

No. 13-15277

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Honolulutraffic.com, *et al.*,

Plaintiffs-Appellants,

v.

Federal Transit Administration, *et al.*,

Defendants-Appellees

Appeal from the United States District Court
For the District of Hawaii
(Civil No. 11-00307 AWT)

**DEFENDANTS-INTERVENORS-APPELLEES FAITH ACTION FOR
COMMUNITY EQUITY, MELVIN UESATO and
THE PACIFIC RESOURCE PARTNERSHIP'S ANSWERING BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendants-Appellees hereby certify that none of them has a parent corporation and that none of them has issued stock of which 10% or more is owned by a publicly held corporation.

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INTRODUCTION

Defendants-Intervenors Appellees, Faith Action for Community Equity (“**FACE**”),¹ Melvin Uesato and the Pacific Resource Partnership (“**PRP**”) (collectively referred to as “**Intervenors**”) represent Hawai‘i’s low-income and Native Hawaiian population, a disproportionate number of whom live in West O‘ahu and suffer severe traffic and associated environmental impacts that residents in East and Windward O‘ahu do not regularly experience. PRP represents the State’s carpenter’s union and its 6,500 members, a significant portion of which are unemployed. Intervenors support the Honolulu High-Capacity Transit Corridor Project (“**Project**”) because it will, among other things, improve the quality of life for their members and the greater O‘ahu community.² Honolulu’s reliance on its

¹ FACE, a faith-based grassroots organization has a membership base of twenty-seven institutions on O‘ahu, twenty-four institutions on Maui, and one statewide institution. FACE’s mission is to engage in actions that challenge the systems that perpetuate poverty and injustice, and to advocate for the interests of Hawai‘i’s low-income population, a disproportionate number of which reside in Central and Leeward O‘ahu, including a significant number of Native Hawaiians. Because of FACE’s commitment to finding solutions for the affordable housing crisis on O‘ahu and to advocating for the needs of the poor, FACE has long-supported the Project. Defendants-Intervenors’ Remedy Brief filed 11/30/12.

² Intervenors moved to intervene in this suit because Plaintiffs-Appellants Honolulu Traffic et al., (“**Honolulu Traffic**”) do not fairly represent the views of O‘ahu’s residents who understand that traffic inequities suffered by those who live in West O‘ahu are unfair and unacceptable, that most of O‘ahu’s expected growth in the next twenty years will occur in West O‘ahu, and that the Project is the best opportunity for the island to economically and environmentally improve its travel mobility, reliability and inequity. Not surprisingly, despite energetic objections from Honolulu Traffic, in November 2008, Honolulu residents voted in favor of

overcrowded roads imposes increasingly burdensome costs in terms of efficiency, gasoline and car maintenance, and missed economic opportunities. Without a functional mass transit alternative in the Project corridor, Intervenor (as well as the greater public) have few alternatives to commute to and from work. For families who live in 'Ewa and Leeward O'ahu, traffic congestion has an enormous corrosive effect on their lives. The extra hours lost each week is time stolen from these families. This is not only a quality of life matter, but in many cases, this issue strikes at the core of the ability of O'ahu citizens to find work and support their families. Access to affordable and reliable transportation widens opportunity and is essential to addressing poverty and unemployment as well as to ensuring access to good schools and health care services. Simply put, improving transportation equity means helping make sure that all O'ahu residents have an opportunity to succeed.

The Project reflects the considered policy choice of Hawai'i's citizens and their elected officials to develop a transportation system that provides a modern, efficient and equitable alternative to highways and the private automobile. Additionally, it also has substantial potential for creating transportation equity and transit-oriented development (which are significant goals and needs of O'ahu residents). Transportation equity is integral both to the goals of the community

the Project. 20 SER (Supplemental Excerpt of Record Vol. 20) 5123. *See* City Charter § 6-1703.

and to the goals of the federal law governing new transit projects. *See* 49 U.S.C. § 5301(f)(4) (stating that a central purpose of the New Starts transportation program is “to provide financial assistance to . . . help carry out national goals related to mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals.”).

Additionally, the Project is expected to positively impact employment conditions both on O‘ahu and throughout the State during the current precarious economy faced by Hawai‘i’s construction and other industries.³

STATEMENT OF JURISDICTION

In accordance with Federal Rule of Appellate Procedure (“**FRAP**”) Rule 28(i), Intervenors hereby incorporate the jurisdictional statement and jurisdictional arguments in the City and County of Honolulu’s (“**City**”) answering brief.

STATEMENT OF ISSUES PRESENTED

Intervenors incorporate the statement of issues presented in the Federal Defendants-Appellees’ brief. Intervenors’ brief focuses on two issues:

³ The Project is reasonably projected to create over 10,000 jobs per year on average – over 4,000 construction jobs (i.e., 42% for engineers, architects, and laborers, 18% in indirect construction, and 40% for suppliers, retailers, restaurants and services). *See* Defendants-Intervenors’ Remedy Brief filed 11/30/12. In addition, subcontractors and other support and craft workers will be hired – those workers will then spend their wages at local businesses, fueling the state’s economy and creating more jobs. *Id.*

(1) Was it arbitrary and capricious for the Federal Transit Administration (“**FTA**”) to determine that the Managed Lane Alternative (“**MLA**”) and the Bus Rapid Transit Alternative (“**BRT**”) would not accomplish the purpose and need of the Project and were also “not prudent” for the purposes of 49 U.S.C. § 303 (“**Section 4(f)**”)?; and

(2) Was the Lead Agencies’⁴ approach to the evaluation of unknown and unidentified below ground archaeological resources arbitrary and capricious?

STANDARD OF REVIEW

In accordance with FRAP Rule 28(i), Intervenors hereby incorporate the standard of review section in the Federal Defendants-Appellees’ answering brief.

STATEMENT OF THE CASE

By way of this lawsuit, Honolulu Traffic seeks to invalidate the FTA’s approval of the Project by alleging that the Final Environmental Impact Statement (“**EIS**”) and Record of Decision (“**ROD**”) approving the Project did not comply with the requirements of the National Environmental Policy Act (“**NEPA**”), Section 4(f) of the Department of Transportation Act, the National Historic Preservation Act (“**NHPA**”) and the regulations implementing those statutes. Intervenors hereby incorporate the Project description and statement of the case in the City’s answering brief.

⁴ Throughout this brief, the use of the term “Lead Agencies” refers to the City and the FTA collectively.

STATEMENT OF FACTS

Early Transit Attempts

After several failed attempts by the City to develop a transit system to alleviate growing transportation issues on the island, *see* 3 ER 527, in 2004, the O‘ahu Metropolitan Planning Organization (“**OMPO**”) surveyed O‘ahu residents about transportation issues. *Id.* By nearly a two-to-one margin, residents responded that improving transit was more important than building more roadways. *Id.* The study identified traffic congestion in the corridor between ‘Ewa and Central O‘ahu and Downtown Honolulu as residents’ biggest concern. *Id.* Thereafter, the OMPO considered a range of future transportation scenarios that were consistent with local land use plans in its O‘ahu Regional Transportation Plan 2030 (“**ORTP 2030**”) in 2004 and 2005, which the OMPO approved in 2006. 2 ER (Excerpts of Record Vol. 2) 250.

December 2005, Federal Register/Notice Of Intent

On December 7, 2005, the FTA published its Notice of Intent (“**2005 NOI**”) to prepare an EIS and Alternatives Analysis (“**AA**”) on the City’s proposal

to implement transit improvements that potentially include high-capacity transit service in a 25-mile corridor between Kapolei and the University of Hawaii at Manoa and Waikiki. Alternatives proposed to be considered in the AA and draft EIS include No Build, Transportation System Management, Managed Lanes, and Fixed Guideway Transit. Other transit alternatives may be identified during the scoping process.

11 ER 2887.⁵ The 2005 NOI stated the proposed purpose and need as:

III. Purpose and Need

Existing transportation infrastructure in this corridor is overburdened handling current levels of travel demand. Travelers experience substantial traffic congestion and delay at most times of the day, both on weekdays and on weekends. Automobile and transit users on Oahu currently experience 42,000 daily vehicle-hours of delay. By 2030, this is projected to increase nearly seven-fold to 326,000 daily vehicle hours of delay. Because the bus system primarily operates in mixed traffic, transit users experience the same level of delay as automobile drivers. Current morning peak-period travel times for motorists from Kapolei to downtown average between 40 and 60 minutes. By 2030 the travel times are projected to more than double. . . . Expansion of the roadway system between the Kapolei and UH Manoa study corridor is constrained by physical barriers and by dense urban neighborhoods that abut many existing roadways.

Numerous lower-income and minority workers live in the corridor outside of the urban core and commute to work in the primary urban center. Many of these workers rely on public transit because they are not able to afford the cost of vehicle ownership, operation, and parking.

The intent of the proposed alternatives is to provide improved person-mobility in this highly congested east-west corridor. A high-capacity improvement project would support the goals of the regional transportation plan by serving areas designated for urban growth, provide an alternative to private automobile travel and improve linkages between Kapolei, Honolulu's Urban Center, UH Manoa, Waikiki, and urban areas between these points.

11 ER 2888 (emphasis added).

⁵ These four alternatives were developed based on previous transit studies, a field review of the study corridor and an analysis of current conditions. See 10 ER 2497.

April 2006, Scoping Report

After a series of scoping meetings in December 2005, on April 6, 2006, the City published its Scoping Report (“**2006 Scoping Report**”), 22 SER 5370-5669; 23 SER 5670-5896, which built upon the comments received at scoping meetings to “establish the purpose of and the needs for the [project], identify the alternatives that should be evaluated for the project, and determine the scope of the analysis that will be conducted to support” the AA and the Draft EIS. 22 SER 5405.

