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FAITH ACTION FOR COMMUNITY EQUITY,
MELVIN UESATO, AND
THE PACIFIC RESOURCE PARTNERSHIP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

HONOLULUTRAFFIC.COM; CLIFF
SLATER; BENJAMIN J.
CAYETANO; WALTER HEEN;
HAWAI‘I’S THOUSAND FRIENDS;
THE SMALL BUSINESS HAWAI‘I
ENTREPRENEURIAL EDUCATION
FOUNDATION; RANDALL W.
ROTH; DR. MICHAEL UECHI; AND
THE OUTDOOR CIRCLE

Plaintiffs,

CIVIL NO. 11-00307 AWT

**MEMORANDUM OF
INTERVENOR DEFENDANTS
FAITH ACTION FOR COMMUNITY
EQUITY, MELVIN UESATO AND
THE PACIFIC RESOURCE
PARTNERSHIP’S IN RESPONSE TO
THE COURT’S SCHEDULING
ORDER RE REMEDY DATED
NOVEMBER 1, 2012; LR 7.5(e);
WORD COUNT COMPLIANCE
CERTIFICATE; EXHIBIT “A”;**

vs.

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

Defendants,

and

FAITH ACTION FOR COMMUNITY
EQUITY, MELVIN UESATO, AND
THE PACIFIC RESOURCE
PARTNERSHIP,

Intervenor Defendants.

**SUPPLEMENTAL DECLARATION
OF JOHN WHITE; CERTIFICATE
OF SERVICE**

HEARING

DATE: December 12, 2012

TIME: 10:00 a.m.

JUDGE: The Hon. A. Wallace Tashima

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

Trial Date: None Set

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MEMORANDUM OF INTERVENOR DEFENDANTS FAITH ACTION FOR COMMUNITY EQUITY, MELVIN UESATO AND THE PACIFIC RESOURCE PARTNERSHIP IN RESPONSE TO THE COURT'S SCHEDULING ORDER RE REMEDY DATED NOVEMBER 1, 2012

I. INTRODUCTION

Intervenor Defendants Faith Action for Community Equity (“**FACE**”), Melvin Uesato and the Pacific Resource Partnership (“**PRP**”) (collectively “**Intervenor Defendants**”) represent Hawai‘i’s low-income and Native Hawaiian population, a disproportionate number of whom live in West O‘ahu and suffer terrible traffic daily that residents on other parts of the island do not regularly experience. PRP represents the Hawai‘i carpenters union and its 6,500 members, 46% of which are currently unemployed statewide. PRP also represents contractors who have obtained or can reasonably expect to obtain contracts to build the Honolulu High-Capacity Transit Corridor Project (“**Project**”). See Suppl. Decl. White ¶ 4 (attached hereto) and Ex. A (Decl. White ¶ 9).

Intervenor Defendants oppose a remedy that will interfere with all activity on the Project pending resolution of the issues identified by the Court. They depend on this Project to provide faster, more reliable, more environmentally friendly and more transit oriented development (“**TOD**”) friendly transportation within the Project corridor. Furthermore, Intervenor Defendants desire the much needed employment opportunities that will result from the Project’s continued and timely construction.

By this brief, Intervenor Defendants seek to support the City and County of Honolulu's ("**City's**") and the Federal Transit Administration's ("**FTA's**") (collectively "**Defendants**") proposed order regarding remedies by specifically addressing Plaintiffs' failure to meet the standard for issuance of injunctive relief barring all construction on the Project and further articulating that should this Court find that an injunction should issue, it should be narrowly tailored in scope to allow construction in the first three phases of the Project while issues in Phase 4 are addressed.

