak, "mobility") in the corridor stretching from Honolulu to Kapolei — so the range of alternatives should also have been quite broad. AR 000247 at 000312-14.

But Defendants' FEIS contains a detailed evaluation of just three action alternatives. AR 000247 at 000331-37. Worse still, the three alternatives are essentially identical. The only difference between them is a short (approximately 4 miles) segment where two slightly-different alignment possibilities exist. *Id.* That is facially unreasonable. *See, e.g., Friends of Yosemite Valley*, 520 F.3d at 1039 (range of alternatives unreasonable where five action alternatives proposed similar outcomes); *California v. Block*, 690 F.2d 753, 765-69 (9th Cir. 1982) (range of alternatives unreasonable where alternative forest plans would preserve similar amounts of wilderness). If Honolulu's transportation problems are broad and complex enough to justify a 20-mile, $5.5 billion elevated heavy rail line, they must also be broad and complex enough give rise to a true **range** of reasonable alternatives.

Defendants' failure to "[r]igorously explore and objectively evaluate all reasonable alternatives" manifested itself in several decisions, each of which violated NEPA. 40 C.F.R. § 1502.14. Defendants (1) impermissibly relied on the City's AA to reject reasonable alternatives before the NEPA process ever began; (2) arbitrarily and capriciously refused to consider the MLA (and then arbitrarily and capriciously refused to reconsider that alternative after the flaws

in their original decision were pointed out); (3) impermissibly limited their consideration of alternatives to "steel wheel on steel rail" technology, thereby excluding other reasonable alternatives; and (4) impermissibly refused to consider alternatives requiring action by the City Council. Both the resulting EIS and the process for getting to that EIS are legally inadequate.

1. Defendants Impermissibly Relied On The City's AA Process

SAFETEA-LU allows FTA and local governments to undertake early "planning level" analyses analyzing alternatives to proposed transit projects. *See* 23 U.S.C. § 139(f)(4). But there are two important limits on the use of such alternatives analyses for NEPA purposes. First, SAFETEA-LU requires that the FTA guide the preparation of, independently evaluate, and approve any document that will be used for compliance with NEPA. 23 U.S.C. § 139(c)(3). Second, the Department of Transportation mandates that the results of an early planning effort to analyze alternatives can only be carried forward into the NEPA process for preparing an EIS if "those results [are] subjected to public and interagency review and comment during the scoping of the EIS." AR 022836 at 022850.

Defendants have identified the City's planning level AA (referred to in the FEIS as "screening" and "alternatives analysis") as the basis for eliminating virtually all potential alternatives to the Project. But the AA does not satisfy the specific procedural requirements, primarily because the results

of the City's AA — that is to say, the series of documents memorializing the City's conclusions memorializing the City's conclusions — were not "subjected to public…review during the EIS scoping process" as required.

To be clear: The City did hold a scoping process after completing the AA and before preparing an EIS. The City could easily have used that scoping process to provide an open, public review of the results of the AA. Such an approach would have satisfied the requirements of NEPA.

Instead, the City sought to restrict the ability of scoping participants to revisit the conclusions of the AA. For example, the NOI initiating the scoping process explicitly noted that Defendants would not consider any Project alternatives "previously evaluated and eliminated" by the City. AR 009696 at 009699. Likewise, the City's scoping report explicitly states that "comments…on a preference for alternatives that have previously been evaluated and eliminated in from consideration are included in the appendices to this report but are neither summarized ***nor considered***." AR 017157 at 017172. These statements — made in the official documents memorializing the scoping process — show that the City was no longer accepting input on anything addressed in the AA. Therefore, it cannot be said that the results of the AA were "subjected to public…review during the EIS scoping process," as required.

