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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAII'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAII ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; DR. MICHAEL UECHI; and THE OUTDOOR CIRCLE, Plaintiffs, v. FEDERAL TRANSIT	Case No. 11-00307 AWT **PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF** Hon. A. Wallace Tashima Action Filed: May 12, 2011 Trial Date: None Set

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.

Defendants.

And

FAITH ACTION FOR COMMUNITY EQUITY; THE PACIFIC RESOURCE PARTNERSHIP; MELVIN UESATO

Intervenor Defendants.

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I. INTRODUCTION AND BRIEF SUMMARY OF RELEVANT BACKGROUND

This Court has found the Defendants have violated the law — specifically, Section 4(f) of the Department of Transportation Act — in three respects. The question now before the Court is what to do about these violations: how best to remedy them and which activities should be permitted to proceed in the interim.

A. Defendants' Violations Of Law

In its November 1 Order, the Court provided the following guidance with respect to Defendants' violations:

- With respect to Defendants' failure properly to evaluate TCPs, the Court concluded the ROD "must" be supplemented to include any newly identified TCPs, going on to say that the FEIS "must" be supplemented to the extent this process requires changes that "may result in significant environmental impacts in a manner not previously evaluated and considered."[1] Order on Cross-Motions For Summary Judgment (Doc. 182) ("Order") at 12:9-12.
- With respect to Mother Waldron Park, the Court found the FEIS did

[1] The Court accurately reflects the regulations governing supplementation of EISs and RODs which require supplemental EISs be prepared if there "may" be environmental impacts. 40 C.F.R. § 1502.9(c)(4) (supplemental EIS to be prepared in same fashion as EISs); 40 C.F.R. § 1502.3 (EIS to be prepared on actions "affecting" environment); 40 C.F.R. § 1508.3 ("affecting" includes "may have an effect on"); s*ee also Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979) (regulations entitled to substantial deference).

not adequately consider constructive use and concluded that the agencies must reconsider. Order at 20:7 to 21:3. If they determine that there will be a constructive use, the ROD must be supplemented and the FEIS supplemented to the extent its conclusions are affected. Order at 20:22 to 21:3.

- With respect to the alternative of a downtown tunnel, the Court concluded Defendants failed properly to consider a tunnel beneath Beretania Street as a feasible and prudent option during the DEIS, FEIS, and ROD process, and directed the Defendants to reconsider. Order at 26:24 to 27:6. The Court also directed that the FEIS and ROD be supplemented to reflect this reasoned analysis. Order at 27:7-9. If, after reconsideration, Defendants determine that their previous decision to exclude the Beretania alternative was incorrect, they must withdraw the FEIS and ROD and reconsider the project in light of the tunnel's feasibility. Order at 27:10-14.

B. Reconsideration and Remedy

In resolving the underlying question of Defendants' 4(f) compliance, three approaches lend themselves for the Court's consideration:

1. Neither the agency nor the Court receives any new factual material to supplement the administrative record, but the matter is decided on the existing record.

- This is clearly an unsatisfactory approach. The Court has already ruled, based on the existing record, that Defendants violated § 4(f) in three respects. Therefore, to confine the review to the existing record is to invite *post hoc* rationalization – retrospectively changing the analysis to alter the conclusion.[2]

2. The Court, not the Federal Transit Administration, receives new factual materials to supplement the existing administrative record.

- This too invites *post hoc* rationalization. Reliance on litigation declarations is precisely what the courts, starting with the Supreme Court in *Overton Park*,[3] have criticized as impermissible *post hoc* rationalization.[4] It bypasses the mechanisms established by law and regulation for the open and fair evaluation of alternatives as required by § 4(f) and as identified by the Court — supplementing the FEIS

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[2] The only Supreme Court case interpreting § 4(f), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), is also the leading Supreme Court case condemning the use of *post hoc* litigation affidavits. *See* Mandelker, NEPA Law and Litigation, § 3.6 at 3-11 (2005 Ed.) (*Overton Park* remains "the leading Supreme Court decision on the judicial review standard to be applied to informal agency decisionmaking").

[3] *See Overton Park*, 401 U.S. at 419.

[4] The Court will note that the Plaintiffs are submitting litigation declarations in the expectation that the Defendants will do so, and that Plaintiffs' submissions will be needed to counter them, but Plaintiffs' position remains that reliance on litigation declarations is inappropriate. Instead, the Court is respectfully requested to remand to the agencies to take the steps necessary to supplement the FEIS and, thereafter, if appropriate, accordingly to amend the ROD. In the meantime, as detailed *infra.*, a carefully tailored injunction is warranted directed at the three areas or sites affected by Defendants' violations of § 4(f) such that the agencies take no action which would prejudice their subsequent reexamination.

and, if appropriate, then amending the ROD.

3. Remand to the agency to receive new factual material to supplement the existing administrative record such that the agency may, after the public scrutiny required by law, receive and analyze such new information as may be appropriate to address the deficiencies which this Court has identified. In the meantime, injunctive relief – contoured to the scope of the matters for which reconsideration is ordered – will be necessary so as not to predetermine the outcome of the supplemental process.[5]

In this connection, one overriding point should be made which Plaintiffs respectfully submit for the Court's consideration. The Court quite properly pointed to supplementing or withdrawing the FEIS and ROD on multiple occasions. Order at 12, 20, 27. Decisions on reanalysis or reconsideration must ***follow***, not precede, that supplementation process. *See* 40 C.F.R. § 1502.2(g) (EISs "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"). After all, it is the purpose of an EIS to provide the data and analysis to inform the agencies' decision, not to follow or rationalize one that has

[5] Plaintiffs' entitlement to injunctive relief is addressed in detail in section II.B, below. The scope and nature of Plaintiffs' requested injunctive relief is addressed in section II.C. Maps of the project appear as attachment 1 to this document.

already been made. *Id*. In the Supreme Court's words, the EIS is an "action-forcing" procedure designed to (1) ensure that the agency will have environmental information available in reaching its decision and (2) make the information available to a "larger audience" (*i.e.*, including the public) which may play a role in the process of making and implementing the decision. *Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); *see also* 40 C.F.R. §§ 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken") (emphasis added), 1502.2(g) (EISs shall not justify decisions already made).

While EISs are a creature of statute (42 U.S.C. § 4332(2)(C)), supplements to EISs and RODs are creatures of regulations (40 C.F.R. §§ 1502.9 (c)(4), 1505.2) which implement the statute.[6] Those regulations, in turn, set out the procedures necessary to supplement an EIS and to prepare a ROD. When there exists significant new information – and most respectfully if new information is substantial enough to cause the reversal of this Court's findings of violations of law, it must be significant – a supplemental EIS must be prepared. 40 C.F.R. § 1502.9(c). Supplemental EISs must be prepared if

[6] Again, CEQ's NEPA regulations are entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979). They govern the procedures to supplement the FEIS and the ROD, which were repeatedly referred to by this Court in its Opinion. Order at 12, 20, 27.

there "may" be significant impacts. 40 CFR § 1508.3. Any supplemental EIS must be circulated to the public in the same manner as an EIS (except for scoping). 40 CFR § 1502.9(c)(4); *see*: 40 C.F.R. part 1503 (Commenting). When, based on the EIS, the agency makes its decision (or, as here, its decision on reconsideration), it prepares a ROD to state what the decision was. 40 C.F.R. § 1505.2.

Most respectfully, as the Court decides how best to implement its decision and ensure a fair and open remedy for Defendants' violations of law, Plaintiffs request that the mechanisms created by law and regulations for dealing with such supplemental information be followed. A supplemental EIS must be prepared to receive and analyze and permit public comment on any new information, to be followed by a revised ROD. In the meantime, "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f) (referring to 40 C.F.R. § 1506.1).