II. BACKGROUND

Following the parties' filing of cross-motions for summary judgment, on November 1, 2012, this Court entered its Order on Cross-Motions for Summary Judgment ("**Order**"), wherein this Court granted the Plaintiffs' Motion for Summary Judgment with respect to:

(1) their Section 4(f) claims that Defendants arbitrarily and capriciously failed to complete reasonable efforts to identify above-ground TCPs prior to issuing the ROD; (2) Defendants' failure adequately to consider the Beretania Street Tunnel alternative prior to eliminating it as imprudent; and (3) Defendants' failure adequately to consider whether the Project will constructively use Mother Waldron Park.

Order at 44. The Court also granted Defendants' Motion for Summary Judgment with respect to all other claims raised in said motion. Order at 44.

With respect the first issue related to identification of TCPs, this Court stated that

Before continuing with the Project in any way that may use unidentified TCPs, Defendants must complete their identification of above-ground TCPs within the corridor. See *N. Idaho Cmty. Action Network*, 545 F.3d at 1160-61 (construction need be delayed during completion of Section 4(f) evaluation only for those phases of the project for which such evaluation had not yet been completed). For any TCPs identified, Defendants must conduct a complete Section 4(f) analysis. The ROD must be supplemented to include any newly identified TCPs. The FEIS must also be supplemented to the extent that this process requires changes that “may result in significant environmental impacts ‘in a manner not previously evaluated and considered.’” *Id.* at 1157 (quoting *Westlands Water Dist. v. Dep’t of Interior*, 376 F.3d 853, 873 (9th Cir. 2004)).

Order at 11-12 (emphasis added). With respect to the second issue relating to the consideration of the Beretania Street Tunnel alternative, this Court stated

Defendants must fully consider the prudence and feasibility of the Beretania tunnel alternative specifically, and supplement the FEIS and ROD to reflect this reasoned analysis in light of evidence regarding costs, consistency with the Project’s purpose, and other pertinent factors. See *Citizens for Smart Growth*, 669 F.3d at 1217. Should Defendants determine, upon further examination of the evidence, that their previous decision to exclude the Beretania alternative because it would be imprudent was incorrect, they must withdraw the FEIS and ROD and reconsider the project in light of the feasibility of the Beretania tunnel alternative. See *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (“The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”).

Order at 27 (emphasis added). With respect to the third issue relating to consideration of constructive use of Mother Waldron Park, this Court stated

Before continuing with any part of the Project that may constructively use Mother Waldron Park, Defendants must reconsider their no-use determination, taking full account of evidence that the Project will significantly affect the park. If Defendants conclude that the Project will, in fact, constructively use Mother Waldron Park, they must seek prudent and feasible alternatives to such use, or otherwise mitigate any adverse impact from constructive use of the park. 49 C.F.R. § 303(c). The ROD must be supplemented accordingly. The FEIS must also be supplemented, to the extent that this process affects its analysis or conclusions. *N. Idaho Cmty. Action Network*, 545 F.3d at 1157.

Order at 20-21 (emphasis added).

In light of its decision, this Court invited the parties to provide briefing on “whether a permanent injunction and/or a declaratory judgment should issue, and the scope of any such equitable relief, in order properly to assess the balance of equities between the parties, as well as where the public interest lies.” Order at 45.

In its First Amended Complaint (“**FAC**”), Plaintiffs requested, in relevant part, that this Court:

1. Issue a declaratory judgment that (1) Defendants’ FEIS, 4(f) evaluation, and ROD are legally inadequate and (2) Defendants have violated NEPA, Section 4(f), the NHPA, and the APA.
2. Issue an injunction requiring the Defendants to comply with the following:
 - (a) Immediately withdraw the ROD approving the Project; and
 - (b) Prior to approving or re-approving the Project or any other proposed rail transit system, comply with the requirements of the NHPA and Section 4(f); and
 - (c) Prior to approving or re-approving the Project or any other proposed rail transit system take one of the following two actions:
 - (i) Prepare and circulate for public review and comment a Draft EIS meeting the requirements of

- NEPA, including, without limitation, the requirement that all reasonable alternatives be considered, to be followed by a Final EIS and a ROD; or
- (ii) Prepare and circulate for public review and comment a Draft Supplemental EIS meeting the requirements of NEPA, including, without limitation, the requirement that all reasonable alternatives be considered, to be followed by a Final Supplemental EIS and a Revised ROD.
3. Take no action with respect to the Project that could within the meaning of 40 CFR § 1506(a): (1) have an adverse environmental impact, or (2) limit the choice of reasonable alternatives until such time as the requirements of 2(c)(i) or (c)(ii), above, are satisfied.