October 2006, Alternatives Analysis Process

The City embarked on evaluation of a broad range of alternatives to implement the policies reflected in the ORTP. On October 24, 2006, the City Department of Transportation Services (“**DTS**”) published its Alternatives Screening Memo (“**Screening Memo**”). 11 ER 2752. According to the memo, the project’s purpose and need was to: provide improved mobility for persons traveling in the highly congested east-west transportation corridor; provide faster, more reliable public transportation services in the corridor than those currently operating in mixed-flow traffic; provide an alternative to private automobile travel; improve mobility for travelers facing increasingly severe traffic congestion; improve transportation system reliability; and improve transportation equity for all travelers. 11 ER 2750-51. The initial screening process reviewed all possible options that could address the purpose and need of the project via a three-part

evaluation consisting of: identification of modal alternatives, examination of potential technologies, and study of potential guideway alignment options. 11 ER 2757. After consideration of comments received during the public scoping process, the City refined the alternatives. 11 ER 2757-58. Subsequently, the concept packages described below were evaluated to determine the effectiveness of different alternatives:

- No Build (included in each alternative)
- Concept 1: TSM — The different types of projects in this alternative include contraflow lanes for high-occupancy vehicles (HOV) and buses on the H-1 freeway, regional bus rapid transit and major upgrades and improvements to the bus system.⁶
- Concept 2: Managed Lane — This concept focuses on adding managed lanes for buses, HOVs, and toll-paying single-occupant vehicles (SOVs). The emphasis of these managed lanes is to provide an alternative to the fixed guideway along approximately the same alignment. This facility is reversible based on the peak direction of vehicle demand and consists of a two-lane elevated highway from the Waiawa Interchange to Iwilei with an intermediate access point at Aloha Stadium.
- Concept 3: Pearl Harbor Tunnel — This concept adds a combination of tunnels across Pearl Harbor to provide an alternative means of access from Kapolei/‘Ewa to Downtown Honolulu. . . .

⁶ Contrary to statements made by Honolulu Traffic, *see* Honolulu Traffic opening brief (“OB”) at 15, enhanced bus service, similar to the BRT system proposed in the 2003 EIS, was considered during the AA phase and in the screening memo as part of the TSM alternative. Under this alternative, the a.m. peak-hour-only zipper lane would have been modified to operate in both the a.m. and p.m. peak periods, which the BRT system proposed in the 2003 EIS. 3 SER 495; 5 SER 1116, 1120 (description of Regional BRT element of BRT system in 2003 EIS).

- Concept 4: Fixed Guideway — The main focus of this concept is the addition of a rapid transit fixed-guideway system to the corridor. The guideway runs from Kapolei to Downtown Honolulu and on to UH Manoa.

11 ER 2761 (emphasis added). During this evaluation, the City eliminated the Pearl Harbor Tunnel, but recommended that the remaining four alternatives be studied in the AA stage. 11 ER 2745-46, 2765.

Next, the Screening Memo analyzed several technologies including conventional bus, guided bus, light rail transit, personal rapid transit, monorail, magnetic levitation, rapid rail, commuter rail, other emerging rail concepts and ferry service. 11 ER 2768, 2775. These technologies were screened against five criteria: (1) technical maturity, (2) line capacity, (3) cruise speeds, (4) station/stop spacing, and (5) activity center access, which resulted in the elimination of several technologies. 11 ER 2771-72. The remaining technologies were further screened under the following criteria: (1) technical maturity; (2) line capacity; (3) performance; (4) maneuverability; (5) costs/affordability; (6) environmental; (7) safety; (8) supplier competition; (9) implementation time; and (10) accessibility. 11 ER 2772-73. As a result of this screening, the following technologies were retained for further study: conventional bus,⁷ guided bus, light rail transit, people

⁷ “It is assumed that conventional bus will be included in the No Build and TSM alternatives and will be incorporated into each build alternative in a modified fashion to serve as a component of the background bus system that will feed and

mover, monorail, magnetic levitation and rapid transit technologies. *See* 11 ER 2779; *see also* Table 3-2: Summary of Technology Screening, 11 ER 2781.

On November 1, 2006, pursuant to 49 C.F.R. § 611.7,⁸ the DTS published its Alternatives Analysis Report (“**AA Report**”). 9 ER 2367. The purpose and need section of the report was substantially the same as that set forth in the Screening Memo. 9 ER 2384-85. Building upon the Screening Memo, the AA Report compared the No Build, the TSM (improvements to the existing transportation system, including expanded bus service), the MLA (express buses operating in dedicated lanes with tolls charged to single occupant vehicles) and Fixed Guideway alternatives. The TSM alternative’s enhanced bus service was substantially similar to the BRT system proposed in the 2003, and thus, was considered as part of this analysis. 3 SER 495; 11 ER 2745.

In addition, as fully described in the City’s brief at Part II(B), the AA Report found that light rail did not meet the Project’s purpose and need because it would, among other things, have required conversion of needed traffic lanes to rail; would not have provided a reliable, high-capacity, exclusive right-of-way system; the

complement each rapid transit build technology. Conventional bus would also be the technology used in the [MLA].” 11 ER 2779.

⁸ 49 C.F.R. § 611.7 sets forth the requirements to qualify for New Starts funding including the preliminary process of Metropolitan Planning Organization (“**MPO**”) planning, AA and determination of a locally preferred alternative (“**LPA**”) that may then qualify the project to enter into the preliminary engineering phase and, thereafter, the final design phase.

short blocks in downtown would have limited the length and speed of trains; and the at-grade system likely would disturb archeological resources. 3 ER 562, Table 2-3; 3 ER 325, 1023, 1036; 2 SER 161-64, 268-270.

The AA report opined that the MLA did not meet the Project's purpose and need because, among other things, the MLA did not achieve the transportation equity policies of the ORTP; travel time improvements for the MLA would be offset by increased congestion at the facility's entrances and exits; the MLA would increase, rather than decrease, vehicle peak-hour volumes in the corridor; the MLA would create the most amount of air pollution and require the most energy for transportation use; and the MLA would not provide substantially improved transit access to the corridor. 9 ER 2377-89. Additionally, the MLA did not have an identified funding source.⁹ 9 ER 2479. The AA concluded that the Fixed

⁹ Contrary to Honolulu Traffic's assertion that the AA report found the MLA less attractive based on only three sets of concerns, OB at 16, the AA Report included Table 6-3, entitled "*Effectiveness of Alternatives at Meeting Goals and Objectives in the Year 2030*," which provided numerous key findings, some of which were that the 20-mile Fixed Guideway provided the highest reduction in transit times at 17%, while the MLA provided a 3% reduction; the Fixed Guideway alternative reduced daily vehicle hours of travel delay by 11%, while the MLA reduced delay by 1%; the Fixed Guideway alternative improved corridor travel time reliability by 20 miles, while the MLA improved it by 16 miles; the Fixed Guideway alternative significantly encouraged transit-oriented development in existing and new growth areas, while the MLA did not; and the Fixed Guideway alternative was projected to significantly reduce energy consumption, while the MLA would not. Moreover, the MLA was projected to have the highest incremental annualized cost per user benefit of \$102.64, while the same figure for the 20-Mile Fixed Guideway figure was \$22.75 and the MLA had the highest incremental annualized cost per new

Guideway alternative was, among other things: (1) the only alternative expected to significantly affect transit mode share and attract additional transit riders; (2) the most effective alternative in accommodating longer corridor transit trips and increased work commutes to West O‘ahu; (3) the most effective at improving transit travel times reliably; (4) the alternative that would generate the least amount of air pollution but require the least energy for transportation; and (5) able to be funded with the City tax surcharge and FTA New Starts funds. 9 ER 2379-80.

The TSM alternative was eliminated from further evaluation because it did not provide high-capacity service and, when operating in mixed traffic, could not provide predictable travel times. 3 ER 529; 11 ER 2779. Because it would operate in mixed traffic, it would have done little to improve corridor mobility and travel reliability. TSM also did not support the goals of concentrating growth within the corridor and reducing development pressure in rural areas. 3 ER 557; 2 SER 495-96 (“[B]ecause of the dispersed nature of the transit service, slow bus speeds, and unreliable service, the TSM Alternative would not have supported the City’s goals

rider at \$562, while the same figure for the 20-Mile Fixed Guideway figure was \$22. Additionally, 100% of the funding required for the 20-Mile Fixed Guideway was available and little or no funding was available for the MLA. 9 ER 2480-81. A 248-page report entitled *Alternative Analysis Detailed Definition of Alternatives*, dated November 1, 2006, accompanied the AA Report and included data supporting the DTS’ findings, *see* 10 ER 2489, and Chapter 5 of this document was devoted to the MLA. 10 ER 2531-55.

of concentrating growth within the corridor and reducing development pressures in rural areas.”).

December 2006, Locally Preferred Alternative Ordinance

After considering thousands of public comments¹⁰ and after extensive collaboration with the FTA and review of the AA, on December 22, 2006, as

¹⁰ With regard to the MLA, some public comments (in italics) and the City’s responses included:

A different [MLA] should have been evaluated. It should have been one or more of the following: longer, wider, provided more ramps.