The City Defendants respond that the NOI initiating the scoping process

shows, on its face, that the results of the AA were available for public review. While this cramped view of public participation is perfectly consistent with the City's actions in approving the Project (i.e., a focus on a predetermined technological alternative), it is not at all consistent with NEPA. One of NEPA's most basic purposes is to guarantee "that the relevant information will be made available to the larger audience that may a play role in both the decisionmaking and the implementation of that decision." *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 349 (1989). By dissuading comments on the results of its AA, and by ignoring those comments that it did receive, the City effectively made it impossible for "the larger audience" (i.e., the public) to "play a role in…the decisionmaking and the implementation of that decision." *See Robertson*, 490 U.S. at 349; AR 009696 at 009699 (dissuading comment); AR 017157 at 017172 (comments ignored).

The City Defendants also cite language from the NOI suggesting that "other alternatives" (*i.e.*, those not dismissed during the AA process) could be raised during the scoping process. City Mem. at 71. That is beside the point. The requirements for integrating planning-level AAs into subsequent NEPA documents explicitly require public review of the results of the AA. [cite]. The fact that the public might also have a chance to propose alternatives outside of the AA is immaterial, particularly when promising ones have been ruled out of order.

The City Defendants also criticize Plaintiffs' failure to address the importance of the transportation planning process, going so far as to suggest that such process renders all five of the Ninth Circuit decisions cited in Plaintiffs' moving papers "entirely inapposite." City Mem. at 71-72. Quite an allegation! But inaccurate.

2. Defendants Arbitrarily And Capriciously Eliminated The MLA From Consideration In The EIS

The MLA is one of the Project alternatives improperly eliminated from consideration on the basis of the City's AA. AR 000247 at 000321. For the reasons explained above, Defendants' reliance on the City's AA was arbitrary and capricious in and of itself. But their decisionmaking with respect to the MLA also violated NEPA in two additional respects: (1) the City's original decision to eliminate the MLA from consideration was based on flawed information and arbitrary and capricious analysis; and (2) Defendants' subsequent refusal to reconsider the City's decision to eliminate the MLA from detailed consideration was also arbitrary and capricious.

Honolulutraffic.com proposed the MLA during the City's AA process. AR 016601 at 016715-27. The proposal involved a two-lane reversible roadway between Pier 16 (just west of downtown Honolulu, outside the historic downtown core) and Waikele (a few miles east of Kapolei). AR 016601 at 016720. Buses and vanpools would use the MLA for free, while

other vehicles would electronically pay a toll calculated to keep the roadway full but free-flowing. *Id*. Honolulutraffic.com submitted detailed information about the performance of such a system (supported by a 3-page list of sources) as well as a set of notes explaining that the MLA could be (1) expanded in width to allow for three lanes and/or (2) expanded in length to the west. AR 016601 at 016720-27.

Honolulutraffic.com also noted with concern the City's apparent efforts to create a "straw man" version of the MLA. AR 016601 at 016722-23. As Honolulutraffic.com pointed out, the City's approach seemed "designed to make the rail transit line look good in comparison." AR 016601 at 016723.

Honolulutraffic.com's fears were well-founded. As detailed in Plaintiffs' moving papers, although the City publicly claimed to give the MLA the "hard look" NEPA requires, the City's analysis of the MLA was riddled with errors and bias. Pl. MSJ at 59-63; s*ee also* AR 017222 at 017223 (unexplained removal of carpool lanes from modeling); AR 017157 at 017222-27 (detailing and documenting errors in City's analysis). In partial response to these problems, the City's own Transit Task Force weighed in with a series of recommendations for further analysis of the MLA. *See* 070839 at 070878-79 (Task Force recommendations). Likewise, FTA staff corrected some of the City's errors. AR 150902 (correcting City's erroneous assumptions regarding absence of funding MLA). And Honoulutraffic.com twice offered corrections

to the City's calculations and requested that the MLA be re-considered. AR 071958; AR 000247 at 002018-31. Defendants nonetheless refused to reconsider their decision to eliminate the MLA. In short, they failed to follow up on information about a potentially-feasible alternative.