FAC at 55-56 (ECF 117). The FAC also alleged that Plaintiffs' interests include enjoyment of views, aesthetics, and ambiance of historic and cultural resources in downtown Honolulu.¹ FAC ¶¶ 7-15; see also Plaintiffs' Standing Affidavits (ECF 109-4).

On January 3, 2012, Intervenor Defendants filed their Motion to Intervene and in support of this motion, attached the declarations of various individuals representing numerous communities of concern, all of whom describe the Project's key role in alleviating the adversity posed by lack of jobs, affordable housing and adequate, reliable transportation in our island community. For the Court's convenience, these declarations are collectively attached hereto as Exhibit A.

¹ Plaintiff Heen is the only Plaintiff of Native Hawaiian ancestry and he alleged an interest in preserving unforeseen burials. In light of this Court's rejection of Plaintiffs' Section 4(f) challenge to the identification of burial sites, Plaintiff Heen's interest in preserving unforeseen burial sites is not relevant to the determination of the proper remedy. See Order at 10.

Andrew Astofi, director of FACE, attested to his organization's support of the Project due to its ability to alleviate problems associated with lack of employment, affordable housing and transportation as well as environmental concerns that impact Hawai'i's low-income population. See Ex. A (Decl. Astolfi ¶¶ 2-14).

Robert Nakata, pastor and member of FACE, attested to the Project's ability to provide more affordable transportation, cut down travel times for commuters, and its potential as a "springboard" for TOD development and desperately needed affordable housing on O'ahu. See Ex. A (Decl. Nakata ¶¶ 4-8).

John White, Executive Director of Hawai'i Carpenters Market Recovery Program doing business as PRP, attested to the precarious employment conditions facing Hawai'i carpenters union members, the existing contracts its members have to construct the Project, and the positive impact the Project is expected to have on the construction industry. See Ex. A (Decl. White ¶¶ 2-14)

Davin Auyong, carpenter and Pearl City resident, attested to the constant environmental pollution and traffic that he endures as a result of living near the H-1 freeway and the Project's ability to alleviate these problems. See Ex. A (Decl. Auyong ¶¶ 3-4, 9). Moreover, Mr. Auyong stated that he has been unemployed and is depending on the Project to provide an opportunity for regular employment. Id. at ¶ 5.

Ruben Amodo, carpenter and Mililani resident, attested to his experience with increasing environmental pollution, transportation costs, and traffic on O‘ahu. See Ex. A (Decl. Amodo ¶¶ 3-5). Moreover, Mr. Amodo stated that he has been unemployed and is depending on the Project to provide an opportunity for regular employment. Id. at ¶¶ 6-7.

Melvin Uesato, Kapolei resident, attested to the traffic conditions he endures as a result of living in Kapolei and working in Honolulu and how the Project is expected to greatly improve his quality of life. See Ex. A (Decl. Uesato ¶¶ 1-8).

As stated by the City Defendants in their memorandum regarding remedies, because evaluation of the effects of the Project on potential above-ground TCPs in Phase 1 through 3 in compliance with Section 4(f) has occurred, the three issues identified by the Court are limited to Phase 4.

As set forth below, Plaintiffs are not entitled to injunctive relief barring all construction activity on the Project because they fail to meet the standard for issuance of such relief, particularly because the balance of harms and public interest factors do not favor issuance of such an injunction. However, should this Court find that an injunction should issue, it should narrowly tailored in scope to allow construction in the first three phases of the Project to proceed.