The reversible [MLA] evaluated in the AA was based specifically on the alternative requested during scoping by the commenters. The original request specified the beginning and end locations, two reversible lanes, and that a number of access points should be provided. The evaluated alternative was designed to provide the best benefit within these parameters. While an alternative of different design would provide somewhat different results, the general findings would be the same for any of the proposed variations.

The cost estimate is too low for the Fixed Guideway Alternative, but too high for the [MLA]. The Tampa HOT lane project was less expensive than what is proposed for Honolulu.

Both alternatives were estimated using the same underlying costs and assumptions. The greatest cost for either system is the construction of an elevated concrete structure. Cost estimates were reviewed by the City Council’s independent Transit Advisory Task Force and found to be reasonable. The Task Force also found that differences in construction conditions between Honolulu and Tampa make comparison of the Tampa highway facility to the [MLA] not valid.

The morning zipper lane should have been continued with the Reversible [MLA].

Peak-period transportation demand is becoming more balanced as more commercial development is occurring in Kapolei. Operation of

required by 49 C.F.R. § 611.7 (4) to qualify for New Starts funding and as required by Act 247 to qualify to use the City's surcharge tax, the City Council adopted Ordinance 07-001, which selected the fixed guideway system as the LPA. 3 ER 529.

March 2007, Federal Register/Notice of Intent to Prepare Environmental Impact Statement

On March 12, 2007, the FTA published a Notice of Intent to Prepare an Environmental Impact Statement (“**2007 NOI**”), which proposed a purpose and need for the project that was substantially the same as that set forth in the AA Report. 11 SER 2782-85. The notice proposed to consider the No Build and two

the zipper lane results in the loss of two ‘Ewa bound lanes. With the reversible [MLA], demand is better balanced by restoring the two ‘Ewa bound lanes when the single Koko Head bound lane provided by the zipper lane is replaced with the two Koko Head bound lanes provided by the managed lanes. Also, the three elevated lanes would need to merge with three existing inbound lanes between the end of the elevated facility and Awa Street. This section would be able to accommodate, without major right-of-way acquisition, only a 5-lane wide at-grade facility. The merge would create a bottleneck that would diminish the benefit of a 3-lane reversible, elevated facility.

Why are more buses included in the [MLA] than in the TSM Alternative?

The managed lane facility would be managed in such a way as to enable free flow speeds for all vehicles using it, including buses. To take advantage of this for transit, new routes were added and corridor bus service was increased in the [MLA] in comparison to the TSM Alternative.

23 SER 5906-07 (emphasis added).

Fixed Guideway alternatives (which varied by route) and five distinct transit technologies: light rail, rapid rail, rubber-tired guided vehicles, a magnetic levitation system, and a monorail system. 11 SER 2777, 2786. The 2007 NOI stated that these alternatives “were developed through an AA process that resulted in selection of a Fixed Guideway Alternative as the [LPA].” 9 ER 2316. The notice also stated that other reasonable alternatives consistent with the project’s purpose and need could be added to the Draft EIS. 9 ER 2316-17.

May 2007, NEPA Scoping Report

On May 30, 2007, the NEPA Scoping Report (“**2007 Scoping Report**”) was published and addressed substantive comments received from the public and agencies. 11 SER 2777. Appendix A contains public comments and includes those from HonoluluTraffic.com, *see* 9 ER 2275, 2304, and others. As a result of public comments, a third alignment that would directly serve Honolulu International Airport was planned to be included in the EIS. 11 SER 2796.

February 2008, Technology Panel

The City Council and the Mayor appointed a technology selection panel to review the following five transit technologies. 3 SER 582; 23 SER 5908-19. On February 22, 2008, the panel issued its report. 3 SER 582. Five out of the six panel members recommended the steel wheel on steel rail system. 23 SER 5912.

August 2008, Archaeological, Historic and Cultural Resources Technical Reports

In August 2008, the DTS released three technical reports for the Project: (1) the Archaeological Resources Technical Report, 8 ER 2051; (2) the Historic Resources Technical Report, 8 ER 1895; and (3) the Cultural Resources Technical Report, 17 SER 4274.

November 2008, Draft EIS

On November 2, 2008, the FTA and the DTS released their Draft EIS for public review. 3 SER 551. The purpose and need section stated:

1.7 Purpose of the Project

The purpose of the Honolulu High-Capacity Transit Corridor Project is to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and UH Manoa, as specified in the *Oahu Regional Transportation Plan 2030* (ORTP) (O'ahuMPO 2007). The project is intended to provide faster, more reliable public transportation service in the study corridor than can be achieved with buses operating in congested mixed-flow traffic, to provide reliable mobility in areas of the study corridor where people of limited income and an aging population live, and to serve rapidly developing areas of the study corridor. The project also would provide additional transit capacity, an alternative to private automobile travel, and improve transit links within the study corridor. Implementation of the project, in conjunction with other improvements included in the ORTP, would moderate anticipated traffic congestion in the study corridor. The Project also supports the goals of the Honolulu General Plan and the ORTP by serving areas designated for urban growth.

In detail, the Draft EIS described four goals for transit improvements, including improvement of: (1) corridor mobility; (2) corridor travel reliability; (3) access to planned development to support the City policy to develop a second urban center;

and (4) transportation equity, 3 SER 607-08, incorporated the AA by reference so as to make the results of that study part of the Draft EIS analysis, *see* 3 SER 611-18, and identified the following alternatives for additional detailed evaluation: (1) No Build; (2) Fixed Guideway via Salt Lake Boulevard (Salt Lake Alternative); (3) Fixed Guideway via the Airport (Airport Alternative); and (4) Fixed Guideway via the Airport & Salt Lake (Airport & Salt Lake Alternative). 3 SER 556. Public hearings on the Draft EIS took place in December 2008. The FTA extended the public comment period to February 6, 2009. 73 Fed. Reg. 77687 (Dec. 19, 2008).

November 2008, Voters Approve Steel Rail

On November 4, 2008, a majority of Honolulu voters in the general election voted in favor of a city charter amendment to authorize the establishment of a steel wheel on steel rail system. 20 SER 5123. *See* City Charter § 6-1703.

January 2009, Resolution 08-261 re Airport Route

On January 29, 2009, based on the AA in the Draft EIS, the City Council adopted Resolution 08-261, which selected the route serving Pearl Harbor and the Airport. 23 SER 5920-24.

June 2010, Final EIS/Section 4(f) Evaluation

On June 10, 2010, the FTA and the DTS released the Final EIS/Section 4(f) Evaluation (“**Final EIS**”) for public review. Chapter 2 discussed the alternatives considered and incorporated by reference the 2006 Screening Memo, the 2006 AA

Report, and the 2006 AA Historic and Archaeological Report. 3 ER 517. The Final EIS discussed the results of the earlier extensive evaluation of the MLA and explained that the MLA would not accomplish the purpose of the project or achieve the objectives of the ORTP. The Final EIS also explained that the MLA was not carried forward for additional evaluation because: (1) system-wide traffic congestion would have been similar to the No Build alternative; (2) the MLA would not have supported planned concentrated future growth; (3) the MLA would not have substantially improved service or access to transit for transit-dependent communities; (4) the MLA would have generated the greatest amount of air pollution and required the greatest amount of energy; (5) the MLA would have served a shorter portion of the study corridor and provided little community benefit because it would not have resulted in substantially improved transit access in the corridor; and (6) the MLA had no identified funding sources. 3 ER 558-60.

Section 4.16 of the Final EIS discussed archaeological, cultural and historic resources, and compliance with Section 106 obligations. 4 ER 850-70. The Final EIS also included a revised Section 4(f) evaluation and incorporated by reference the August 2008 Archaeological, Cultural and Historic Resources Technical Reports, the 2009 Addendum to the Historic Resources Technical Report and the 2009 Historic Effects Report, and noted that in its review of these reports, the State

Historic Preservation Officer (“**SHPO**”)¹¹ “did not have any questions or comments regarding the methodology used to determine National Register eligibility.” 7 ER 855.

The Final EIS documented the extensive studies to identify Native Hawaiian burials in the Project’s Area of Potential Effects (“**APE**”) and described the Lead Agencies’ commitments to conduct sub-surface testing after the completion of detailed construction plans. This careful approach minimized unnecessary disturbance of unknown cultural resources. In fact, the Final EIS concluded that conducting sub-surface investigations in locations where foundations will be placed “would limit the area disturbed . . . to potentially less than 10 percent of what would be disturbed if archaeological investigations were conducted for 100 percent of the alignment.” 4 ER 853.

December 2011, Governor and State OEQC Acceptance of Final EIS

On December 15, and 21, 2010, Governor Abercrombie and the State Office of Environmental Quality Control, respectively, accepted the Final EIS. 24 SEC 5952-56, 5957-71.

January 2011, Record Of Decision and PA

¹¹ The SHPO administers the State’s historic preservation program. 36 C.F.R. § 900.16(v); Haw. Rev. Stat. § 6E-5.

On January 18, 2011, the FTA issued its ROD. *See* 2 ER 247-463. The Final PA was attached as Appendix B. The ROD described the Project’s purpose and need as follows:

Planning for the Project

The purpose of the Project is to improve transit in the congested east-west transportation corridor confined by the mountains to the north and the sea to the south, a fairly linear urban configuration where the population and employment levels warrant a high capacity rapid transit system. Improved transit in this east-west corridor has been studied in detail numerous times by the City and the federal government since the early 1960s. More recent planning studies leading to this Project include the 2030 O’ahu Regional Transportation Plan and the 2005-2006 Alternatives Analysis.