NEPA does not allow agencies to "simply [] sit back, like an umpire" while the public tries to generate alternatives. *See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1119 (D.C. Cir. 1971). Instead, they must "take the initiative of considering environmental values at every distinctive and comprehensive stage of the process." *Id*. The Defendants' failure to do so violated NEPA.

In response, the Federal Defendants allege that Plaintiffs' concerns are irrelevant since the MLA was rejected on other grounds. Fed. Mem. at 67. Specifically, they assert that the MLA was rejected because "it did not offer an alternative to private automobile traffic," because "it did not serve low income communities," and because "the vehicles using the MLA would utilize existing infrastructure to access and exit the MLA." *Id*. If true, this is further evidence of Defendants' arbitrary and capricious decisionmaking. The MLA was explicitly designed to for use by express buses and vanpools; as such, it certainly represents an alternative to private automobile travel. *See, e.g.,* AR 071958; *see also* City Mem. at 8-9 (admitting that MLA involved express buses). Low income communities could easily be served by the express buses

using the MLA. And, contrary to Defendants' assertions, buses using the MLA would use new infrastructure to access the MLA. *See, e.g.*, 049484 at 049526 at 049550 (description of bus service).

The Federal Defendants also suggest that Defendants were not required to reconsider the MLA because it would not meet the purpose and need for the Project. Fed. Mem. at 68-9. In doing so, they ignore the possibility that a reasonable reconsideration of the MLA (with the City's errors corrected) would reveal that the MLA does, in fact, meet the purposes of the Project.

The City Defendants raise the same arguments as the Federal Defendants. But they also contend that Defendants' refusal to reconsider the MLA was appropriate because the Transit Task Force recommendations were "non-substantive." City Mem. at 80-81. Even a cursory glance at the recommendations reveals otherwise. *See* AR 070839 at 070878-79. Among other things, the Task Force recommended changes and/or additional information on the network of buses that would use the MLA, the use of carpool lanes in conjunction with the MLA, and the use of park and ride facilities in conjunction with the MLA. *Id*. Each of these suggestions was explicitly designed to provide a more detailed, substantive look at the performance of the MLA. *Id*. To no avail.

3. Defendants Impermissibly Limited Their Consideration Of Alternatives To Steel Wheel On Steel Rail Technology

Defendants also violated NEPA by impermissibly limiting the range of alternatives evaluated in the EIS to "steel wheel on steel rail" technology. First, by moving from the "high capacity transit service" identified in the 2005 NOI to the "fixed guideway transportation system" identified in the 2007 NOI Defendants excluded such reasonable alternatives as light rail. Second, as explained in Plaintiffs' moving papers, the City's AA process identified several potentially-feasible technologies to meet the Project's more limited fixed guideway purpose and need, including light rail, rubber-tired guided transit vehicles, magnetic levitation (or "maglev") systems, and monorails. *See, e.g.,* AR 009434 at 009467 (listing technologies), 009473 (Project "could use a range of fixed guideway technologies"). Defendants' 2007 NOI promised that each of these technologies would be evaluated in the EIS. Instead, the City convened a "Panel of Experts" who purported to eliminate from consideration all options except heavy, elevated steel wheel on steel rail. AR 000247 at 000283, 000331, 000333-38.

Defendants' approach to "evaluating" technology alternatives violates NEPA. The 2008 Panel of Experts considered only performance, cost, and reliability; it did not consider the environmental advantages and disadvantages

of different technologies.[57] AR 000247 at 000331. But the very purpose of evaluating alternatives under NEPA is to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by decisionmakers and the public." 40 C.F.R. § 1502.14; *see also* 42 U.S.C. § 4332(2)(C) (statutory alternatives analysis requirement); *Alaska Wilderness*, 67 F. 3d at 729 (fundamental purposes of alternatives analysis). A limited, technical review conducted by a panel of appointed experts cannot substitute for the rigorous, objective, agency-driven public evaluation of environmental issues NEPA requires. *Id.*

None of the Defendants disputes that the technology options promised for the Draft EIS were in fact eliminated from consideration outside the NEPA process. Instead, they focus on describing and defending the outcome reached by the Panel. Fed. Mem. at 69-72; City Mem. at 81-84. This "ends justify the means" mentality perfectly encapsulates the problems with Defendants' NEPA process.