II. ARGUMENT

A. This Matter Must Be Remanded To The FTA For Further Proceedings

As discussed more fully in the section above, FTA's process of demonstrating compliance with Section 4(f) might conceivably take three forms: (1) reliance on the existing administrative record; (2) submission of new material directly to the Court; or (3) remand to the agency for additional

factual development and analysis. The first two options would involve extensive litigation affidavits and would invite *post hoc* rationalizations, both of which have been proscribed in APA cases like this one. *See, e.g.*, *Overton Park*, 401 U.S. at 419 (litigation affidavits are "*post hoc* rationalizations which have traditionally been found to be an inadequate basis for review"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record" rather than "some new record made initially in the reviewing court"); *I-CARE v. Dole*, 770 F.2d 423, 434 (5th Cir. 1985) (same). Plaintiffs respectfully request that the Court adopt the third course of action and remand the matter to the FTA. *See Florida Power & Light v. Lorion*, 470 U.S. 729, 742-45 (1985) ("proper" approach is remand); *Camp*, 411 U.S. at 143 (where a finding "is not sustainable on the administrative record made, then the [] decision must be vacated and the matter remanded…for further consideration").

B. Plaintiffs Are Entitled To Injunctive Relief

Plaintiffs also request that this Court exercise its discretion and provide for a carefully tailored injunctive remedy during Defendants' reconsideration. That request is subject to a four-part test requiring (1) "a likelihood of irreparable harm"; (2) that "remedies available at law, such as monetary damages, are inadequate to compensate for that harm"; (3) that, "considering the balance of hardships between the [Plaintiffs] and the [Defendants], a

remedy in equity is warranted"; and (4) that "the public interest would not be disserved" by an injunction. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 21-22 (2008) ("likelihood of irreparable harm"); *Monsanto v. Geertson Seed Farms*, ___ U.S. ___, 130 S. Ct. 2743, 2756 (2010) (four-part test).

In conducting the equitable analysis required by the four-part test, the Court must not defer to the views of government agency defendants. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185-86 (9th Cir. 2011) (abuse of discretion to defer to government experts for equitable analysis). After all, "[i]f the federal government's experts were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable, as government experts will likely attest that the public interest favors the government's preferred policy, regardless of procedural failures." *Sherman*, 646 F.3d at 1186.

For the reasons set forth below, Plaintiffs easily satisfy all four parts of the four-part test, and are therefore entitled to injunctive relief.

1. Irreparable Injury Is Likely

The first part of the four-part test requires "a likelihood of irreparable injury." *See Winter*, 555 U.S. 7, 21-22 (2008). As explained below, (a) the Project will cause significant harm; (b) that harm will be irreparable; and (c) Defendants have pledged to implement the Project, regardless of the Court's

November 1 Order. Therefore, Plaintiffs meet the first part of the four-part test.

a) The Project Will Cause Significant Harm

The Project will cause significant harm to environmental, historic, and cultural resources. In particular, it will damage Mother Waldron Park, historic downtown Honolulu (an area that would be avoided by a tunnel beneath Beretania Street and which includes both the Chinatown Historic District and the Dillingham Transportation Building), and TCPs.

(i) Mother Waldron Park

Mother Waldron Park is significant under §4(f) for two reasons. First, it is a public park containing a playground and other outdoor amenities. *See, e.g.,* AR 000247 at 000690. Second, it is an historic resource eligible for listing in the National Register for its Art Deco architectural features, its landscape design, and its association with a movement to create urban playgrounds. *See* AR 000247 at 000747; AR 153157 at 153158-59, 15165-71. Mother Waldron Park's important historic features include distinctive perimeter walls built in an Art Deco style, an Art Deco building, and an overall design deemed "perhaps the best" ever created by well-known architect Harry Sims Bent. AR 153157 at 153159. The park is one of the last two Art Deco playgrounds in Honolulu to retain "historic integrity." AR 153157 at 153169.

As the Court has accurately noted, "there is a great deal of evidence in the record that the [P]roject's impacts on Mother Waldron Park will be quite serious." Order at 19:20-22. The City's "Historic Effects Report" concludes that the Project would adversely affect the outdoor playground at Mother Waldron Park, and that the Project (AR 039555 at 039909); "would be out of character with the historic appeal of [] 1930s Mother Waldron Playground" (*id*.); and would interfere with the integrity of the Park's setting and association (*id*. at 39909-10). The EIS reports that the Project would "contrast significantly with the scale and character" of the Park. AR 000247 at 000512. The FTA has admitted that the visual impacts of the Project near Mother Waldron Park will be "devastating." AR 072988 at 072998. And the record as a whole shows that the Project would result in a 40-foot high concrete structure looming over Mother Waldron Park's historically-significant Art Deco exterior walls. *See* AR 000247 at 000732 (Project located 10 feet from perimeter of Park);[7] AR 039555 at 039980 (Project 40 feet high); AR 153157 at 153158-59 (exterior walls are a design feature qualifying the park for the National Register).

[7] A different part of the record estimates 20 feet between the Project and the perimeter of the park. *See* 000247 at 000747. Either way, the Project will loom over the park.

Plaintiffs regularly use and enjoy Mother Waldron Park. *See, e.g.*, Declaration of Michelle Matson ("Matson Dec.") ¶ 2, 4. The Project would interfere with that use and enjoyment. *Id*. ¶ 4.

(ii) Downtown Honolulu (Historic Resources Avoided By A Beretania Tunnel)

Downtown Honolulu contains a significant concentration of historic resources (including the Chinatown Historic District and the Dillingham Transportation Building) which would be avoided by a tunnel beneath Beretania Street. *See, e.g.*, AR 000247 at 000343 (map). These historic resources combine with open views toward Honolulu Harbor and the mountains to create a unique and pleasing aesthetic environment. AR 000247 at 000507 (map showing concentration of protected views in/near downtown), 000540 ("this area of Downtown includes several historic districts and other sensitive visual resources, including protected view corridors"), 000631 (map showing concentration of historic resources); *see also* Declaration of Cliff Slater ("Slater Dec.") ¶ 2-3, Matson Dec. ¶ 2, 6-8.

Chinatown is one of the most significant historic resources in downtown Honolulu. *See, e.g.*, AR 152844 at 152845 ("the most extensive area in Honolulu reflecting a contiguous architectural and historic character which recalls a sense of time and place"), 152850 ("the one and only district in Honolulu which reflects vividly in its building, institutions, and people, the full

impact of the city's role as an attraction for many diverse races and cultures"). The City refers to Chinatown as "one of the few areas of Honolulu which has maintained a sense of identity as a community over the years" and notes that the neighborhood is an historic district which has been listed on the National Register of Historic Places since 1973. AR 039555 at 039837. The EIS reports that Chinatown "retains its distinctive cultural surroundings and architectural character." AR 000247 at 000718. These historic, cultural, and architectural character attributes derive, in significant measure, from the neighborhood's connection to Honolulu Harbor. *See* AR 000030 at 000213 ("Chinatown's connection with the harbor and its historic ties to the waterfront" is "a factor of great importance"); AR 152844 at 152845 (historical development due to "close proximity to Honolulu Harbor").

The record demonstrates that the Project would significantly impact Chinatown. The Project would pass directly through the Chinatown Historic District[8] along the waterfront, and, in so doing, would cut the historic connection between the District and Honolulu Harbor. *See, e.g.*, AR 039555 at 039838-39 ("the guideway would substantially obscure the visual relationship between the neighborhood and the harbor and thereby obscure the [district]'s historic character"); AR 039555 at 039840 (map). The City admits that the

[8] Defendants admit that the Project will directly use the Chinatown Historic District. AR 000247 at 000718-21.