2 ER 250.

Basis for Decision

FTA has determined that the Project meets the Purpose and Needs of the proposed action as discussed below. *Improves Corridor Mobility* — Transit ridership will increase by approximately 56,200 trips per day or 25 percent by 2030, and transit users will save more than 20 million equivalent hours of travel time per year by 2030. *Improves Corridor Travel Reliability* — Transit trips on the exclusive fixed guideway will not be subject to traffic delay. *Support for Transit Oriented Development* — The Project will support development and redevelopment around stations by enhancing access and supplying a daily influx of transit riders and potential customers for businesses. . . . With the Project, approximately 60,000 additional residents and 27,000 new jobs will be located within walking distance of stations in 2030. *Improves Transit Equity* — The Project will provide service in the area of the City where the transit need is greatest. The Project will connect areas that have the highest transit dependency, which includes “communities of concern” designated by the City. Based on demographics within the study corridor, the demand and need for public transit on O’ahu is greatest within the areas served by the Project.

2 ER 255 (emphasis added). The ROD also discussed the MLA, stating that it did not meet the Project's purpose and need because it would not have supported forecasted population growth, would have provided very little transit benefit at a high cost, and would not have substantially improved service or access to transit for transit-dependent communities. 2 ER 253. The ROD concluded that with the execution of the PA, "all reasonable steps are being taken to minimize the adverse environmental effects of the Project, and where adverse environmental effects remain, no feasible and prudent alternative to such effects exists." 2 ER 260. The FTA, the City, the SHPO and the Advisory Council on Historic Preservation ("**Advisory Council**")¹² executed the PA.

SUMMARY OF ARGUMENT

Intervenors appreciate the excellent, good faith defense that the Lead Agencies have put forth against Honolulu Traffic's claims in this appeal, and Intervenors hereby incorporate by reference their answering briefs. Should this Court decide that it indeed does have jurisdiction over this appeal, Intervenors argue that: (1) the Project's purpose and need statement did not violate NEPA because it appropriately reflected the goals of federal transportation law applicable to new transit projects and the regional transportation plan; (2) the FTA evaluated a

¹² The Advisory Council is the federal agency with the responsibility to oversee and to provide guidance and advice to other federal agencies concerning implementation of NHPA. *See* 36 C.F.R. § 800.2(b).

reasonable range of alternatives, including the MLA and increases in bus service; (3) the FTA's determination that the MLA did not accomplish the project's purpose and need (and was therefore not a prudent alternative under Section 4(f)) was not arbitrary and capricious; and (4) the FTA complied with Section 4(f) as it relates to Native Hawaiian burials.

ARGUMENT

I. THE PURPOSE AND NEED STATEMENT COMPLIED WITH NEPA.

On appeal, Honolulu Traffic argues that the FTA violated NEPA by restricting the Project's purpose and need statement in unreasonably narrow terms such that only the elevated fixed guideway railway alternative survived. The District Court concluded that the statement was reasonable because it did not foreclose all alternatives and was shaped by federal legislative purposes, including those of SAFETEA-LU and the New Starts program. 1 ER 80-83.

A district court evaluates an agency's statement of purpose for reasonableness, *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010), which requires consideration of the statutory context of the federal action at issue. *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012).

The Final EIS defines the Project's "purpose" as "to provide high capacity rapid transit in the highly congested east-west transportation corridor between

Kapolei and UH Mānoa, as specified in the ORTP (O‘ahu Metropolitan Planning Organization 2007).” 3 ER 545. The “need” is to improve corridor mobility and travel reliability, to improve access to planned development to support the City policy to focus transit investments and new development in the H-1 corridor, and to improve transportation equity. *Id.* As set forth below, the purpose and need did not violate NEPA because it appropriately reflected the goals of federal transportation law applicable to new transit projects and the regional transportation plan, was appropriately derived from federally-supervised state-developed studies, and did not foreclose a fair evaluation of other alternatives.

A. The Project’s purpose and need clearly reflects the objectives of the statutes under which the Final EIS arose.

The Project’s purpose and need was reasonable because it squarely reflected the objectives of the federal law applicable to new transit projects. Under SAFETEA-LU (the 2005 federal transportation authorization legislation), a federally-funded transportation project’s purposes may include meeting a transportation objective in an applicable metropolitan plan and supporting land use, economic development, and growth objectives established in applicable local plans. *See* 23 U.S.C. § 139(f)(3). Providing high-capacity rapid transit in the highly congested H-1 corridor is a goal aimed at achieving a local transportation objective set forth in the ORTP, a regional transportation plan. *See* 23 U.S.C. § 139(f)(3)(A). Moreover, the Project supports local and state land use policies

because it is aimed at protecting rural areas and open space by focusing new development and transit improvements in the already urbanized H-1 corridor.

Federal law governing new transit projects provides that it is in the interest of the United States to foster transportation systems that maximize safe, secure, and efficient mobility of individuals, minimize environmental impacts, and minimize fuel consumption. 49 U.S.C. § 5301(a). Furthermore, one of the purposes of the New Starts program is to provide financial assistance to state and local governments in order to improve mobility for elderly and economically disadvantaged individuals. *Id.* § 5301(f)(4). Providing an alternative to private automobile travel serves the purpose of minimizing environmental impacts and fuel consumption, compatible with 49 U.S.C. § 5301(a). Moreover, providing faster, more reliable public transit and providing reliable service to the poor and elderly also serves the purpose of the New Starts program. The Project must also be a part of an approved transportation plan and program of projects, 49 U.S.C. § 5309(c)(1)(A), and in this case, the Project's purpose is to provide transit as specified by the ORTP.

B. The Project's purpose and need appropriately derived from federally-supervised state-developed studies.

An agency may utilize federally-supervised state-developed planning studies in order to produce a purpose and need statement. 23 C.F.R. § 450.318(a) and 23 C.F.R. pt. 450 App'x A at 11. As demonstrated by the chronology provided in this

brief, the Project's purpose and need derived from the preliminary process including the 12/05 NOI, 4/06 ORTP, 4/06 Scoping Report, 10/06 Screening Memo, 11/06 AA Report, 3/07 NOI and 5/07 Scoping Report, all of which were incorporated by reference into the Final EIS.

The reasonableness of this Project's purpose and need statement is also supported by the Nevada U.S. District Court's decision in *Sierra Club v. U.S. Department of Transportation*, 310 F. Supp. 2d 1168 (D. Nev. 2004), whereby the Court approved of a Final EIS that similarly derived from the preliminary planning process and rejected the same type of argument Honolulu Traffic is making in this case. In *Sierra Club*, Nevada local agencies recognized that rapid population growth overwhelmed the capacity of existing transportation facilities. Local agencies conducted studies of the increased congestion, developed a program to meet transportation needs, prepared a preliminary evaluation of alternatives, conducted a detailed evaluation of viable alternatives, and finally, selected a LPA. In its draft and final EIS, the Federal Highway Administration ("FHWA") analyzed only two alternatives, which were derived directly from the LPA, and did not evaluate the alternatives rejected during the preliminary process. The plaintiffs filed suit and asserted that the FHWA's reliance on the local agencies' preliminary analysis was arbitrary and capricious because the EIS failed to consider eliminated alternatives. *Id.* at 1190. In rejecting this argument, the District Court held:

CEQ regulations mandate federal and state cooperation “to the fullest extent possible to reduce duplication between NEPA and State and local requirements, including joint planning, environmental research and studies, public hearings, and environmental assessments.” 40 C.F.R. § 1506.2(b). Accordingly, a federal agency does not violate NEPA by relying on prior studies and analyses performed by local and state agencies. *See Laguna Greenbelt*, 42 F.3d at 524 n. 6 (“[T]he absence of a more thorough discussion in the EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA.”); *see also North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542–43 (11th Cir.1990) (finding federal reliance on state and local assistance in NEPA process was not arbitrary and capricious).

Id. at 1193; *see also Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). The DTS’ extensive preliminary analysis process sets this case and *Sierra Club* apart from Honolulu Traffic’s cases, discussed *infra*. As a result, this Court should reject Honolulu Traffic’s arguments that the purpose and needs statement violated NEPA.

C. The Project’s purpose and need identified Honolulu’s transportation problem and did not foreclose a fair evaluation of other alternatives, which were evaluated by the FTA in consultation with other agencies and the public.

The analysis of whether the purpose and need is too narrow must include a review of the administrative record to determine whether rational alternatives were evaluated during the preliminary process. *Audubon Naturalist Soc’y of the Cent. Atl. States, Inc. v. U.S. Dept. of Transp.*, 524 F. Supp. 2d 642, 664 (D. Md. 2007); *Davis v. Latschar*, 83 F.Supp.2d 1, 8 (D.D.C. 1998).