[57] Indeed, there is evidence in the administrative record that technologies such as maglev and monorail have fewer environmental impacts than "steel wheel on steel rail." *See, e.g.,* AR 022575 at 022682 (FTA noise guidance reports maglev noise levels lower than steel wheel on steel rail).

4. Defendants Impermissibly Refused To Consider Alternatives Requiring Action By The Honolulu City Council

Defendants also violated NEPA by refusing to consider Project alternatives requiring action by the Honolulu City Council, a violation best exemplified by their failure to consider in the EIS any alternative to the Project's route past the Federal office building within which the United States District Court for the District of Hawaii is located.

As explained in Plaintiffs' moving papers, the EIS considers just one route through downtown Honolulu, and that route — which follows Nimitz Highway to Halekauwila Street — requires that the Project be built within approximately 45 feet of the third- and fourth-floor windows of the Federal building. *Id*.; AR 000247 at 000343, 000689, 000931. During the public comment period on the Draft EIS, eight of the nine federal judges then sitting in the United States District Court for the District of Hawaii submitted a letter expressing significant concerns about the Project and requesting that Defendants consider an alternative route. AR 000247 at 000930-34; *see also* 000994-996 (GSA not notified of Project). Among other things, that letter reports a conversation between the judges and the Chief of the City's Rapid Transit Division in which the City took the position that alternative alignments were unlikely to be considered because they would require approval from the Honolulu City Council. AR 000247 at 000930-34. No alternative to the

Nimitz-to-Halekauwila route was ever added to the EIS. AR 000247 at 000333-38 (FEIS alternatives); 000937-38 (City's response to comments calls Nimitz-to-Halekauwila route "preferable," refuses to add alternative to EIS).

Defendants had an obligation to "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). NEPA's implementing regulations explicitly provide that this obligation extends to "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c); *see also Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999) (NEPA requires consideration of reasonable alternatives outside lead agency's existing legal authority); "Forty Most Asked Questions Concerning NEPA Regulations," 46 Fed. Reg. 18026 at 18027 (March 17, 1981) (alternative requiring change of local law must be evaluated if reasonable). Therefore, it was arbitrary and capricious for Defendants to rely on the (reported) need for City Council action to avoid considering alternatives.

The Federal Defendants and the City Defendants respond that Plaintiffs have not established that alternative routes were rejected because of the need for City Council action. City Mem. at 84-85. But a fair reading of the judges' letter reveals that ***they*** were of the opinion that alternative routes were not being studied because of the (asserted) need for City Council action. How else to explain the footnote in which the judges point out the City could take action

if it wanted to do so? City Mem. at 84-85.

5. The Government's Statutory and Regulatory Citations Provide Them No Support.

The government cites 49 USC § 5309 (a)(1) and 5309 (e)(3) for the unremarkable position that an alternative analysis is part of Federal Law. Fed. Mem. at 5-6. So it is — a definition of the term alternatives analysis (which includes identification of the locally preferred alternative) coupled with direction to the Secretary of to "analyze and consider" the results of planning and alternative analysis for the project. Nothing – repeat nothing – in the statute either directs or permits the Secretary to ignore and fail to consider under NEPA the full range of alternatives other than the locally preferred alternative. Including and analyzing and considering one alternative among the range of "all reasonable alternatives" (40 CFR 1502.14(a)) is one thing; essentially discarding all alternatives other than the locally preferred one is quite another.

Federal defendants then cite 23 CFR part 450 App. A, ¶12. Fed. Defendants' Opp. at 6, which effectively undercuts their position. That provision states, "Alternatives that remain 'reasonable' after the planning-level analysis must be addressed in the EIS even when they are not the preferred alternative."[58] Would that the FTA had followed its own guidance.