Project would "cause physical damage or destruction to a portion of the historic district" (AR 039555 at 039837); would "alter historically significant design features within the Chinatown Historic District" (*id*. at 039838); would "introduce a design element…that is out of character with [the] historic setting" (*id*. at 039839); and would "alter historically significant visual relationships of the property and [] obscure its historic appearance to an observer" (*id*. at 039839). The EIS concedes that the Chinatown rail station, proposed to be located within the Historic District, "will be a dominant visual element, contrasting in scale with the pedestrian environment and substantially changing [] views of Honolulu Harbor." AR 000247 at 000540.[9] The EIS also admits that the Project would adversely affect Chinatown's integrity of design, setting, feeling, and association. *Id*. at 000635.

The Dillingham Transportation Building is another important historic resource in downtown Honolulu. *See, e.g.*, AR 152907 at 152911 ("a significant architectural landmark in Honolulu's downtown area"). The four-story building is significant for its architecture (including, in particular, its exterior features), for its entry lobby, and for its association with the Dillingham family. *See* AR 000030 at 000227; AR 037883 at 037969; AR 039555 at 039878; AR 152907 at 152911. The building has been listed on the

[9] Renderings prepared by the Honolulu chapter of the American Institute of Architects show the magnitude of the Chinatown station's impacts. *See*

National Register of Historic Places since 1979. AR 037883 at 037969. It retains "high integrity." AR 000030 at 000227.

The record demonstrates that the Project would significantly impact the Dillingham Transportation Building.[10] The Project would pass within 25 to 40 feet from the building. AR 039555 at 039878. The City admits that the Project would "cause physical damage or destruction to a portion of the property" (AR 039555 at 039878); would "significantly alter the immediate physical and visual setting" of the building (*id*. at 039879); would "generally obscure the historic appearance of the building" (*id*.); would "diminish the building's expression of its historic character" (*id*. at 039880); and would "obscure [the building's] historic appearance to an observer" (*id.*). The EIS concludes that the Project would "change the visual character of the streetscape and substantially affect the visual setting of the Dillingham Transportation Building," resulting in an adverse effect on the building's integrity of setting, feeling, and association. AR 000247 at 000541, 000635.[11]

Plaintiffs regularly visit downtown Honolulu and enjoy the historic resources (including Chinatown and the Dillingham Transportation Building)

Adams Dec. ¶ 2, Ex. 1.

[10] The City admits to the Project's direct use of the Dillingham Transportation Building. AR 000247 at 000721.

[11] Renderings prepared by the Honolulu chapter of the American Institute of Architects demonstrate the magnitude of the Project's impacts on the Dillingham Transportation Building. See Adams Dec. ¶ 3, Ex. 2.

and aesthetic environment there. *See, e.g.,* Slater Dec. ¶ 2-4; Matson Dec. ¶ 2-8; Declaration of Walter Heen ("Heen Dec.") ¶ 7-8. The Project would interfere with that enjoyment. *Id*. Alternatives to the current Project alignment through Downtown Honolulu could significantly lessen (or even entirely avoid) the harm to Plaintiffs. *See* AR 000247 at 000719-22 (avoidance of §4(f) resources, including Chinatown and the Dillingham Transportation Building).

(iii) Traditional Cultural Properties

TCPs are resources which may be "eligible for inclusion in the National Register because of [] association with cultural practices or beliefs of a living community that (a) are rooted in the community's history and (b) are important in maintaining the continuing cultural identity of the community." *See* Parker and King, *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties* at 1-2.[12] Section 4(f) protects TCPs eligible for listing in the National Register. *See* 23 C.F.R. § 774.17. TCPs are particularly important in Hawaii because of (in the words of the City's consultants) "the fundamental and complete intertwining of physical

[12] Bulletin 38 does not appear in the Administrative Record, indicating that it was not consulted by Defendants (despite being the Federal Government's guidance on the subject of TCPs). Both sides have cited extensively to the document, and it available online at http://www.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm#tcp_agency_public

and spiritual connections between Hawaiians and the [land], which makes it impossible to separate culture from nature." Adams Dec. ¶ 4, Ex. 3 at 20.

The record contains a few general statements indicating that the Project has the potential to harm cultural resources. *See, e.g.,* AR 038098 at 038179 ("Potential long-term effects include the permanent modification of cultural resources (moving, damage, destruction)"). But Defendants did not undertake a comprehensive effort to identify potentially-affected TCPs prior to approving the Project. *See* Order at 10:23 to 12:13; *see also* AR 000247 at 000680-752 (TCPs not included in §4(f) evaluation).[13]

Defendants may argue that they subsequently addressed the possibility of harm to TCPs. More specifically, they may point to three documents prepared more than a year after the Project was approved: (1) an April 21, 2012 "Traditional Cultural Property Technical Report" (the "TCP Technical Report"); (2) an April 20, 2012 "Draft Study to Identify the Presence of Previously Unidentified Traditional Cultural Properties in Sections 1-3 for the Honolulu Rail Transit Project Management Summary" (the "Draft TCP Study"); and (3) a May 25, 2012 "Determination of Eligibility and Finding of Effect for Previously Unidentified Traditional Cultural Properties in Sections 1-3" (the "Eligibility and Effect Report") *See* Adams Dec. ¶ 5, Ex. 4 (TCP

[13] As this Court accurately noted, Defendants never fully explained their failure to identify and evaluate the Project's impacts on TCPs. Order at 11:21-23.

Technical Report), Ex. 3 (Draft TCP Study), Ex. 5 (TCP Eligibility and Effect Report).

But those documents do not, in fact, resolve the possibility of harm to TCPs. First of all, the documents only address sections 1, 2, and 3 of the Project. *See, e.g.*, Draft TCP Study at 6, 8; TCP Eligibility and Effect Report at 11. The documents do not address section 4 of the Project, which stretches from the proposed Middle Street Transit Center, past Chinatown, through Downtown, and to the Ala Moana Center. *Id*. Section 4 of the Project extends for approximately three miles, contains 8 of the Project's 21 stations, and includes one of the oldest and most densely-settled areas of Oahu. *Id.*; *see also* AR 037676 at 037759 ("center of population and activity"); AR 152844 at 152849 ("the longest continuous history of native and immigrant settlement"). At least one TCP has already been identified in Section 4, and others are likely to exist.[14] *See* AR 000247 at 000632 (Chinatown qualifies as a TCP); Heen Dec. ¶ 4. A full TCP study, conducted by a qualified expert with input from traditional cultural practitioners, is needed in order to identify, evaluate, and determine the Project's effects on TCPs in Section 4. *Id*.

Second, Defendants have not actually addressed all TCPs in sections 1, 2, and 3 of the Project. For example, they fail to address the impacts of the

[14] It is highly implausible that no TCPs would exist in one of the most history-rich parts of Honolulu — the downtown. *See* Heen Dec. ¶ 4.