III. ARGUMENT

A. Injunctive relief barring all construction on the Project is not warranted because Plaintiffs fail to demonstrate all four necessary factors.

Injunctive relief “is an extraordinary remedy never awarded as of right.”

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S.Ct. 365, 376

(2008). “In each case, courts ‘must balance the competing claims of injury and

must consider the effect on each party of the granting or withholding of the

requested relief.” Id. (quoting Amoco Production Co. v. Gambell, 480 U.S. 531,

542, 107 S.Ct. 1396, 1402 (1987)). “In exercising their sound discretion, courts of

equity should pay particular regard for the public consequences in employing the

extraordinary remedy of injunction.” Id. at 24, 129 S.Ct. at 376-77 (quoting

Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803 (1982)).

[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2756 (2010) (quoting eBay

Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390, 126 S.Ct. 1837, 1839 (2006));

see also N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) (citing

eBay Inc., 547 U.S. at 390, 126 S.Ct. at 1839). “An injunction should issue only if

the traditional four-factor test is satisfied. . . . It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine an injunction *should* issue under the traditional four-factor test set out above.”² Monsanto Co., 130 S.Ct. at 2757. In this case, Plaintiffs fail to satisfy this burden to obtain a full injunction because they do not satisfy the third and fourth prongs of this test. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365 (2008) (reversing injunctive relief and holding that the alleged irreparable injury to marine mammals resulting from the Navy’s sonar training exercises was outweighed by the public interest and the Navy’s hardship from restrictions in effective, realistic training of its sailors).

Plaintiffs do not sustain their burden of proving the balance of hardship and public interest requirements favor full injunctive relief. Harm to Plaintiffs’ enjoyment of views, aesthetics, and ambiance of historic and cultural resources in downtown Honolulu is less important in comparison to the significant harm that will be imposed on Intervenor Defendants (and the greater public) should an injunction barring all activity on the Project be issued. In fact, in light of the City’s

² “The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” Amoco Prod. Co., 480 U.S. at 546 n. 12, 107 S. Ct. at 1404 n. 12.

completion of Section 4(f) evaluations for Phases 1 through 3, Plaintiffs' harm relates only to Phase 4 of the Project, for which construction is scheduled years from now, allowing adequate time for Defendants to fully address the issues identified by the Court. At a minimum, Intervenor Defendants (representing working class Union members as well as lower income and minority populations, many of whom reside in West O'ahu) will experience the continued hardship of inequitable and insufferable traffic delays and environmental suffering from auto emissions, loss of steady employment and contracts from the Project, and the loss of the only foreseeable resolution to one of the worst urban traffic problems in the United States.

The record in this case contains the declarations of various individuals representing numerous communities of concern, all of whom describe the Project's key role in alleviating the adversity posed by lack of jobs, affordable housing and adequate, reliable transportation in our island community. These declarations highlight the Project's clearly significant positive impact on improving employment and economic conditions experienced by those living on O'ahu and throughout the state, as well as to the environment. Thus, an injunction that bars all activity on the Project will substantially hinder the Project's beneficial impact on these communities of concern and the environment.

PRP is a non-profit, joint labor management partnership with the state's largest construction union, the 6,500-member Hawai'i carpenters union – the United Brotherhood of Carpenters and Joiners of America, Local 745, now known as the Hawaii Regional Council of Carpenters (“**Union**”) and the over 200 contractors signatory to the Union. PRP's overriding mission is to improve the quality of life for Hawai'i's residents.³ PRP has advocated for the Project since its inception. Its members depend on the Project for steady employment and affordable transportation, as well as a means to curtail the increasing air pollution attributable to Honolulu's auto-centered transportation system. Ex. A (Decl. White ¶ 9, 12). An injunction barring any activity on the Project will deprive PRP members and the greater public of these critical benefits.