[58] The cited appendix allows discarding alternatives which fail to meet the purpose and need, which is fair enough. But here, as captured in the

C. Defendants Failed Properly To Evaluate The Environmental Consequences Of The Project

NEPA requires federal agencies to evaluate the environmental consequences of their proposed actions. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.8, 1508.27. This analysis must address direct impacts, indirect impacts, and cumulative impacts and serves as the basis for comparing alternative courses of action. 40 C.F.R. §§ 1502.16, 1508.8.

1. Defendants Arbitrarily And Capriciously Failed To Evaluate And Disclose The Environmental Impacts Of Fabricating The Fixed Guideway Structure

Defendants failed properly to account for the environmental impacts associated with construction of the Project. For example, their EIS does not account for the potential impacts on air quality associated with the fabricating and installing the large sections of concrete needed for the guideway. AR 000247 at 000551-54. Nor does it account for the air emissions associated with transporting material to the areas where the guideway will be built. *Id*. Both of these impacts are reasonably foreseeable. Therefore, they should have been identified, evaluated, and disclosed to the public. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.16, 1508.8, 1508.27.

The Federal Defendants and the City Defendants contend that these

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comparison of the purposes in the 2005 NOI and the 2007 NOI, the purpose was altered – more particularly, improperly narrowed – to exclude essentially all action alternatives other than the locally preferred alternative. Of course, given the (improper) narrowing of the purpose and need, no alternatives other than the locally preferred alternative meet it. If you say the purpose is to build a 10 story building, a 9 story building doesn't make it.

claims were waived because no one raised them during the administrative process. But disclosure of the City's fabrication facility for the concrete guideway only appeared at the very end of that process, when it was published as an appendix to the ROD, the document which closes the administrative record. Under these circumstances, there was simply no way for anyone to comment on the issue. Accordingly, the waiver claim should be rejected.

2. Defendants Arbitrarily And Capriciously Failed To Account For The Indirect And Cumulative Impacts Of The Project

Defendants also failed properly to account for the indirect and cumulative effects of the project on land use and growth. The Project is quite explicitly designed to promote growth in the agricultural areas west of Honolulu. AR 000247 at 000313. The EIS asserts that these areas are "less likely to develop" without the Project. *Id*. The EIS also notes that the Project will "influence the distribution, rate, density, and intensity of development." AR 000247 at 000657. But the document does not provide meaningful information about how that influence will affect environmental resources. For example, it does not explain whether there are sensitive resources (habitat, wetlands, etc.) that could be affected in the areas to which growth will be redirected. Essentially, Defendants are proposing to instigate a massive change in land development patterns on Oahu without providing the public any detail about the environmental consequences of those changes. For that

reason, too, the EIS fails to provide the "hard look" that NEPA requires. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1122-23 (10th Cir. 2002) (failure to consider effect of providing access to previously undeveloped areas).

The City Defendants assert that this analysis satisfies NEPA because it is based on the Oahu general plan. City Mem. at 88-89. That is not the issue. Regardless of the source of the information, the EIS should have provided a detailed look at the impacts of the growth that the Project will cause. That is particularly true in light of the Project's explicit, growth-inducing purpose.

D. Defendants Impermissibly Segmented Their Analysis Of The Project (Count 4)

As discussed in Plaintiffs' moving papers, NEPA's implementing regulations emphasize the importance of "mak[ing] sure the proposal which is the subject of an [EIS] is properly defined." Pl. MSJ at 68; 40 C.F.R. § 1502.4(a). Among other things, they direct that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action, shall be evaluated in a single impact statement." *Id.* (emphasis added); *see also* 40 C.F.R. § 1508.25(a)(1). The purpose of this requirement is to prevent agencies from artificially "segmenting" their environmental analyses, thereby hiding the true impacts of and alternatives to proposed actions. *See Thomas v. Peterson*, 753 F. 2d 754, 758 (9th Cir. 1985) (segmentation allows agencies to minimize environmental impacts); *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975) (project must be defined so as to

assure adequate opportunity to consider alternatives); *see also Alpine Lakes Protection Society v. Schalpfer*, 518 F. 2d 1089, 1090 (9th Cir. 1975) ("close scrutiny" required in order to "prevent the policies of NEPA from being nibbled away by multiple increments").