Project on (a) the karst cave system and (b) traditional cultural practice of planting and gathering of certain seaweed (or "*limu*") species in an area of section 1 known as Ewa. *See* Declaration of Michael Kumukauoha Lee ("Lee Dec.") ¶ 3-11 (describing practices); TCP Eligibility and Effects Report at 17-56 (failure to address). Ewa is located near the Project's proposed East Kapolei, UH West Oahu, and Ho'opili rail stations, and is hydrologically connected to that portion of the Project by a unique and fragile karst geology containing underground rivers. AR 037893 at 037897 (map); AR 038098 at 38298 (underground rivers; importance of hydrological connection); Lee Dec. ¶ 12, Ex. B (map of hydrological connection provided by Project staff). The cultural importance of the marine plants grown and harvested near Ewa is due, in part, to the fresh water flowing through the karst beneath the Project. *See* AR 038098 at 38298; Lee Dec. ¶ 5, 10-11, 13; *see also* TCP Technical Report at 779-780. The karst cave system is itself culturally important because (among other things) it was used for royal burials. Lee Dec. ¶ 10. The record makes it clear that the Project requires massive columns drilled deep into the karst. *See, e.g.*, AR 004453 at 004454-55 (columns drilled 50 to 150 feet deep). But, despite all of this evidence, Defendants' TCP Eligibility and Effect Report fails even to mention the possibility that the Project could impact either the karst or the traditional resource gathering places which depend on the karst. Eligibility and Effect Report at 21-56. Those impacts would likely

be severe. *See, e.g.,* Draft TCP Report at 31 (water quality impacts); Lee Dec. ¶ 13. Plaintiffs and their members include traditional cultural practitioners who would be harmed. *Id*. at ¶ 1-13.

Finally, we note that while Plaintiffs have submitted evidence of specific TCPs in support of this request for injunctive and declaratory relief, it is the Defendants (and, in particular, the Federal defendants) who are ultimately responsible for complying with the law by fully identifying and evaluating TCPs along the entire Project route. *SeeDep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004) (although citizens are responsible for alerting an agency to concerns, "the agency bears the primary responsibility to ensure that it complies" with the law).

b) Harm Will Be Irreparable

The Supreme Court has accurately noted that "environmental injury, by its nature…is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (same). The injuries at issue in this case — damage to historic, cultural, and aesthetic resources — are no exception. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 995 (8th Cir. 2011) (irreparable harm to aesthetic interests); *Wilderness Watch v. Iwamoto*, 853 F.Supp. 2d 1063, 1077-78 (W.D. Wash. 2012) (visual impacts irreparable). The Project is intended to

be permanent; therefore, its impacts on historic, cultural and aesthetic resources will also be permanent.

c) Defendants Have Pledged To Implement The Project, Regardless Of The Court's November 1 Order

The significant, irreparable harm detailed above is likely to occur because Defendants have pledged to implement the Project. The Court's November 1 Order (1) found that Defendants' decision to approve the Project violated Section 4(f) in three respects and (2) mandated that the Defendants reconsider their decision after completing further analyses. But rather than reconsidering (or completing further analyses), Defendants immediately reconfirmed their commitment to implementing the Project. The City's immediate reaction, for example, was "[t]he project remains on course." Adams Dec. ¶ 7, Ex. 6. And on November 19, 2012 (less than three weeks after the Court found multiple violations of §4(f)), the FTA informed Congress of its intent to provide the Project with $1.55 billion in federal funding. Adams Dec. ¶ 8, Ex. 7.

These statements and actions confirm that Project-related harm is sufficiently likely to justify injunctive relief. *See, e.g., Muckleshoot Indian tribe v. U.S. Forest Service*, 177 F.3d 800, 815 (9th Cir. 1999) (issuing injunction where 10% of project had been completed and there were plans to continue development); *Coalition for Responsible Regional Development v.*

Brinegar, 518 F.2d 522, 527 (4th Cir. 1975) (transportation project was sufficiently imminent to justify injunctive relief where land acquisition could begin at any time and construction contracts had been let); *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp. 2d 1193, 1194 (D. Colo. 2011) (fact that agency had begun to implement ROD indicated that harm was sufficiently certain to warrant injunctive relief). Therefore, Plaintiffs satisfy the first part of the four-part test.

2. Legal Remedies Are Inadequate

The second part of the four-part test for injunctive relief requires that "remedies available at law, such as money damages, [be] inadequate" to compensate for the relevant harms. *Monsanto*, 130 S. Ct. at 2756. The harms relevant to this case include damage to irreplaceable environmental and cultural resources. Environmental injury of this sort "by its nature can seldom be adequately remedied by money damages." *Amoco*, 480 U.S. at 545 (1987); *see also Alliance for the Wild Rockies*, 632 F.3d at 1135; *Hatmaker v. Georgia Dep't of Transp.*, 973 F.Supp. 1047, 1057 (M.D. Ga. 1995) (§4(f) represents a policy determination that "the loss of national resources cannot be quantified in dollar terms"). And, in any event, the APA — the statutory authority under which all Section 4(f) claims must be litigated — does not provide for money damages. *See Overton Park*, 401 U.S. at 410 (Section 4(f) claims reviewed under APA); *Iwamoto*, 853 F.Supp. 2d at 1077-78 (W.D. Wash. 2012) (fact

that damages are not available under APA weighs in favor of injunctive relief). Therefore, Plaintiffs satisfy the second part of the four-part test.

3. A Remedy In Equity Is Warranted In Light Of The Balance Of Hardships

The third part of the four-part test requires that "considering the balance of hardships between the plaintiff[s] and the defendant[s], a remedy in equity is warranted." *Monsanto*, 130 S. Ct. at 2756. As explained in greater detail below, the balance of hardships favors Plaintiffs because (a) permanent harm to § 4(f) resources outweighs temporary delay and economic injury; (b) Defendants bear responsibility for most (if not all) of the economic risk they now face; (c) an equitable remedy would not cause environmental harm; and (d) Defendants have violated (and continue to violate) the terms of the Programmatic Agreement governing the Project.

a) Permanent Harm To §4(f) Resources Outweighs Temporary Delay And Economic Injury

As explained above, the Project will cause irreparable injury in the form of permanent environmental damage to historic resources and parklands. On the other side of the ledger, an equitable remedy carries the potential for a temporary delay in construction, and, with it, the possibility of economic injury to the City Defendants and the Intervenors.[15] Plaintiffs are not aware of

[15] We note that Intervenors have suggested that a delay in construction will

any evidence that a temporary delay would cause economic harm to the Federal Defendants.

In balancing the hardships, the potential for permanent environmental harm generally outweighs the potential for temporary economic injury associated with delayed project implementation. *See, e.g., S. Fork Band of W. Shoshone v. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (temporary nature of economic harm may favor injunctive relief); *Oregon Natural Resource Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007) (economic harm outweighed by environmental harm); *Quechan Tribe of the Fort Yuma Reservation v. U. S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1121 (S.D. Cal. 2010) (importance of preserving historic resources outweighs disruption of project financing); *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009) (potential 12-month delay "sharply" outweighed by potential irreparable environmental injury).[16]

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result in "loss of construction jobs and contracts." Intervenors' Motion For Summary Judgment ("Int. MSJ") (Doc. 109) at 70. Intervenors have not explained why a temporary delay in construction will result in a ***loss*** (rather than a temporary ***delay***) in construction employment. If, after reconsideration, the City and FTA decide to go forward with the Project, the Intervenors will have the same opportunities they currently enjoy (or expect). If, after reconsideration, the City and FTA choose to pursue some other transportation project, that alternative project will create its own employment opportunities.

[16] *Western Watersheds Project v. Bureau of Land Management*, 774 F.Supp. 2d 1089 (D. Nev. 2011) is not to the contrary. In that case, injunctive relief would have caused a private sector developer to permanently abandon a useful renewable energy project. *W. Watersheds Project*, 774 F.Supp. 2d at 1103. In this case, there is no evidence that the economic harm associated with a temporary delay would require permanent abandonment of the Project; on the

The Supreme Court has made it clear that this is particularly true in the context of Section 4(f): "Congress clearly did not intend that cost and disruption to the community were to be ignored…[b]ut the very existence of the statute indicates that protection of [4(f) resources] was to be given paramount importance." *Overton Park,* 401 U.S. at 412-13.