The state's construction industry in particular faces precarious economic conditions. Ex. A (Decl. White ¶ 9). As of October 1, 2012, 43% of active Union members on O'ahu were unemployed. See Suppl. Decl. White ¶ 4. Statewide, the unemployment level for Union members is 46%. Id. There were 25,000 unemployed persons on O'ahu. See Ex. A (Decl. White ¶ 9). Should an injunction

³ To serve this purpose, PRP has used its position to strengthen Hawai'i's economy by working with public and private developers and contractors and the unionized carpenters to bolster the building sector. PRP identifies development opportunities and assists with legislation and public policy development and support, guides projects through the federal, state, and county development process, and facilitates relationships with potential business and community organizations. Ex. A (Decl. White ¶ 3)

be issued barring any activity on the Project, PRP members will continue to suffer from these dismal and insecure economic conditions.

The positive impact of the Project on employment conditions both on O‘ahu and throughout the state is significant. 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 Suppl. Decl. White ¶ 4 and Ex. A (Decl. White ¶ 9) 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. Ex. A (Decl. White ¶ 9).

The Union is a signatory to the Project’s Rapid Transit Stabilization Agreement, which is a contract between the City and various construction unions to ensure that construction of the Project occurs without disruption due to labor disputes, among other things. Kiewit Infrastructure West Co., a PRP member, was awarded the design and build contract to construct the guideway for the first and second phases of the Project. In addition, Kiewit teamed with fellow PRP member, Albert C. Kobayashi Inc., as a joint venture and won the bid to construct the maintenance and storage facility for the Project. Other PRP members have also been retained as subcontractors to work on the Project. Id. at ¶¶ 10-11.

“Economic harm may indeed be a factor in considering the balance of equitable interests.” Earth Island Institute v. Carlton, 626 F.3d 462, 475 (9th Cir. 2010). Additionally, “[p]ossible harm to the defendant agency is a factor the courts balance in considering whether to grant a preliminary injunction. The additional project costs caused by a delay in the completion of a project are a factor typically considered by a court when weighing harm to a defendant.” Daniel R. Mandelker, *NEPA Law and Litig.* § 4:59 (2012). Should an injunction be issued that ceases all activity on the Project, the many Union workers, subcontractors, and firms employed on the Project, as well as the broader economy will be negatively impacted by construction delay costs and loss of steady employment.

The Project will improve the quality of life for PRP’s members and the greater O’ahu community. Honolulu’s reliance on its overcrowded roads imposes increasingly burdensome costs in terms of efficiency, gasoline and car maintenance, and missed economic opportunities. Without a functional mass transit alternative, PRP’s members and contractors (as well as the greater public) have few alternatives to congested highways to get to and from work. See Ex. A (Decl. White ¶ 12).

FACE, a faith-based grassroots organization that was founded in 1996, 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 live in Central and Leeward O‘ahu, including a significant number of Native Hawaiians. FACE supports, funds, and works with community organizations that equitably meet the environmental, social, and economic needs of Hawai‘i residents.⁴ Because of FACE’s commitment to finding solutions for the affordable housing crisis on O‘ahu and its commitment to advocating for the needs of the poor, FACE has long-supported the Project. Ex. A (Decl. Astolfi ¶¶ 7-12). Should all work on the Project cease due to issuance of a full injunction, FACE’s members (and the communities for which it advocates) will be deprived of the benefit of affordable mass transportation, decreased air pollution, and more transit-oriented affordable housing.

This Court must weigh these harms against the possible harm to the Plaintiffs’ interests should an injunction not be issued. As stated earlier, Plaintiffs’ interests include enjoyment of views, aesthetics and ambiance of historic and cultural resources in downtown Honolulu. See FAC ¶¶ 7-15; see also Plaintiffs’ Standing Affidavits (ECF 109-4).