Defendants — until the EIS itself — defined the Project as a 25- or 30-mile network of rail lines connecting Kapolei, the University of Hawaii, and Waikiki. *See*, *e.g.*, AR 009700 (2005 Federal Register notice); AR 009556 at 009566-68 (2006 Alternatives Screening Memo), AR 9696 (2007 Federal Register notice); AR 033642 at 033654 (2008 technical report). Indeed, the City's "locally preferred alternative" consists of that larger project. But the EIS evaluates only a subset of that network — a 20-mile section from East Kapolei to Ala Moana Center, just east of downtown Honolulu — as "the Project." *See* AR 000247 at 000340-43 (Project maps).

In doing so, Defendants artificially and improperly segmented environmental review of the Project. The entire network of rail lines is quite clearly "related…closely enough to be, in effect, a single course of action." 40 C.F.R. § 1502.4(a). Indeed, the University of Hawaii and Waikiki lines do not have any independent utility; they only make sense as part of the Project. *See, e.g., Hammond v. Norton*, 370 F. Supp. 2d 226, 247-53 (D.D.C. 2005) (improper segmentation where one of two pipeline projects lacked independent utility). Accordingly, the entire 25-mile rail network should have been

evaluated as a single project in a single EIS. *Id*.; *see also* 40 C.F.R. § 1508.25(a)(1)(iii) ("interdependent parts of a larger action that depend on the larger action for their justification" should be discussed in the same impact statement).

Defendants attempt to excuse their segmentation by making several arguments:

- The City asserts that the segmentation is justified by a provision of the FTA's NEPA regulations. City. Mem., at 89, *et seq*. One of the provisions of that regulation allows segmentation if the action being evaluated would not "restrict consideration of alternatives for other reasonably foreseeable transportation improvements." *Id*. at 98, quoting 23 CFR § 771.111(f)(3). It is hard to see how a heavy steel wheel on steel rail system terminating at the Ala Moana Center does not constrict consideration of the projected extension to the University of Hawaii and Waikiki to the same technology, excluding, or at minimum, biasing the selection against light rail or MLA or some other alternative technology or route. *See, e.g., Named Individual Members v. Texas Highway Department*, 446 F. 2d 1013, 1023 (5th Cir. 1971) (artificial segmentation of highway project "make[s] a joke of" the alternatives requirement).[59]

[59] *Named Individual Members*, a leading 4(f) case, addressed segmentation in the context of that section. *Named Individual Members*, 446 F.2d at 1023. The Fifth Circuit confronted the question "Whether the Secretary may take a single 'project' and divide it into 'segments'" for purposes of securing regulatory approval. The Department of Transportation proposed to segment a highway project such that the road would be built in segments on either side of a 4(f)-protected park, leaving for a later day the "question" of how to connect the segments. *Id*. The same sort of logic is at work in this case. Defendants may pretend that they will consider a full range of alternatives to expanding

- Somewhat inconsistently the City also alleges that the EIS does in the cumulative impacts discussion evaluate the extensions. City Mem. at 91. As set out below, the EIS fails to so analyze the extensions.
- The Federal government would excuse its compliance with governing law because funding for those portions of the project was not available. Fed. Mem. at 78. They present no authority for the apparent assertion that shortage of funding excuses failure to comply with analyses required by applicable environmental laws. Perhaps because of financial limitations Defendants cannot now build the planned extensions -- but they certainly can analyze their environmental impacts as part of the whole project.