Likewise, the Ninth Circuit has recognized that under §4(f), cost is a "subsidiary factor." *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1452 (9th Cir. 1984) ("cost is a subsidiary factor in all but the most exceptional cases"); *Benton Franklin Riverfront Trailway and Bridge Committee v. Lewis*, 701 F.2d 784, 789 (9th Cir. 1983) (cost is only determinative "in truly unusual circumstances"); *see also Sierra Club v. United States Department of Transportation*, 664 F. Supp. 1324, 1330, 1342 (N.D. Cal. 1987) (permanent aesthetic harms caused by highway outweigh temporary economic and safety concerns); *Hatmaker*, 973 F.Supp. at 1057 ("while [defendant] may incur

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contrary, the Defendants have stated that the Project remains on course.

Nor does the Ninth Circuit's recent order in *Alaska Survival v. Surface Transportation Board* provide that temporary economic harm outweighs permanent environmental injury. In that order, the court declined to stay a rail project because the project was in compliance with federal law: "Because we have concluded that the agency acted in accord with law and that its decision is not arbitrary and capricious, it is for the [agency] and not for our court to balance the justifications of planned economic progress…against the possibilities of environmental harm." *Alaska Survival v. Surface Transportation Board,* 2012 U.S. App. LEXIS 24428, *3-4 (9th Cir. Nov. 28, 2012). In this case, on the other hand, the Court has determined that the Defendants violated federal law; accordingly, permanent environmental harm should outweigh temporary delay and economic injury.

some expense if a preliminary injunction is issued…Plaintiffs will suffer an irreparable loss if one is not issued").

Similarly, in promulgating its §4(f) regulations, the United States Department of Transportation (of which all Federal Defendants are a part) explicitly recognized that preservation outweighs economic concerns. *See* 73 Fed. Reg. 13368 at 13391 (March 12, 2008) ("In *Overton Park*, the [Supreme] Court instructed that cost, directness of route, and community disruption should not be considered on an equal footing with the preservation of parkland").

The specific facts of this case provide an additional reason to weigh permanent environmental injury more heavily than temporary delay. On August 24, 2012, the Hawaii Supreme Court held that the City Defendants violated state law by failing to complete Archaeological Inventory Surveys ("AISs") for the entire rail line before approving the Project. *See Kaleikini v. Yoshioka*, 283 P.3d 60, 71-81 (Haw. 2012). Defendants must now remedy that violation of state law. In the meantime, construction of the Project (but not land acquisition, construction contracting, or the purchase of material) has been suspended. Declaration of David Kimo Frankel ¶ 4. In other words, many of the delay-related costs now facing the Defendants are unrelated to the

possibility of an equitable remedy in this litigation. Those costs should not weigh in Defendants' favor.[17]

b) Defendants Are Responsible For The Risk Of Economic Harm They Now Face

Defendants made a conscious decision to start building the Project (and to proceed with all of the contracts and land acquisitions necessary to do so) despite having notice that the Project could be enjoined or otherwise delayed. From the outset of this case, Plaintiffs have made it quite clear that if successful on the merits they would pursue injunctive relief. *See, e.g.*, Complaint (Doc. 1) at 54-55; First Amended Complaint (Doc. 59) at 55-56. In fact, Plaintiffs went so far as to confirm that the City would have the economic and technical wherewithal to implement an equitable remedy. *See* Adams Dec. ¶ 9, Ex. 8-9 (communication with counsel for the City); Plaintiffs' Opposition/Reply (Doc. 155) at 109.

When Defendants nonetheless decided to proceed with construction, property acquisition, and other Project-related contracts and activities, they did so at their own risk. *See, e.g., National Wildlife Federation v. Espy*, 45 F.3d

[17] For similar reasons, the amount of time that has gone into planning the Project should not weigh in Defendants' favor. The fact that a transportation project "has already been long delayed" does not "justif[y] ignoring the standards which Congress has provided for balancing the paramount interest of protecting areas with…historic and archeological characteristics against the importance of providing needed highways." *Wade v. Lewis*, 561 F.Supp. 913, 954 (N.D. Ill. 1983)

1337, 1343 (9th Cir. 1995) (extent of defendants' knowledge of potential environmental restrictions is relevant to the balance of equities); *Conservation Congress v. United States Forest Service*, 803 F.Supp. 2d 1126, 1133-34 (E.D. Cal. 2011) (project proponents "were on notice that the project might be enjoined, and any economic investments related to the project were made at the [their] own peril"); *see also* Plaintiffs' Opposition/Reply at 109 (clearly stating that Defendants were proceeding at their own risk). The economic injuries they now face as a result of that decision cannot justify denial of injunctive relief. *Id.; see also Quechan Tribe*, 755 F.Supp. 2d at 1121 ("While the court is sympathetic to the problems Defendants face, the fact that they are now pressed for time and somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor."); *Hatmaker*, 973 F.Supp. at 1057 (issuing injunction where potential economic harm was attributable to defendants' own haste in developing a new highway).

c) An Equitable Remedy Will Not Cause Environmental Harm

Intervenors' motion for summary judgment suggested that environmental harm will occur if the Project is delayed. *See* Int. MSJ at 70. Specifically, they argued that the Project will reduce the number of private automobile trips in Honolulu and will therefore reduce traffic and air pollution.

Id. On that basis, they asserted that any delay in Project construction would cause severe environmental harm. *Id*.

But the factual assumption underlying Intervenors' position — namely, that the Project will slash the number of private automobile trips in Honolulu — is simply not accurate.[18] The EIS reports that in 2007 (the year identified as "existing conditions" in the EIS) there were 2,424,500 daily private automobile trips in Honolulu, a number representing 75.4% of the total trips taken. AR 000247 at 394. If the Project is never built, there will be 3,003,400 daily private automobile trips in Honolulu by 2030 (the year identified as representing future conditions in the EIS), a number representing 75.3% of total trips taken. *Id*. If the Project is built, there will be 2,952,200 daily private automobile trips in Honolulu by 2030, a number representing 74.0% of total trips taken. *Id*. In other words, even if the Project is built according to the precise timeline specified in the EIS, (1) the absolute number of private automobile trips in Honolulu will significantly ***increase*** and (2) the private automobile's share of the total trips taken in Honolulu will be reduced by just

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[18] The EIS also demonstrates that Intervenors' concerns about the impact of construction delays on transportation equity are misplaced. *See* Intervenors' MSJ at 70. The EIS shows that the transit-dependant households in Honolulu are clustered in the western part of the Project area. AR 000247 at 000493-94. The City chose to begin construction of the Project in a sparsely-inhabited agricultural area far to the west of those households. *See* AR 000247 at 000361-62 (discussion of construction phasing, including maps). If the Intervenors are genuinely concerned about the fact that transit-dependent households may not have immediate access to the Project, they should raise that issue with the City.