⁴ FACE seeks to cultivate diversity and economic opportunity in its work with schools, community organizations and its members. It chooses the issues that it will act upon through a democratic process, soliciting the opinions of all the members of its congregations to learn what issues they are facing and what issues they see as important for the low-income community that FACE seeks to serve. See Ex. A (Decl. Astolfi ¶¶ 4-5).

It is clear that Plaintiffs fail to demonstrate that harm to its interests absent a full injunction outweighs the harm imposed on Intervenor Defendants should a full injunction be issued. Injunctive relief that ceases all activity on the Project will result in Intervenor Defendants (representing many working class, minority, and/or lower-income individuals) facing the serious hardship of continued inequitable and insufferable traffic delays, environmental suffering from auto emissions, loss of steady employment and contracts from the Project, and loss of the only foreseeable solution to O‘ahu’s traffic nightmare.

The evidence in this case clearly supports a finding that a full injunction will disserve the public interest. “Judicial evaluation of the public interest often includes an appraisal of the effect of a delay on the completion of a project. The courts consider whether a delay in project execution so affects an important public interest that a preliminary injunction should not be granted.” Daniel R. Mandelker, NEPA Law and Litig. § 4:60 (2012). Thus, for the aforementioned reasons, as well as the Project’s potential for creating transportation equity and transit-oriented development (which are significant goals and needs of O‘ahu residents) the public interest does not weigh in favor of a full injunction.

Transportation equity is integral both to the goals of the community and to the goals of the New Starts statute under which Congress authorized funding for

the Project. As Department of Transportation Secretary Ray LaHood stated during a video message to FACE in 2011:

In a free society, transit is a pathway to economic opportunity. It's more than the train, streetcar, subway, or motor coach that brings us from Point A to Point B. It's the way we lead our lives and pursue our dreams. It gives people new choices – or first chances – to get from home to school, to work, to the store, or to see family friends or a doctor.

That's why outstanding projects like Oahu Rail Transit – one of the best transit projects in America – deserve our continued support. That's why we'll maintain our focus on making transportation systems more accessible and more affordable at a time when transportation has become America's second highest household expense.⁵

The FEIS at 1-22 similarly discusses the significance of transportation equity by noting the importance of transit to many lower-income and minority workers who live in the corridor outside of the urban core, and describes the burdens borne by these workers because of traffic congestion:

Transit-dependent households concentrated in the Pearl City, Waipahu, and Makakilo areas rely on transit availability, such as TheBus, for access to jobs in the PUG Development Plan area. Delay caused by traffic congestion accounts for nearly one-third of the scheduled time for routes between 'Ewa and Waikiki.

The FEIS at 1-22 also emphasizes that many lower-income workers rely on transit because of its affordability:

⁵ Transcript of Secretary Ray La Hood's Video Message, Jan. 23, 2011, at http://www.transportationequity.org/index.php?option=com_content&view=article&id=383:usdot-head-pledges-long-and-fruitful-relationship-with-ten&catid=30:press-releases&Itemid=154.

These transit-dependent and lower-income workers lack a transportation choice that avoids the delay and schedule uncertainty currently experienced by TheBus. In addition, Downtown median daily parking rates are the highest among U.S. cities, further limiting access to Downtown by lower-income workers. Improvements to transit availability and reliability would serve all transportation system users, including minority and moderate-and low-income populations.

Because the Project's "need" included transportation equity, the EIS evaluated how well a fixed guideway system would serve "communities of concern," including "linguistically isolated households, transit-dependent populations, and areas with public housing and community services." See FEIS at 3-38. The EIS concluded that these communities will benefit substantially from the Project. Id. A fixed guideway system will "improve transit equity by reducing travel times for transit-dependent populations to major employment areas." See FEIS at 5-6. Areas with high transit dependence, such as Waipahu, Pearl City, Aiea, Kalihi, Iwilei, Chinatown, Downtown, Kaka'ako, Ala Moana, and Waikiki will experience substantial benefits. Transportation equity is a purpose and need of the Project under the FEIS and is expressly required by the FTA New Starts program because the welfare of lower income individuals may be "seriously and adversely" affected when public transportation is either unavailable or unaffordable. 49 U.S.C. § 5301(b)(5). A central purpose of the New Starts 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.” Id. § 5301(f)(4).