By segmenting their environmental review of the Project, Defendants understated the environmental consequences of the rail system. For example, the EIS fails to evaluate air emissions and noise impacts associated with the full rail network. *See, e.g.*, AR 000247 at 000551-54 (air quality), 000554-64 (noise), 000655-78 (cumulative impacts). Similarly, while the EIS includes a vague statement about the visual effects of the Waikiki extension being "similar" to those of the Project, Defendants did not make a meaningful attempt to disclose the visual impacts of the rail system as a whole. AR 000247 at 000501-551 (visual impacts analysis), 000670 (cumulative impacts

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elevated heavy rail to Waikiki. But just as the highway in the *Named Individual Plaintiffs* was clearly designed to go through a protected park, so too is the elevated heavy rail system at issue in this case clearly designed to extend to Waikiki.

analysis). Indeed, that may well have been their intent. *See, e.g.*, AR 072134 at 072137 (members of Honolulu City Council report that "the branch to Waikiki was intentionally left out of the [EIS]…to avoid having to address the negative environmental impacts").

IV. DEFENDANTS VIOLATED THE NHPA

The NHPA prohibits requires federal agencies from approving a project (referred to as an "undertaking" in the context of the NHPA) before (1) assessing the project's effects on historic properties and (2) developing and evaluating "alternatives or modifications to the [project] that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. §§ 800.5, 800.6. The "adverse effects" to be addressed as part of this process include both direct effects and indirect effects. 36 C.F.R. § 800.5(a).

The Project is explicitly designed to induce "transit-oriented development" and "transit-supportive development" at and near the 21 stations along the rail line. AR 000247 at 000657-58. Such development is expected to include "office space and multi-story residential buildings" as well as new communities of "retail, high-density residential, [and] mixed use" features. *See* AR 000247 at 000657.

All of this growth would affect historic resources located near rail stations. Or, in the language of the NHPA, the Project would have an (indirect) "effect on historic resources." *See* 000247 at 000657; 36 C.F.R. §§

800.5(a)(2)(ii) (adverse effects include changes to an historic resource's setting), 800.5(a)(2)(v) (adverse effects include introduction of visual atmospheric, or audible elements).

In purported compliance with the NHPA, the City and FTA prepared a Programmatic Agreement. *See* AR 000030 at 000166-185. The Programmatic Agreement explicitly notes the possibility that the Project would indirectly effect historic resources near rail stations by stimulating significant amounts of new development, and it includes provisions designed to minimize the effects of such development within the Merchant Street Historic District and the Chinatown Historic District. AR 000030 at 000086. But the Programmatic Agreement fails to include equivalent protections for other historic resources. AR 000030 at 000083-113.

As explained in Plaintiffs' moving papers, that is a significant failure. Pl. MSJ at 71-74. There are sizeable clusters of historic resources around the proposed Pearl Harbor, Kahili, Iliwei, Downtown, and Civic Center rail stations. And the EIS concluded that considerable Project-induced development is likely some of those areas. *See* AR 000247 at 000657-59 (Kahili, Iliwei, Civic Center). In short, while the FTA and the City recognized that Project-induced growth could have adverse effects on historic resources (and that the NHPA requires such effects to be minimized or mitigated), they only sought to address that possibility for two of the resources under threat.

AR 000030 at 000083-113. Therefore, their approval of the Project was arbitrary, capricious, and contrary to the NHPA. *See Motor Vehicle*, 463 U.S. at 43 (agency's failure to consider an important problem is arbitrary and capricious); 36 C.F.R. § 800.6 (requiring efforts to avoid or minimize adverse effects).

Defendants do not really dispute any of these claims. Fed. Mem. at 82-85; City Mem. at 93; Int. Mem. at 42-71. In fact, neither the Intervenors nor the City Defendants responded at all. City Mem. at 93 (joining in federal memorandum); Int. Mem. at 42-71 (arguments do not address NHPA). The Federal Defendants' brief does purport to address the NHPA. Fed. Mem. at 82-85. But that "response" avoids the substance of Plaintiffs' claims; instead, it cites strings of documents on other NHPA topics. *See* Fed. Mem. at 83-84 (string citations purporting to demonstrate adequate consultation procedures).