1.3%. *Id*. Indeed, the City now admits that "traffic congestion will be worse in the future with rail than what it is today without rail." AR 000855 at 002105.

d) Defendants' Violation Of The Programmatic Agreement Weighs In Favor Of An Equitable Remedy

Defendants' violation of the Programmatic Agreement ("PA") also weighs in favor of an equitable remedy. The PA includes several specific requirements governing Defendants' implementation of the Project. *See* AR 000030 at 000087 (Project must be implemented in accordance with PA); *see also Tyler v. Cisneros*, 136 F.3d 603, 608-09 (9th Cir. 1998) (duty to implement provisions of NHPA agreement). One of those requirements provides that Defendants must complete their analysis of TCPs prior to initiating construction of the Project: "[t]he City will complete ***all*** fieldwork, eligibility and effects determination, and consultation to develop treatment measures prior to the commencement of construction." AR 000030 at 000091 (emphasis added).[19] The PA also stipulates that the State Historic Preservation

[19] While the PA purports to allow some analyses and mitigation measures to proceed on a segment-by-segment basis, it plainly and explicitly mandates that ***all*** TCP fieldwork and analysis — not just the portions of that work relevant to a particular segment — be completed "prior to the commencement of construction." *Compare* AR 000091 (for TCPs, "[t]he City will complete all fieldwork, eligibility and effects determination, and consultation to develop treatment measures prior to the commencement of construction") *with* AR 000093 (for archaeological fieldwork, stipulation III.C purports to authorize a phase-by-phase approach).

Department ("SHPD") will have 30 days to review the City's assessment of the Project's potential effects on TCPs. *Id*.

The City began construction of the Project on April 23, 2012. Adams Dec., ¶ 10, Ex. 10. At that point, the City had completed the Draft TCP Study and the Draft TCP Study Technical Report, both of which identified potential TCPs in sections 1, 2, and 3 of the Project. The City had not completed an analysis of the effects of the Project on the TCPs identified in those two documents. *See* Eligibility and Effects Determination (dated May 25, 2012). There is no evidence that the City had submitted any draft TCP to the SHPD for a 30-day review. Moreover (and as explained above), the Draft TCP Study and the Draft TCP Study Technical Report were limited to sections 1, 2, and 3 of the Project; the City had not (and still has not) completed any TCP studies for section 4 of the Project. In short, while the City may have started ***some*** analysis of TCPs for ***some*** parts of the Project prior to commencing construction, it did not comply with the PA's plain and explicit requirement to "complete ***all*** fieldwork, eligibility and effects determination, and consultation…prior to the commencement of construction."

Today, more than seven months after "commencement of construction" (and nearly two years after the PA was signed), Defendants still have not completed "all fieldwork, eligibility and effects determination, and consultation" regarding TCPs. Adams Dec., ¶ 10, Ex. 10 ("commencement of

construction" on April 23, 2011); AR 000030 at 000121 (PA requirements). Specifically, Defendants have neither identified nor evaluated potential impacts on TCPs for section 4 of the Project. These violations weigh heavily in favor of granting an equitable remedy.[20] *See, e.g., Idaho Conservation League v. Atlanta Gold Corporation,* 2012 U.S. Dist. LEXIS 100841, *37-38 (D. Idaho 2012) (project proponent's violations of environmental law weigh in favor of injunction, particularly where they are of a "longstanding and continual nature"); *Oregon Natural Desert Association v. Tidwell,* 2010 U.S. Dist. LEXIS 137612, *16 (D. Ore. 2010) (agency's failure to implement conditions of project approval weighs in favor of granting injunctive relief).

4. The Public Interest Would Not Be Disserved By Injunctive Relief

The fourth part of the four-part test for injunctive relief requires that "the public interest [] not be disserved by a permanent injunction." *Monsanto*, 130 S. Ct. at 2756. In weighing the public interest, the courts look to the language of the statute at issue. *See, e.g., Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1138-39 (9th Cir. 2011); *S. Fork Band,* 588 F.3d at 728; *Quechan,* 755 F.Supp. 2d at 1121 (S.D. Cal. 2010) citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, (1978) ("the court looks to the statutes enacted

[20] It is worth noting that these are not the Defendants' only violations of the PA. *See* Adams Dec. ¶ 11, Ex. 11 (cataloguing compliance problems).

by Congress rather than to its own analysis of desirable priorities in the first instance").

The plain language of Section 4(f) clearly articulates the relevant public interest: "It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands…and historic sites." 49 U.S.C. § 303(a). To implement that policy, Congress further declared that the Department of Transportation may only approve a transportation program or project requiring the use of a §4(f) resource if "there is no prudent and feasible alternative" and "the program or project includes all possible planning to minimize harm." *Id*. It is hard to imagine clearer statement of the public interest. Indeed, the Supreme Court has found the above-cited provisions to be "clear and specific directives." *Overton Park*, 402 U.S. at 411.

Defendants may claim that the Project is also intended to benefit the public. They may argue, among other things, that rail transit provides a public benefit, that the Project will help stimulate the local economy, and/or that the Project is needed in order to address fundamental inequalities in the current transportation system.

Efficient transportation, economic growth, and equitable treatment are worthy goals.[21] But that is not the question currently before the Court. The proper question is whether an equitable remedy delaying the Project pending Defendants' compliance with Section 4(f) would "disserve" the public interest. *Monsanto*, 130 S. Ct. at 2756; *see also Sierra Club v. United States Department of Agriculture*, 841 F.Supp. 2d 349, 360 (D.D.C. 2012) (distinguishing between potential public benefits and the public interest in an equitable remedy). And the answer to that question is quite clear: The Project will use Section 4(f) resources; therefore an equitable remedy requiring Defendants to comply with the "clear and specific" Congressional declaration of national policy concerning those resources would advance — and cannot reasonably be said to "disserve" — the public interest. *See* AR 000247 at 000727 (undisputed use of 4(f) resources); *Overton Park*, 402 U.S. at 411 ("clear and specific directive"); *Coalition for Responsible Regional Dev't v. Brinegar*, 518 F.2d 522, 526 (4th Cir. 1975) ("*Overton Park* and section 4(f) make clear that the ultimate public interest is in the preservation of parklands

[21] For the record, Plaintiffs do not concede that the Project will achieve — or was reasonably calculated to achieve — these objectives. Plaintiffs also note that any economic interests asserted by the Intervenors (whose involvement in the case is based, in large measure, on their interest in collecting on construction contracts with the City) are private, not public, and are therefore irrelevant to the fourth part of the four-part test. *See, e.g., Save Strawberry Canyon*, 613 F.Supp. 2d at 1190-91 (economic interest in government contracts not a "public" interest).

unless and until it is shown that parklands unavoidably must be used"). For this reason alone, Plaintiffs satisfy the fourth part of the four-part test.

Moreover, the public interest weighs strongly against denial of an equitable remedy. Defendants' failure to comply with Section 4(f) "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *City of S. Pasadena v. Slater*, 56 F.Supp. 2d 1106, 1144 (S.D. Cal. 1999); *see also National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp. 2d 1143, 1162 (W.D. Wash. 2002) ("ensuring that government agencies comply with the law is a public interest of the highest order"); *Hatmaker*, 973 F.Supp. at 1058 (public interest in making sure that 4(f) is properly applied). Defendants' violations of Section 4(f) are not procedural anomalies or mere technicalities; on the contrary, they go to the heart of Section 4(f)'s substantive mandate to avoid using historic resources and parklands for transportation projects.[22] *See* 49 U.S.C. § 303(c) (substantive mandate); *Lands Council v. Forester of Region One*, 395 F.3d

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[22] For this reason, *St. Paul Branch of the NAACP v. United States Dep't of Transp.*, 764 F.Supp. 2d 1092 (D. Minn. 2011) is distinguishable. The *St. Paul* case involved an agency's failure properly to calculate lost business revenues under a procedural provision of NEPA. *St. Paul*, 764 F.Supp. 2d at 1118-19. The *St. Paul* plaintiffs did not establish any irreparable harm to the physical environment and failed to explain why additional mitigation payments (rather than changes to the project) would not address the problem. *Id*. In contrast, this case involves violations of a substantive requirement and clear evidence of irreparable harm to the physical environment. Moreover, the City and the FTA have admitted that the impacts at issue in this case cannot fully be mitigated. *See, e.g.*, AR 000247 at 000509 (adverse visual effects "cannot be mitigated and will be significant").