The factual chronology does not support Honolulu Traffic's claim that the purpose and need was so narrowly drawn as to preclude consideration of reasonable alternatives. Rather, the administrative record demonstrates the need for transportation improvements in the H-1 corridor and the Lead Agencies' rational analysis of multiple alternatives in the preliminary process. In particular, the 12/05 NOI, 4/06 ORTP, 4/06 Scoping Report, 10/06 Screening Memo, 11/06 AA Report, 3/07 NOI and 5/07 Scoping Report provide evidence of this extensive and detailed evaluation of alternatives. Initially, a total of 6 modes, 13 technologies and 75 alignments were screened and refined during the early stage of the preliminary process. *See* 10 ER 2497; 11 ER 2737. For example, the 12/05 NOI for the AA process expressly included the TSM and the MLA, 11 ER 2887; the 10/06 Screening Memo expressly included the TSM, the MLA, three downtown tunnel alternatives and several technologies, 11 ER 2761, 2779, 2836-39; the 11/06 AA Report evaluated in detail each alternative's performance in meeting the project's purpose and need, 9 ER 2401-06; the 3/07 NOI included five different technologies that would be considered and stated that other reasonable alternatives may be added, 11 SER 2777, 2786; the 2/08 Technology Panel reviewed the five rail technologies, 3 SER 582; the 11/08 Draft EIS included three rail alignments as formal alternatives but extensively discussed the rejected alternatives, 3 SER 611; and the 6/10 Final EIS considered the airport rail route as

a formal alternative but again extensively discussed the TSM, the MLA, and other alternatives including downtown tunnel and various technologies, 3 ER 549-64, 4 ER 917-18. Furthermore, the Final EIS explained that technologies were limited to the proposed elevated system because, among other reasons, an at-grade system would not have provided a reliable, high-capacity exclusive right-of-way system and would potentially disturb far more archaeological resources. 3 ER 555. Thus, the Project's purpose and need did not prohibit reasonable consideration of the MLA and other alternatives.

Moreover, this preliminary analysis was an open and transparent process that encouraged public and interagency comments and the Lead Agencies fielded and responded to thousands of such comments, including those of Honolulu Traffic. *See e.g.*, 2005 NOI, 11 ER 2887; 4/06 ORTP 2030, 19 SER 4640; 11/06 thirteen City Council hearings, 23 SER 5897-5907; 2007 NOI, 11 SER 2783; 3/26/09 FTA letter to Slater, 24 SER 5951; 5/21/10 City letter to Slater, 24 SER 5927-50.

Honolulu Traffic relies upon *National Parks* and *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), to support its position.¹³

¹³ In *Simmons*, the Seventh Circuit found that the federal agency defined an impermissibly narrow purpose for its project because no preliminary analysis addressed alternative water sources and the agency made its selection without identifying the other water sources in its EIS. 120 F.3d at 666-67. In this case, however, the Lead Agencies conducted a comprehensive preliminary analysis that fairly evaluated and rejected alternatives that did not meet the project's purpose and need.

However, these cases are clearly distinguishable. In *National Parks*, the Ninth Circuit found that the Bureau of Land Management (“**BLM**”) violated NEPA by adopting the purposes of a private developer. In this case, the BLM proposed several alternatives to a land exchange for the Kaiser landfill project. The Ninth Circuit found a NEPA violation because the BLM did not “consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that Kaiser’s private needs be met.” 606 F.3d at 1072. The Court eliminated those private interests and reviewed the eliminated alternatives against the revised purpose and needs, and found that they should not have been eliminated. 606 F.3d at 1070-72. *National Parks* does not apply here because as already shown, the MLA and light rail alternatives were considered in detail in the AA and discussed extensively in the EIS. Thus, Honolulu Traffic fails to show that the Project’s purpose and need statement did not comply with NEPA.

II. THE CITY AND FTA PROPERLY REJECTED THE MANAGED LANE ALTERNATIVE UNDER NEPA AND SECTION 4(F)

Honolulu Traffic argues that the FTA evaluated an erroneous version of the MLA, OB at 27-29, and the Lead Agencies failed to address the recommendations of the City’s Transit Advisory Task Force on the MLA’s variations.¹⁴ OB at 28-

¹⁴ Honolulu Traffic asserted these same arguments to the District Court, which the District Court rejected, finding that

Defendants’ decision to limit their analysis to the two-lane versions of the MLA explored in the AA did not violate “the rule of

29. For the reasons explained below, this Court should reject this argument because the Lead Agencies seriously considered and reasonably determined that the MLA did not accomplish the purpose of the Project.

The concept of alternatives under NEPA is “bounded by some notion of feasibility.” *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d at 524 (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978)). “The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project.” *Id.*; see *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1157-59 (9th Cir. 1997) (Although certain alternatives satisfied some of the project goals, they were properly rejected from consideration in the Final EIS

reason.” Indeed, Defendants addressed the many design alterations suggested by Plaintiffs’ comments and found that they were not substantial. . . .

Defendants also adequately defended their MLA cost estimates; the Transit Advisory Task Force found that the Tampa project was not a good cost comparator because of the many differences between the two projects, see AR 55308 at 55311, that the cost estimates in the AA were “fair and accurate,” and that the same costing techniques were used to price all of the alternatives analyzed in the AA. AR 855 at 2091. It was not unreasonable for Defendants to refuse to reassess a new version of the MLA in the FEIS, because there was no indication that the AA’s assessment of the MLA was inaccurate or that changes to the MLA design would have made a difference. See *Headwaters*, 914 F.2d at 1181 (no need to separately analyze alternatives that are not significantly distinguishable from those already considered).

1 ER 87-88.

because they did not sufficiently meet other project goals). NEPA does not dictate particular results and Courts must not substitute their judgment for that of the agency. *Sierra Club*, 310 F. Supp. 2d at 1185. This deference also applies to an agency's decision to eliminate alternatives if it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.* at 1185 (citing *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953–954 (9th Cir. 2003)); *Colo. Rail Passenger Ass'n v. Fed. Transit Admin.*, 09-CV-01135-WJM-KMT, 2011 WL 6934100 (D. Colo. Dec. 30, 2011) ("NEPA does not require agencies to analyze 'the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.'"). Under both NEPA and Section 4(f), federal agencies may rely on local government's preliminary analysis to eliminate alternatives from detailed evaluation. *Laguna Greenbelt*, 42 F.3d at 524-25; 23 C.F.R. § 450 App. A, ¶ 11A; 40 C.F.R. § 1502.21. Thus, the FTA's decision not to duplicate the state agency's analyses and evaluations regarding the elimination of certain alternatives during its screening process, AA, and the selection of its LPA, does not violate NEPA or Section 4(f). *Sierra Club*, 310 F. Supp. 2d at 1193; *Alaska Ctr. for Env't v. Armbrister*, 131 F.3d 1285, 1288 (9th Cir. 1997); *Ariz. Past & Future Found. Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983).

As explained below, the Lead Agencies did not violate NEPA in rejecting the MLA because based on comprehensive study, it was not a reasonable alternative. The administrative record clearly demonstrates the Lead Agencies extensively considered and incorporated into the preliminary analysis Honolulu Traffic's version of the MLA. *See* 21 SER 5367 (12/6/05, City email to Slater enclosing draft purpose and need statement); 21 SER 5362 (1/25/06, DTS email re adds elevated, 2-lane, reversible roadway for HOVs, HOTs, and buses in response to Slater's proposal); 21 SER 5359 (4/6/06, FTA email re ensuring that the Honolulutraffic.com alternative will be considered); and 22 SER 5405 (2006 Scoping Report, "A second option was added to the Managed Lanes Alternative that would include operating the managed lanes as a two-lane reversible facility."). Preliminary analysis studies supported the rejection of the MLA because it "would not have qualified for local excise and use tax surcharge funding [and] [b]ecause single-occupant vehicles would have been permitted, even if tolled, Federal New Starts funding could not have been used" (3 ER 562); "would not have resulted in substantially fewer environmental impacts" (3 ER 562); "would not have been financially feasible" (3 ER 562); was not practicable, (3 ER 562); "would not have supported [the] Honolulu General Plan" (3 ER 554); would have caused an "increase in vehicle miles traveled and vehicle hours of delay" (3 ER 554); would have resulted in "increased traffic on arterials trying to access the facility" (3 ER

558); “Transit reliability would not have been improved except for express bus service operating in the managed lanes” (3 ER 558); “would not have supported planned concentrated future population and employment growth because it would not provide concentrations of transit service that would serve as a nucleus for the development” (3 ER 558-60); “The cost-per-hour of transit-user benefits for the [MLA] would have been two to three times higher than that for the Fixed Guideway Alternative” (3 ER 560); “would not have substantially improved service or access to transit for transit-dependent communities” (3 ER 560); “does not moderate anticipated traffic congestion” (3 ER 560); “Because of the estimated high toll cost for users, the [MLA] would also not support the identified need to improve transportation equity to all users, including low-income populations” (3 ER 560); “would have generated the greatest amount of air pollution and required the greatest amount of energy for transportation use” (3 ER 560); “would have been more visually intrusive because its elevated structure, with a typical width of between 36 and 46 feet, would have been much wider than the Fixed Guideway Alternative” (3 ER 560); and “would have provided little community benefit as it would not have resulted in substantially improved transit access in the corridor.” (3 ER 560). Ultimately, the Final EIS concluded that the MLA was unable to meet the Project’s purpose and need. *See* 3 ER 560; 4 ER 1031-35 (explaining the agencies’ decision not to include or revisit the MLA). As such, the Lead Agencies

were not required to consider it further. *Laguna Greenbelt*, 42 F.3d at 524-25 (explaining that an agency is not required to consider an alternative that is inconsistent with the basic policy objective governing the project).