In the end, none of the Defendants disputes that there are historic resources near many (if not most) of the 21 rail stations along the Project route. Fed. Mem. at 82-85; City Mem. at 93 (joining in federal memorandum); Int. Mem. at 42-71 (arguments do not address NHPA). None of the Defendants disputes that the Project will cause significant growth around rail stations. *Id*. None of the Defendants disputes that such growth could harm historic resources. *Id.* And none of the Defendants disputes that the Programmatic Agreement fails to protect some historic resources from these

indirect effects, even while recognizing that those same protections should be granted to other resources. *Id*. Accordingly Plaintiffs are entitled to summary judgment.

V. INJUNCTIVE RELIEF IS APPROPRIATE

Defendants have used portions of their briefs to raise questions about appropriate remedies and procedures in case Plaintiffs should prevail. The Intervenors assert that the Court must not issue an injunction even if it rules for Plaintiffs. Int. Mem. at 67-71. The City Defendants and the Federal Defendants contend that the best course of action would be to hold further proceedings (presumably while they are allowed to continue their Project-related activities). Fed. Mem. at 85-86; City Mem. at 93-95.

Plaintiffs respectfully request that the Court do neither. Should the Court find for Plaintiffs, it will have at its disposal all of the information it needs to fashion an appropriate remedy. And because the claims at issue in this case involve Defendants' violation of a substantive mandate and/or inadequacies in core elements of environmental analyses (*e.g.*, avoidance of 4(f) sites, purpose and need, range of alternatives), Plaintiffs respectfully submit that the most appropriate course of action would be to enjoin further ground-disturbing work on the Project[60] until such time as the Defendants (or

[60] Of course, ground-disturbing activity required to identify and/or evaluate environmental consequences should be allowed to continue.

some of them) have corrected their errors and properly reevaluated the Project on the basis of those corrections.

Plaintiffs also note that they have worked collaboratively with the City Defendants and the Federal Defendants to accommodate the City's asserted need to continue work on the Project, while, at the same time, simultaneously ensuring that the Project does not pass "the point of no return." Adams Dec. at ¶¶ 2-3. Consistent with those efforts, the City has assured the Plaintiffs that (1) it is proceeding at its own risk, (2) all work currently being done can reasonably be undone, and (3) the City has sufficient financial resources to do so. Adams Dec. at *Id.* In not seeking a preliminary injunction, Plaintiffs relied upon these assurances that work being done while motions for summary judgment proceeded could be undone without excessive financial harm to the City.

Finally, we note that the Intervenors' showing of harm is minimal. They claim that an injunction would force them to endure traffic jams, air pollution, and, possibly, a loss of construction jobs. Int. Mem. at 69-70. But they also admit that (1) final designs for the first phase of construction are not expected to be complete until December, 2012, (2) final design plans for the final phase of construction are not expected to be complete until 2014, and (3) "there is ample time to cure any violations" before those events occur. Int. Mem. at 70-71. The project has, in short, not proceeded to a stage where enjoining it

would affect Defendants' ability to comply with the law, properly examine reasonable alternatives to the currently selected alternative, and then proceed in whatever direction the resulting analyses under 4(f), NEPA, and the NHPA warrant.

Respectfully submitted,

Dated: June 22, 2012

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of LR7.5 (b) and (e) because the brief contains 26,686 words, excluding the parts of the brief exempted by local rule. This brief complies with the typeface requirements of LR10.2 (a) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 14-point Times New Roman.

/s/ Matthew G. Adams

CERTIFICATE OF SERVICE

I certify that on June 22, 2012, I electronically filed the above document with the Clerk of the District Court using its CM/ECF system, which will send notice of electronic filing to the following:

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