1019, 1037 n.25 (9th Cir. 2004) (errors preventing "a proper, thorough, and public evaluation of [] environmental impacts" are not harmless). Under these circumstances, denying an equitable remedy would be "antithetical to the purpose and intent of [federal] statutes and regulations" and therefore contrary to the public's interest in having its government follow the law. *City of S. Pasadena*, 56 F.Supp. 2d at 1144; *see also Hatmaker*, 973 F.Supp. at 1057-58 (if a defendant "is allowed to arbitrarily circumvent the procedures set forth by Congress to protect a policy of national interest…the nation suffers an injury to its most fundamental precepts"); *Lands Council v. Cottrell*, 731 F.Supp. 2d 1074, 1092 (D. Idaho 2010) ("failure to provide for an injunction would undermine the public's interest in ensuring that executive agencies follow the laws that govern their conduct"); *Sequoia Forestkeeper v. United States Forest Service*, 2011 U.S. Dist. LEXIS 26447, *31 (N.D. Cal. 2011) (allowing a program to proceed without a legally-adequate ROD "runs contrary to…the public interest").

Finally, in weighing the public interest it is worth noting that Congress has the power to exempt the Project from Section 4(f) — and, in fact, has created such an exemption for another controversial piece of transportation infrastructure in Honolulu — but has not chosen to exercise that power here. *See Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989) (upholding Congressional exemption of freeway project from Section 4(f)); *see also*

Quechan, 755 F.Supp. 2d at 1121 (Congress could have exempted renewable energy projects from federal historic preservation and grant requirements, but chose not to do so).

C. Plaintiffs Properly Seek "Tailored" Injunctive Relief

Unlike the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), Section 4(f) imposes substantive requirements mandating avoidance of damage to historic resources and parklands. *See* 49 U.S.C. § 303(c); *Overton Park*, 401 U.S. at 411; *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008); *see also Wade*, 561 F.Supp. at 949 (where 4(f) applies, "the agency bears a substantially higher burden than that of merely considering [] environmental consequences"); *Marple Township*, 1982 U.S. Dist. LEXIS 18158 at *46-47 ("in contrast to NEPA, [Section 4(f)]…imposes absolute substantive provisions").

The existence of this substantive mandate means that curing a Section 4(f) violation is not merely a paperwork exercise. By definition, a good faith reconsideration involves new evaluations, analyses and/or information. And new information and analyses, in turn, may reveal additional substantive obligations to reconfigure the Project and/or adopt a different project alternative. *See, e.g.*, 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.3(a) (requiring

adoption of feasible and prudent alternative to use of 4(f) resources), 774.7 (requiring documentation of feasibility/prudence analysis).

This case provides an excellent example. If the FTA were to conclude (after appropriate reconsideration) that tunnel beneath Beretania Street is prudent, the agency would be obligated to adopt and implement that alternative. *See* 49 U.S.C. § 303(c); 23 C.F.R. § 774.3(a); Order at 27:7-16. Likewise, if the FTA determines that the Project would constructively use Mother Waldron Park, it would be obligated to adopt any feasible and prudent alternative to such use. 49 U.S.C. § 303(c); 23 C.F.R. §§ 774.3(a), 774.15; Order at 20:20 to 21:3. And if the FTA's studies reveal that the Project would use one or more previously-unidentified TCPs, the agency would be required to identify and adopt any feasible and prudent avoidance alternatives. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3(a); Order at 12:4-13.

Recognizing that proper application of Section 4(f)'s substantive mandate can — and was intended to — fundamentally alter the outcome of agency decisionmaking, the courts have often required that project implementation be suspended until 4(f) violations have been cured. *See, e.g.*, *Stop H-3 Ass'n v. Dole*, 740 F.2d at 1465 (enjoining entire highway project where defendants failed properly to apply Section 4(f) to a park property); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 446 (9th Cir. 1976) (enjoining highway project where defendants failed properly to apply Section 4(f) to an historic

property); *I-CARE v. Dole*, 770 F.2d 423, 443 (5th Cir. 1985); *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013, 1029 (5th Cir. 1972) ("[c]onstruction shall not proceed until there has been full compliance with the law"); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1339 (4th Cir. 1972) ("further acquisition of right-of-way and construction…must be enjoined").

Mindful of the Supreme Court's recent warning against over-broad injunctions, however, Plaintiffs do not seek to enjoin all Project-related activity in this case. *See Monsanto*, 130 S.Ct. at 2759 ("Nor can the District Court's injunction be justified as a prophylactic measure…"). Instead, Plaintiffs respectfully request an appropriately "tailored" injunctive remedy, the terms of which are specified below.

1. Scope Of Requested Injunctive Relief Against The Federal Defendants

Plaintiffs respectfully request that the Court issue an injunction setting aside the portions of FTA's ROD purporting to authorize any Project construction which could impact (a) Mother Waldron Park, (b) the areas that would be avoided by a Beretania Street tunnel alternative (including the Chinatown Historic District and the Dillingham Transportation Building), and/or (c) any area which includes a potential TCP.

a) The Court Should Set Aside Portions Of The ROD

The APA provides that "the reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary and capricious." 5 U.S.C. § 706(2). Accordingly, the presumptively appropriate remedy for a violation of the APA is to set aside the ROD (or relevant portions of it) while the matter is remanded to the agency for further consideration. *See, e.g., Overton Park*, 401 U.S. at 413-14 ("In all cases, agency action must be set aside if the action was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements") (quotes omitted).[23]

The Ninth Circuit has only departed from this general approach in circumstances where vacating a ROD would lead to severe environmental harm and/or regulatory confusion. Those circumstances have variously been described as "limited," "rare," and "unusual." *See California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) ("limited circumstances"); *Humane Society v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir.

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[23] In *Monsanto*, the Supreme Court made it clear that there is no presumption to permanent injunctive relief in environmental cases. *See Monsanto*, 130 S. Ct. at 2757. Where (as here) injunctive relief is warranted, however, vacatur is the presumptively appropriate ***type*** of injunctive remedy. *See, e.g., Sierra Club v. Van Antwerp*, 719 F.Supp. 2d at 80 (distinguishing between presumption of entitlement to injunctive relief and presumptions with regard to type of injunctive relief); 5 U.S.C. § 706(2) (reviewing courts "shall" set aside arbitrary and capricious agency action).

2010) (referring to circumstances as "rare"); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("[u]nder the unusual circumstances of this case…"). For example, in *Idaho Farm Bureau v. Babbitt* (a case relied on by the City and the Federal Defendants), the court declined to set aside a procedurally-defective regulation where doing so might result in the extinction of an endangered species. *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995). In *Western Gas & Oil Association v. EPA* (a case cited by the City), the court declined to set aside a procedurally-defective regulation where doing so might thwart "the operation of the Clean Air Act in the State of California." *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).[24] And in *California Communities Against Toxics v. U.S. EPA*, the court declined to set aside an arbitrary and capricious rule in order to ensure the safety of the power supply and avoid rolling blackouts. *California Communities Against Toxics*, 668 F.3d at 994.