Contrary to Honolulu Traffic's assertions, the preliminary analysis was an open and transparent process that encouraged public and interagency comments, which were responded to by the Lead Agencies. *See* Part I(C), *supra*. In fact, on June 11, 2010, the DTS sent a 24-page letter to Plaintiff-Appellant Cliff Slater that extensively explained the reasons that the MLA was not included in the EIS and responded in detail to each of Honolulu Traffic's concerns, including the Tampa-Hillsborough (Florida) Authority official's open letter, stating, in relevant part:

Much of the time saved in the managed lane itself would be negated by the time spent in congestion leading up to the managed lane, as well as exiting the lanes at their downtown terminus. [2 SER 249]

With respect to the goal of providing equitable transportation solutions that meet the needs of lower-income transit-dependent communities, the Alternatives Analysis Report noted that the [MLA], "would not substantially improve service or access to transit for transit-dependent communities, as buses that use existing HOV facilities would be routed to the managed lane facility but would continue to be affected by congestion in other parts of their routes. [2 SER 249]

Comments received about the [MLA] referenced in the Draft EIS suggested there were significant differences between the alternative studied in the Alternatives Analysis and an ideal managed lane option. However, there was no substantial difference between the alternatives proposed in comments and those studied in the Alternatives Analysis that would have resulted in a different outcome. The primary concern raised about the Alternatives Analysis alternatives was that they did

not allow access other than at the beginning and end of the facility. That is a misunderstanding of the Alternatives Analysis alternatives. Both provided access at Aloha Stadium and Middle Street to allow connections to intermediate points along the corridor. Any additional access points would substantially increase the cost of the facility because of right-of-way and structure costs and would affect the level-of-service provided by the investment. [2 SER 250]

Regarding the Tampa Expressway, the Task Force compared the [MLA] to the Tampa Expressway. The designer of the Tampa Bay facility herself admitted that to apply such an estimate without detailed consideration of the many differences between the two locations is not reasonable. For clarification, the Tampa Bay elevated toll lanes extend only 5.8 miles within the 10-mile expressway. The costs quoted are from 2002, long before the costs of materials and construction rose dramatically after 2004. Furthermore, the corridor within which the Tampa Bay lanes are built required no right-of-way, had no significant utility conflicts, no major structures or crossings, and was built in much more favorable geotechnical conditions than exist on Oahu. In addition, real estate costs between the two locations are different, with costs being substantially higher in Honolulu. . . . The Transit Task Force Report stated that “the committee concluded that the projects are sufficiently different (actual costs versus projected costs with contingencies; available, accessible ROW vs. construction in actively used highways; no utilities relocation vs. extensive relocations) as to make the comparison unreasonable.” [2 SER 252]

An increase in the number of lanes on the facility would not have substantially changed the findings of the analysis. It would have increased the cost and marginally increased freeway capacity, but the arterial system would still have experienced increased congestion, resulting in total systemwide congestion similar to or worse than the No Build Alternative and substantially worse than the Fixed Guideway Alternative. [2 SER 253]

Once an alternative is properly rejected, an agency is not required to conduct a “separate analysis of alternatives which are not significantly distinguishable from

alternatives actually considered or which have substantially similar consequences.” *Westlands Water Dist.*, 376 F.3d at 868; *see also City of Carmel*, 123 F.3d at 1142 (agency need not consider plaintiff’s suggested alternative that was similar to alternative discussed in detail in Final EIS and did not amount to a new, substantive proposal). Although several comments requested reconsideration of the MLA, the Final EIS determined that “no new information was provided that would have substantially changed the findings of the [AA] process regarding the [MLA].” 3 ER 515. And “[w]hile there may be some minor details of the proposed alternatives that differ from the [AA] alternatives, the evaluation assesses the concept fairly in the context of the Project’s Purpose and Need.” 4 ER 1035. *See also* City’s May 21, 2010 letter to Slater, 2 SER 251. Thus, the Lead Agencies had a rational basis for rejecting Honolulu Traffic’s request for reconsideration of the MLA and explained their findings in significant detail throughout the Final EIS (3 ER 515-16, 529, 554-63; 4 ER 845, 1023, 1031-35); specifically in Chapters 2 and 8 of the Final EIS; and in a letter to Honolulu Traffic (*see* 23 SER 5940; 2 SER 245-54).

Honolulu Traffic also argues that the MLA was a prudent and feasible alternative that the FTA failed to properly evaluate under Section 4(f). OB at 40-45. National Trust also asserts that the FTA failed to determine that the MLA was

imprudent and thus, the Lead Agencies provide merely “post hoc rationalizations.” Amicus at 19-20. As explained below, these arguments should be rejected.

Under Section 4(f), an agency may properly eliminate alternatives that compromise the project to a degree that it is unreasonable to proceed in light of its stated purpose and need. *Alaska Ctr.*, 131 F.3d at 1288; 23 C.F.R. § 774-17.

Furthermore, courts will not disrupt an agency’s choice to eliminate an alternative if it is “reasonably founded,” *Ariz. Past & Future Found.*, 722 F.2d at 1429, and must not substitute their judgment for the agency’s. *Alaska Ctr.*, 131 F.3d at 1288.

The AA examined two versions of the MLA and found that the MLA would not meet the Project’s purpose and need because, among other things, travel time improvements for the MLA would be offset by increased congestion at the facility’s entrances and exits; the MLA would increase, rather than decrease, vehicle peak-hour volumes in the corridor; the MLA would create the most amount of air pollution and require the most energy for transportation use; and the MLA would not provide substantially improved transit access to the corridor. 9 ER 2377-89.¹⁵

¹⁵ Honolulu Traffic also argues that the Lead Agencies improperly relied on the AA process to exclude all alternatives except the LPA. OB at 23-26. However, as fully explained in the City’s brief, these arguments should be rejected. 40 C.F.R. § 1506.2 requires federal agencies to cooperate with state and local agencies as much as possible in order to reduce duplicative efforts between NEPA and state and local regimes. *See also The Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994); *Sierra Club*, 310 F. Supp. 2d at 1193. Moreover,

The Lead Agencies were not required to explicitly state in the Final EIS or the ROD that the MLA was imprudent because it did not meet the purpose of the Project. *Citizens for Smart Growth v. Sec’y of Dept. of Transp.*, 669 F.3d 1203, 1217-18 (11th Cir. 2012) (an agencies’ explanation for excluding an alternative from Section 4(f) analysis will not be found lacking simply because they did not explicitly state that it was infeasible or imprudent); *See Comm. to Pres. Boomer*

Congress required an AA in order to identify an LPA. 49 U.S.C. §§ 5309(a)(1), 5309(e)(3). Additionally, because the public had the opportunity to review and comment on the AA and the FTA provided guidance and independently evaluated the AA, federal law permitted use of the City’s AA to comply with NEPA. *See* 23 U.S.C. § 139(c)(3). SAFETEA-LU regulations also specifically provide that transportation planning processes may be used to screen alternatives and eliminate unreasonable alternatives. 23 C.F.R. § 450.318(a)(3). Contrary to Honolulu Traffic’s assertions, 23 C.F.R. part 450, Appendix A (“**Part 450 Appendix**”) implements Congress’ longstanding purpose of ensuring that federally funded transit projects “flow from metropolitan and statewide transportation planning processes.” Part 450 Appendix at 123. According to the Appendix, in New Starts projects, the alternatives considered in the NEPA process may be narrowed in those instances where the AA is conducted as a planning study prior to the EIS and the FTA may, in some circumstances, narrow the alternatives considered in the EIS to the No-Build alternative and the LPA. *Id.* at 128. The Appendix also provides that alternatives found to be infeasible during the planning process or that do not meet the project’s purpose and need “can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document.” *Id.* at 129. This is the case here. 3 ER 555.

Honolulu Traffic also argues that the City’s selection of an LPA was not a NEPA decision and was not accompanied by a completed EIS and thus, does not serve to delimit the scope of subsequent NEPA review. OB at 25. As explained more fully in the City’s brief, the City conducted the AA process pursuant to the above-mentioned statutes and regulations, not on “tiering” provisions cited by Honolulu Traffic. Furthermore, the cases cited by Honolulu Traffic to support this argument are inapposite.

Lake Park v. Dep't of Transp., 4 F.3d 1543, 1550–51 (10th Cir.1993) (explaining that the “mechanical use” of magic words “is unrelated to the [4(f)] documents’ substantive merit”); *Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 162–63 (4th Cir.1990) (holding that it was unnecessary for the Secretary to use the terms “unique” and “extraordinary” in the Section 4(f) analysis).¹⁶ In this case, because the FTA determined that the MLA was not prudent, no further analysis was required. *See Alaska Ctr.*, 131 F.3d at 1288.

Honolulu Traffic also argues that the FTA arbitrarily and capriciously failed to consider BRT as an avoidance alternative under Section 4(f). OB at 45-47.

However, the record clearly establishes that the TSM alternative included an alternative substantially similar to BRT proposed in 2003, which was studied

¹⁶ Additionally, contrary to the assertions of Honolulu Traffic and *amici* National Trust, regardless of the 2008 Section 4(f) regulations, an avoidance alternative that fails to meet a project’s purpose and need is imprudent under Section 4(f). *See Ariz. Past & Future Found.*, 722 F.2d at 1428 (stating that an alternative is not prudent under Section 4(f) where the agency reasonably determines that the alternative would not accomplish the Project’s purpose and need). Thus, Honolulu Traffic’s argument that *Overton Park* and its requirement that imprudent alternatives must present “truly unusual factors” and “unique problems” is inapplicable because it does not address the issue here, where an avoidance alternative fails to meet the purpose and need of the project. Even if this Court were to accept Honolulu Traffic and National Trust’s argument in this respect, the MLA’s lack of funding, 9 ER 2479, is of an extraordinary magnitude which renders the MLA imprudent under 23 C.F.R. § 774-17(vi). *See Adler v. Lewis*, 675 F.2d 1085, 1093-94 (9th Cir. 1982) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 403 (1971) (an alternative is not prudent if its cost reach “extraordinary magnitudes”)). Thus, even if the MLA met the Project’s purpose and need, which it did not, it was properly excluded from the Section 4(f) evaluation because of its lack of funding.

during the AA process. This alternative was found not to meet the Project's purpose and need because it did not provide high-capacity service, was unlikely to generate significant development opportunities, and when operating in mixed traffic, could not provide predictable, reliable travel times. 11 ER 2779. The City sensibly addressed Honolulu Traffic's comments urging that BRT was a "reasonable alternative" by stating that while it was cost effective, its overall system benefit was low. 2 SER 254. Moreover, the Final EIS noted that the TSM alternative did not meet the Project's purpose and need because it would not have improved corridor reliability and mobility. 3 ER at 554, 562. Thus, under *Alaska Ctr.*, 131 F.3d at 1288, no further analysis was required by the FTA and this Court should not disrupt the FTA's reasonably founded choice to eliminate this alternative.