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 problem strikes at the core of the ability of O‘ahu citizens to find work and support themselves and their families. Access to affordable and reliable transportation widens opportunity and is essential to addressing poverty and unemployment as well as ensuring access to good schools and health care services. Simply put, improving transportation equity means helping make sure that all individuals living on O‘ahu have an opportunity to succeed. At a time when many individuals cannot find jobs and families are struggling to get by, this Court should not stop all activity on a Project that will provide critically needed jobs as well as access to jobs and services. The larger public interest will be greatly disserved should an injunction be issued.

Under these circumstances, Plaintiffs cannot sustain their burden of proving the balance of hardship and public interest requirements favor full injunctive relief. Thus, this Court should deny Plaintiffs’ request for such relief. See Monsanto Co., 130 S.Ct. at 2757 (“An injunction should issue only if the traditional four-factor test is satisfied.”) (emphasis added).

B. Should this Court find that an injunction should issue, it should be narrowly tailored in scope to allow construction in the first three phases of the Project.

Assuming *arguendo* that this Court finds that injunctive relief is necessary, this Court should carefully and narrowly tailor such injunction to provide a balanced remedy.

“A district court ‘has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.’” High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004) (quoting Natural Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 999 (9th Cir. 2000)). “While recognizing the district court’s considerable discretion in fashioning the terms of an injunction, we must insure that it is tailored to eliminate only the specific harm alleged. An overbroad injunction is an abuse of discretion.” E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992) (citing Lamb–Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 973 (9th Cir.1991) (emphasis added)). In other words, injunctive relief should be no more burdensome to Defendants than necessary to provide complete relief to Plaintiffs. See Lamb-Weston, 941 F.2d at 974 (citing Califano v. Yamasaki, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558 (1979)).

If an injunction is warranted, the circumstances of this case warrant a partial injunction rather than a full injunction. Invalidation of the ROD and enjoinder of all construction, as requested by Plaintiffs in their First Amended Complaint, is

needless and unnecessary. Instead, this Court should fashion any such injunction to allow partial construction on the Project while Defendants concurrently address and remediate the issues identified by this Court. See N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007) (footnotes omitted) (“Sometimes a full injunction is appropriate.[] But at other times, the equities demand a partial injunction.[]”). In this regard, the Ninth Circuit has upheld numerous injunctions fashioned in this manner.

In Westlands Water District v. U.S. Department of Interior, 275 F. Supp. 2d 1157, 1231-36 (E.D. Cal. 2002) aff’d in part, rev’d in part and remanded, 376 F.3d 853 (9th Cir. 2004), the District Court fashioned an injunction that allowed partial implementation of a project restoring stream flows to the Trinity River, despite its findings that the relevant agencies violated NEPA and must conduct additional work to cure these violations.⁶ See also id. at 1232 (“Any harm to the NEPA

⁶ Cognizant of the fact that environmental concerns were on both sides of the balance of hardships, the District Court stated:

On one side, the federal defendants, in seeking to restore the Trinity River fishery, failed: 1) to adequately analyze the impact of likely major CVP reoperation associated with the X2 standard on the Sacramento River and Delta ESA-listed species; 2) to consider the impacts of Trinity Dam outlet bypass on Northern California hydroelectric power supply and reliability; 3) to adequately analyze the Preferred Alternative’s ability to impact on Northern California hydroelectric power supply; and, 4) to fully consider an Integrated Management Alternative. NEPA’s purpose is to ensure decisions made by federal agencies include such analysis to reduce the

decisionmaking process by allowing these measures to go forward is overwhelmingly offset by the benefit to the Trinity River fishery and need to discharge the federal trust obligation owed to the Indian Tribes.”). Upon review by the Ninth Circuit, the partial injunction as crafted by the District Court was upheld. Westlands Water Dist., 376 F.3d at 877.