III. THE FTA COMPLIED WITH SECTION 4(F) WITH RESPECT TO NATIVE HAWAIIAN BURIALS IMPACTED BY THE PROJECT

Honolulu Traffic argues that the approach regarding unknown burials in the PA violated Section 4(f) on the grounds that all Section 4(f) sites should be identified and evaluated prior to the ROD's issuance. However, this position ignores the factual circumstances and reasons for deferring subsurface testing for unknown and unidentified burials.

In 2006, the City conducted an initial identification of potential historic and cultural resources as part of the preparation of the AA required by Congress for all

New Starts transportation projects. 8 ER 2084-87, 1919-20; 17 SER 4300; *see* 49 U.S.C. § 5309(c)(1). This AA report synthesized information for the entire corridor from U.S. Department of Agriculture soils survey data, which provided insight as to the possible location of archaeological and burial materials; previous archaeological investigation results; previously recorded archaeological resources; historic land records; and previously recorded burial locations. 8 ER 2084-87.

Building on this AA report, in August 2008, the Lead Agencies prepared several technical reports, including the Archaeological Resources Technical Report. 8 ER 2051-2194; 9 ER 2195-2257. The report utilized various data and record resources to identify all known burial sites and to rationally predict the likelihood of encountering burials in each Project phase. These resources included an in-depth literature search, consultations with cultural and ethnic experts, voluminous archaeological research on the study corridor compiled for various other projects, and a comprehensive above-ground investigation for the entire length of the Project to identify any evidence of previously unknown historic and cultural resources. 4 ER 852; 8 ER 2078-88. The report also explained the numerous reasons not to conduct sub-surface archaeological surveying of the entire route prior to the ROD's issuance. Specifically, the report concluded that until "there is certainty regarding column placement, any archaeological testing associated with the Project's archaeological historic property/archaeological

resource identification effort could be outside the actual project footprint and could disturb archaeological resources that would otherwise not be disturbed by the Project.” 8 ER 2079. This report reasoned “[b]ecause of the Project’s need for extensive subsurface archaeological investigations, their cost in time and money, the relative inaccessibility of the archaeological resources beneath in-use roadways and sidewalks, and current uncertainty regarding the actual location of the project footprint, it is reasonable to defer to the approach described previously.” 8 ER 2080.

In March 2009, the AIS Plan for Phase 1 was issued. At this time, engineering plans were not sufficiently detailed to identify all of the direct ground disturbance areas, such as utilities, and only conceptual designs were available to roughly estimate the locations of the stations and columns. 5 ER 1090, 1116. Thus, as noted in the AIS report completed in April 2010, 5 ER 1088, “[t]est excavations were distributed throughout the project area to provide representative coverage and assess the stratigraphy and potential for subsurface cultural resources” within the project area. 23 SER 5926. The plan set out to test 35 out of 250 pier locations and “the approach would be to locate on the ground as precisely as possible the footprint of the proposed column foundation.” The plans that were used to estimate the approximate location of columns stated that they

“are based on conceptual engineering designs.” *See* AIS Plan for Phase 1 at 127.¹⁷

This approach was acceptable for Phase 1 because the archaeological history indicated that the area was not likely to include historic resources. 5 ER 1092.

In June 2010, the Final EIS was issued for public comment, which stated that the PA’s approach “would limit the area disturbed for archaeological investigations and construction to potentially less than 10 percent of what would be disturbed if archaeological investigations were conducted for 100 percent of the alignment.” 4 ER 853. Accordingly, the Final EIS appropriately committed: “If archaeological resources either are encountered during the AIS or inadvertently during construction and are determined to be eligible for the NRHP and warrant preservation in place, the City will prepare separate Section 4(f) evaluations for such resources.” 4 ER 924.

In January 2011, the ROD was issued, which attached the Final PA. 2 ER 247. In the PA, the City, the FTA, the SHPO, and the Advisory Council committed that the FTA will conduct additional sub-surface testing for potential burials as soon as more detailed engineering studies are available. 2 ER 313. It also required the completion of the AIS before beginning the final design plans in order to provide options to allow preservation of burial sites in place by relocation of columns and alternate utility locations. 2 ER 310. Additionally, the SHPO’s

¹⁷ AIS Plan for Phase 1 can be found at <http://www.honolulutransit.org/media/96074/20090301-final-WOFH-aisp.pdf>

required approval of the AIS Plan ensured that the appropriate level of sub-surface testing is performed once detailed engineering plans determine the APE. 2 ER 309. Moreover, the PA preserved the OIBC's jurisdiction to determine the treatment of burials discovered after completion of the AIS investigations and before construction of that phase begins. 3 ER 309. Since the ROD's issuance, the City has committed in its briefs to the District Court that it will avoid all burials. *See* Transcript 8/21/12 hearing at 47; City's Motion for Summary Judgment filed 6/1/12 at 20-21 ("If additional surveys identify a previously unidentified burial or other archaeological resources protected by state or federal law, then guideway columns will be adjusted either to straddle the site with wide supports or to adjust the span lengths along the alignment so as to avoid the site. This ensures no Section 4(f) "use" because all burials will be preserved in place.').

In September 2011, the AIS Plan for Phase 4 was issued. Phase 4 (or "City Center") includes areas that are rated higher for expectation of potential burials. Therefore, Phase 4's AIS Plan provided for 232 archaeological subsurface test excavations at column locations, station locations and utility relocation areas. *See* AIS Plan for Phase 4 at iii.¹⁸ Phase 4's AIS Plan is precise as to the location of the columns, utilities and stations to avoid unnecessary disturbance of burial sites. *See* AIS Plan for Phase 4 at 278-311. In other words, because Phase 4 includes areas

¹⁸ AIS Plan for Phase 4 can be found at <http://www.honolulutransit.org/media/50207/20111206-aisp-cc-vol1-sec1.pdf>

that have a greater potential for burials, its AIS plan required more testing to increase the likelihood that potential burials are identified and avoidance measures can be taken. The AIS plan also required more precision to avoid unnecessary disturbance of potential but unknown burials. As explained in the City's brief, the City recently completed the archaeological fieldwork for all phases of the Project. *See* City's brief at 60.

This approach was also utilized because federal law requires the approval of a ROD prior to completing detailed engineering studies, which would be necessary to determine construction disturbance locations. 23 C.F.R. § 771.113(a)(1)(iii)¹⁹ (stating that federal authorization to conduct the detailed engineering studies necessary to determine construction disturbance locations cannot be granted until the ROD is executed); *see also City of Alexandria v. Slater*, 198 F.3d 862, 873 (D.C. Cir. 1999). Consequently, if sub-surfacing testing were to be conducted

¹⁹ 23 C.F.R. § 771.113(a)(1)(iii) (emphases added) states, in relevant part:

(a) final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d) of this section:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

before execution of the ROD, the area of investigation would increase ten fold and likely disturb burials that otherwise would not be affected. 4 ER 853. Therefore, the Lead Agencies coordinated with the SHPO and appropriately limited the APE for below-ground archaeological resources to areas of direct ground disturbance such as locations of foundations so that the archaeological surveying would not unnecessarily disturb additional burials not otherwise at risk of disturbance. Thus, Honolulu Traffic's argument that the AIS for Phase 4 could have been reasonably completed before the ROD was executed is not supported by the facts.

The District Court appropriately found that the process for identification of Section 4(f) historic sites incorporates Section 106's regulations, which require "reasonable and good faith effort[s]." *See* 1 ER 60-61. In particular, 36 C.F.R. § 800.4(b)(1) states:

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which **may include** background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the

likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

See also 23 C.F.R. § 774.17 (defining “historic site” for Section 4(f) purposes as those sites “included in, or eligible for inclusion in, the National Register). In *N. Idaho Community Action Network v. U.S. Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008), this Court recognized the relationship between the Section 106 review process to identify historical resources and the subsequent identification of any impacts to those resources via Section 4(f) review by stating: “And because the § 4(f) evaluation cannot occur until after the § 106 identification process has been completed, the § 106 process necessarily must be complete by the time the ROD is issued.” 545 F.3d at 1159. These regulations do not mandate sample field investigation such as subsurface archaeological testing. 36 C.F.R. § 800.4(b)(1) (stating that reasonable and good faith identification efforts “*may include* background research, consultation, oral history interviews, sample field investigation, and field survey.”) (emphasis added).

While Section 4(f) does not allow phasing under 36 C.F.R. § 800.4(b)(2), the lead agency and the FTA satisfies its Section 106 identification obligation for the entire Project corridor where it rationally defers certain testing until engineering

studies are developed pursuant to 23 C.F.R. § 771.113(a)(1)(iii), which is the case here. 23 C.F.R. § 774.9(c)(2) permits this type of timing.²⁰ In explaining this change to its rules in 2008, the FTA and FHWA stated that

Section 4(f) approval can be made ‘in a Separate 4(f) evaluation’ in certain circumstances. We agree, and accordingly added at the beginning of this paragraph [in 774.9(b)] ‘Except as otherwise provided in paragraph (c), for ***.’ Paragraph 774.9(c) covers the circumstances where a separate Section 4(f) approval is appropriate.