In Northern Cheyenne Tribe v. Norton, 503 F.3d at 843-44, the Ninth Circuit reviewed and upheld a District Court’s issuance of a partial injunction that prohibited coal bed methane development on 93% of the resource area until the Bureau of Land Management completed a revised environmental impact statement, but permitted development on 7% of the resource area, subject to site-specific review.⁷ See id. at 843 (“We cannot, on the basis of these cases, fault the district

likelihood a bad decision is made. On the other hand, restoration of the Trinity River fishery, and the ESA-listed species that inhabit it, are to remedy real and continuing environmental harm, and are unlawfully long overdue. The chronic delays by Interior in discharging its express statutory duties in managing the CVP, and its riverine components, have unjustifiably thwarted these Congressional objectives. *See generally, Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577–78 (9th Cir.2000).

Westlands Water Dist., 275 F. Supp. 2d at 1231.

⁷ The district court granted the partial injunction on the Bureau of Land Management’s recommended terms, concluding it was a “balanced and equitable” solution because “the EIS generally passed muster under NEPA, with the exception of the failure to consider a phased development alternative.” 503 F.3d at 841.

court's exercise of its discretion to issue a partial injunction balancing the equities rather than an automatic full injunction.”).

In North Idaho Community Action Network v. U.S. Department of Transportation, 545 F.3d 1147 (9th Cir. 2008), the Ninth Circuit concluded that various agencies violated Section 4(f), but ultimately found it unnecessary to enjoin the entire Project while the agencies completed the necessary evaluation. The Court fashioned the scope of injunctive relief such that construction was delayed during completion of Section 4(f) evaluation only for those phases of the project for which such evaluation had not yet been completed. Id. at 1160-61.

In light of clear support for issuance of a partial injunction under these circumstances, this Court should find that the remedy proposed by Defendants is acceptable and should be adopted because it is both fair and balanced. See High Sierra Hikers Ass'n, 390 F.3d at 342-43 (affirming district court injunction that “crafted a fair and balanced injunction that provided for interim relief for the environment pending compliance with NEPA and did not drastically curtail the packers’ operations. . . . The district court considered the economic impact of

curtailing all commercial pack operations in the interim, and chose only to reduce the current levels in order to minimize the harm.”).

DATED: Honolulu, Hawaii November 30, 2012

/s/ William Meheula

WILLIAM MEHEULA

SEAN KIM

Attorneys for Intervenor Defendants
FAITH ACTION FOR
COMMUNITY EQUITY, MELVIN
UESATO, AND
THE PACIFIC RESOURCE
PARTNERSHIP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

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

Defendants.

CIVIL NO. 11-00307 AWT

**LR 7.5(e) WORD COUNT
COMPLIANCE CERTIFICATE**

LR 7.5(e) WORD COUNT COMPLIANCE CERTIFICATE

I, William Meheula, certify that **Memorandum of Intervenor Defendants** Faith Action for Community Equity, Melvin Uesato and The Pacific Resource Partnership's **in Response to the Court's Scheduling Order re: Remedy Dated November 1, 2012** complies with Local Rule 7.5(c).

I further certify that, in preparation of this memorandum, I used *Microsoft Word 2010, using the Times New Roman font, size 14*, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced reply memorandum contains 5,408 words.

DATED: Honolulu, Hawaii November 30, 2012

/S/ William Meheula
WILLIAM MEHEULA
SEAN KIM

Attorneys for Intervenor Defendants
FAITH ACTION FOR
COMMUNITY EQUITY, MELVIN
UESATO, AND
THE PACIFIC RESOURCE
PARTNERSHIP