73 Fed. Reg. 13368, at 15.

In its brief, Honolulu Traffic cites to the OIBC’s explanation that disruption of *iwi kupuna* is “akin to disrobing a living person and physically handling them against their will.” OB at 47; 5 ER at 1141. However, the very next paragraph (not quoted by Honolulu Traffic) of this October 2009 OIBC letter, states: “Hence, even the possibility of the archaeological inventory survey that might encounter *iwi kupuna* through careful hand excavation is worrisome for Native Hawaiians. More troubling is the thought of archaeological investigation via backhoe excavation.”

²⁰ 23 C.F.R. § 774.9(c)(2) (emphases added) states, in relevant part:

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property[.]

As stated earlier, the parties to the PA agreed to the PA's approach in order to avoid unnecessary and needless disruption of burials otherwise not at risk of being impacted by the Project. The Lead Agencies studied the entire Project corridor for potential burials and other archaeological sites. 8 ER 2051-2194; 9 ER 2195-2257. The process included the 2006 and 2008 Archaeological reports, the Final EIS, and the PA, which fully examined known and potential burial sites along the corridor short of conducting sub-surface testing throughout the corridor. 8 ER 2051; 4 ER 850. The Lead Agencies (with the SHPO's and Advisory Council's approval) reasonably concluded that this approach would significantly reduce unnecessary ground disturbance (and disturbance to burials) during testing by waiting for more precise engineering plans in order to identify the APE. Thus, the extensive investigations of archaeological resources undertaken along the Project's corridor and the PA's sensible approach to conduct additional testing once more detailed engineering plans became available complied with the requisite level of "reasonable and good faith" effort required to identify burials as well as other historic resources. 36 C.F.R. § 800.4(b)(1); 23 C.F.R. § 774.17. Moreover, as mentioned earlier, the Advisory Council and the SHPO agreed that the archaeological evaluation undertaken was adequate. 2 ER 300, 304, 338-39.

Contrary to the assertions of Honolulu Traffic, *N. Idaho* is clearly distinguishable from the facts supported by the record in this case. To support its

argument that *N. Idaho* is factual similar, Honolulu Traffic cites to the U.S. District Court case, which erroneously stated that preliminary reports were completed for all four phases but detailed identification was deferred for three phases. OB at 54; *see N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, CIV. 05-0273-N-EJL, 2008 WL 838718 (D. Idaho Mar. 27, 2008) *aff'd in part, rev'd in part and remanded*, 545 F.3d 1147 (9th Cir. 2008) (“Even though the Overview was preliminary and additional investigations were necessary, it did address the historical properties.”). However, the Ninth Circuit decision accurately found that

The Agencies concede that they have taken a phased approach and have conducted a detailed § 106 identification process and § 4(f) evaluation only with respect to the Sand Creek Byway phase of the Project, and have not done so with respect to the remaining three phases of the Project.

N. Idaho, 545 F.3d at 1158.²¹ Thus, the type of phased approach employed in *N. Idaho* completely deferred the Section 106 identification process and Section 4(f) evaluation process for the three phases and only conducted them for the one phase prior to the ROD's issuance. The Ninth Circuit concluded that this approach violated Section 4(f) because the Final EIS and ROD completed the alternative analysis for the entire project before the Section 106 identification process and

²¹ This distinction in the facts of this case is also confirmed by Intervenor's Notice of Lodging of Uncited Authorities, filed August 20, 2012 in the District Court, which attached Plaintiff-Appellant's Reply Brief, stating that “The DOT now concedes that they have not completed the § 4(f) process for surveying, identifying, and evaluating impacts to historic 4(f) properties in three segments of the US-95 Project.”

Section 4(f) evaluation process were performed for three out of the four phases. *Id.* at 1158-59. In *N. Idaho*, the Court applied the pre-2008 Section 4(f) regulations, but also stated that the result would not change had the 2008 rules been applied. However, the *N. Idaho* Court also recognized that reasonable deferral might apply as it did in *City of Alexandria*, 198 F.3d 862, discussed *infra*, where 23 C.F.R. § 774.9(b) is applicable. 545 F.3d at 1159 n.8. Thus, Honolulu Traffic’s argument that “Section 4(f) regulations require that all historic resources be identified prior to project approval[,]” is incorrect. *See* OB at 49.

In *Corridor H Alternatives Inc. v. Slater*, 166 F.3d 368 (1999), a programmatic agreement phased the 100-mile new highway project into 14 segments but there was no Section 4(f) evaluation, not even a preliminary one, for the entire project before the ROD issued. *Id.* at 373. However, *Corridor H* implied that 23 C.F.R. § 774.9(c)(2) might apply under appropriate circumstances. *Id.* at 372-73.

In *City of Alexandria*, 198 F.3d 862, the D.C. Circuit clarified its position in *Corridor H*, 166 F.3d 368. In this case, the project was to replace the six-lane Woodrow Wilson Bridge to reduce congestion. The Final EIS proposed seven build alternatives, all of which had twelve lanes. Although the Final EIS discussed a 10-lane alternative, it was not afforded full treatment as a formal alternative because the agencies concluded that it fell short of meeting the bridge’s long-term

traffic needs. The decision concluded that the agencies did not violate NEPA by failing to include the ten-lane proposal as a reasonable alternative. *Id.* at 122. The Final EIS included a full Section 4(f) evaluation but it deferred identification of historic properties on construction staging, dredge disposal, wetland mitigation and other ancillary activity areas until the construction stage. *Id.* at 118. The Court distinguished *Corridor H* on the basis that the agencies had identified historic properties along the entire corridor and documented their findings in a memorandum of agreement and the Final EIS. *Id.* at 126. The Court acknowledged that precise identification of sites requires substantial engineering work that is not performed until the design stage, which occurs after acceptance of the Final EIS and ROD, citing to 23 C.F.R. § 771.113(a)(iii). *Id.* at 126. Although the plaintiffs argued that even without final designs the ancillary sites could have been feasibly identified, the Court held that the agencies are not required to do so under Section 4(f) regulations, particularly where sites postponed are ancillary to the project and the planning process is rational. *Id.* Finally, the Court concluded that the timing of this phased approach did not violate Section 4(f) because the Court found that plaintiffs' ten-lane alternative was not prudent in any event. *Id.* Similar to *City of Alexandria*, the PA binds the City and the FTA to fulfill their Section 106 and Section 4(f) responsibilities in each phase before commencing construction in that phase.

Under *N. Idaho*, *Corridor H* and *City of Alexandria*, Honolulu Traffic cannot establish that the Lead Agencies' approach is arbitrary and capricious because: (1) the Lead Agencies conducted the Section 106 identification process and Section 4(f) evaluation for the entire corridor and documented their findings in the Final EIS and PA and documents incorporated therein by reference; (2) the Lead Agencies, the Advisory Council and the SHPO rationally concluded that the PA's approach subjected unknown burials to far less risk by deferring the AIS until more detailed engineering plans were available, 4 ER 853; and (3) the PA provides significant additional commitments to preserve and avoid unknown burials, 4 ER 851; 2 ER 309-12. Moreover, the Lead Agencies' approach was not arbitrary and capricious especially when one considers that none of Honolulu Traffic's alternatives qualified as prudent under 23 C.F.R. § 774.17. *See* Part II, *supra*; City's brief at 27-48.

The District Court rejected Honolulu Traffic's argument that the FTA violated Section 4(f) by conducting the identification of Native Hawaiian burial sites at risk of being disturbed along the Project's route in phases. *See* 1 ER 56-61. The District Court reasoned that "[b]ecause Section 4(f) compliance is predicated on identification of historic sites via the § 106 process, if an agency makes a 'reasonable and good faith effort' to identify historic sites, the agency's Section

4(f) responsibility should also be satisfied.” 1 ER 61. Upon review of the record, the Court found that “Defendants have made a significant effort to pinpoint all known archaeological sites along the project route, and crafted a plan for dealing with any sites that may be later discovered as construction progresses.” *Id.* The Court concluded that because the Lead Agencies made a “reasonable and good faith effort” to identify Section 106 sites, they satisfied their obligations to identify Section 4(f) sites prior to issuance of the ROD and thus, did not violate Section 4(f) in this respect. *Id.* This reasoning and conclusion is consistent with the law and factual record. Additionally, Honolulu Traffic provides no law or argument to dispute that at the time the ROD was executed: (1) the Lead Agencies had conducted the Section 106 identification process and Section 4(f) evaluation for the entire corridor except for new sub-surface testing; (2) that until sufficiently detailed engineering plans were available, the area of testing would be ten times greater thus increasing the chance of disturbing burials, *see* 4 ER 853; and (3) that higher level of engineering specificity is not authorized until the ROD is issued, *see City of Alexandria*, 198 F.3d at 873; 23 C.F.R. § 771.113(a)(iii). Accordingly,

this Court should reject Honolulu Traffic's argument that the Lead Agencies violated Section 4(f) in its treatment of unknown burials.

Dated: June 19, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

Intervenors do not know of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2011, the body of the foregoing brief contains 11,524 words, exclusive of those parts excluded by FRAP Rule 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by FRAP Rule 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* FRAP Rule 32(a)(5), (6).

Dated: June 19, 2013

Respectfully submitted,

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