This case simply does not present comparable issues. Setting aside the relevant portions of FTA's ROD would not lead to the extinction of a species, endanger Honolulu's power supply, or call into question the operation of federal pollution control laws in the State of Hawaii. Nor would it cause any

[24] A similar, unpublished Ninth Circuit decision declined to vacate a procedurally improper regulation where doing so would threaten the implementation of a Clean Water Act permitting program in Alaska. *Cook Inletkeeper v. U.S. EPA*, 400 Fed. Appx. 239, 241-42 (9th Cir. 2010).

other problems approaching that level of severity. At most, it would temporarily delay a long-term project that (1) has already been delayed due to Defendants' own violations of state law and (2) even under the most wildly optimistic projections, is not scheduled to be fully operational for several years. *See Kaleikini v. Yoshioka*, 283 P.3d 60, 71-81 (Haw. 2012) (violations of state law, City required to complete AISs); AR 000247 at 000363 (EIS originally estimated Project would begin construction in 2010 and be operational in 2019).

b) The Court Should Limit FTA's Reliance On The ROD Until Such Time As The Agency Has Satisfied The Requirements Of Section 4(f)

Compliance with Section 4(f) must precede the Federal Government's commitment to a transportation project. 49 U.S.C. § 303(c) (approval of transportation project allowed "only if" Section 4(f) has been satisfied); 23 C.F.R. § 774.3 (prohibiting federal approval without compliance); *see also Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 700-01 (2d Cir. 1972) ("the affirmative duty to minimize the damage to parkland is a condition precedent to approval"). This Court has held that the FTA issued its ROD without fully complying with Section 4(f). Order at 12, 20-21, 25-27, 44-45. Therefore, it is only reasonable that FTA should be prohibited from further relying on the ROD for Section 4(f) purposes until such time as Section 4(f) has been satisfied. *Id*.; *see also City of S. Pasadena*, 56 F.Supp. 2d at 1147

("defendants may not proceed with any actions in furtherance of the [project] a prerequisite of which was the issuance of a valid ROD").[25]

With that in mind, it bears repeating that on November 19, the FTA formally notified Congress of the agency's to enter a $1.55 billion Full Funding Grant Agreement ("FFGA") for the Project — apparently without further analyses or proceedings to cure the agency's §4(f) violations.[26] Adams Dec. ¶ 8, Ex. 7 (notice to Congress); *see also* 49 U.S.C. §5309(k)(5) (requiring that FTA notify Congress 30 days prior to entering an FFGA). Among other things, an FFGA (1) commits the United States to obligate present and future taxpayer funds to the Project and (2) establishes the maximum amount of federal assistance for the project. *See* 49 U.S.C. §§ 5309(k)(2)(C)(ii) (FFGA establishes maximum amount of federal funding), 5309(k)(2)(D)(i) (FFGA commits the United States to financial support, so long as the Project complies with the Agreement).

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[25] Of course, FTA would remain free to take Project-related actions which do not require a valid ROD. *See City of S. Pasadena*, 56 F.Supp. 2d at 1147 (allowing federal agency to proceed with actions not requiring a valid ROD).

[26] Upon hearing of the FTA's decision to enter the FFGA, Plaintiffs' counsel contacted counsel for the Federal Defendants and asked (1) whether that decision had been based on supplemental Section 4(f) or NEPA analyses and (2) whether an additional Administrative Record would be prepared. Adams Dec. ¶ 12. The Federal Defendants responded that the decision to enter the FFGA was based on the FTA's January, 2010 ROD and that no additional Administrative Record would be prepared. *Id*. ¶ 12, Ex. 12. Plaintiffs' counsel attempted to clarify whether the decision to enter the FFGA was based *solely* on the January, 2011 ROD, but received no response. *Id*. Under these circumstances, Plaintiffs assume that the FTA decided to proceed with an FFGA without completing additional administrative processes (despite this

Both of these aspects of an FFGA are likely to prejudice the reconsideration process called for in the Court's November 1 Order. For example, by locking into place a maximum amount of federal funding, an FFGA would effectively preclude federal support for alternatives to the Project (such as a downtown tunnel) which may be more costly, but nonetheless prudent. As the Fourth Circuit held in *Arlington Coalition on Transportation v. Volpe*:

> investment of resources…in the proposed route would render alteration or abandonment of the proposed route increasingly costly and, therefore, increasingly unwise. If [defendants] were thus allowed to limit their options during their reconsideration … [the] reconsideration would be a hollow gesture.

Arlington Coalition, 458 F.2d at 1327 (4th Cir. 1972). Likewise, by declaring federal financial support for ***this*** version of the Project — rather than, say, a version that avoids TCPs or is re-routed away from Mother Waldron Park — an FFGA would make a sham of the reconsideration of those resources ordered by this Court. *Id*. at 1329; *see also Bair v. Cal. Dep't of Transp.*, 2011 U.S. Dist. LEXIS 72295, *24 (N.D. Cal. 2011) (enjoining pre-construction activities requiring a commitment to a certain course of action).

Accordingly, Plaintiffs respectfully request that in prohibiting the FTA from relying on the ROD until such time as Section 4(f) has been satisfied, this

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Court's Order).

Court explicitly provide that the FTA (1) must withdraw its November 19 notice to Congress and (2) shall not finalize an FFGA for the Project until Section 4(f) compliance is complete. There is no legal basis for FTA to commit $1.55 billion in taxpayer funds to a project which has just been found to violate Section 4(f). 49 U.S.C. § 303(c); 23 C.F.R. § 774.3(a); *Monroe County*, 472 F.2d at 703 ("It defies reason to think that the federal government should obligate itself to a project which has not yet complied with federal law"). And there is no equitable reason to allow Defendants to escape a temporary, narrowly-tailored equitable remedy by presenting the Court with evidence that the Project has become a *fait accompli*. *See Sierra Club v. U. S. Dep't of Transp.*, 664 F.Supp. 1324, 134-41 (N.D. Cal. 1987) (setting aside federal funding agreement entered immediately prior to hearing on injunctive relief).

Defendants may suggest that *North Idaho Community Action Network v. Department of Transportation* allows them to continue relying on the entire ROD. *See, e.g.*, City Reply In Support Of Motion For Summary Judgment (Doc. 159) ("City Reply") at 44-45 (citing *North Idaho*); Intervenor Defendants' Reply Memorandum (Doc. 158) ("Int. Reply") at 32 (same). The Court should reject any such suggestion.

In *North Idaho*, the Ninth Circuit allowed the Department of Transportation to proceed with construction on the first phase of a highway

project (presumably, but not explicitly, on the basis of an pre-existing ROD) while the agency simultaneously remedied §4(f) violations affecting the highway's three subsequent phases. *N. Idaho*, 545 F.3d 1147, 1160-61 (9th Cir. 2008). That remedy was explicitly based on two "unique facts." *Id.* at 1160 ("On the unique facts of this case…"). First, all parties to the case agreed that 4(f) had been satisfied with respect to the first phase of the highway project. *Id*. at 1160 ("All parties agree that the §4(f) evaluation has been completed with respect to the Sand Creek Byway phase of the Project"). Second, the first phase of the highway project had independent viability and would independently meet many of the objectives of the complete four-phase project. *Id*. ("The Sand Creek Byway has independent viability, beginning and ending at points on existing US-95, and [] will accomplish many goals of the overall [p]roject").

Neither one of the "unique facts" of *North Idaho* is present in this case. *See id.* at 1160 ("unique facts"). First, Plaintiffs dispute that the FTA and the City have fully and properly complied with Section 4(f) for the first phase of the rail Project. Second, there is no evidence that the first phase of the rail line has independent utility or would independently meet "many of the objectives" of the Project. On the contrary, the City and the FTA have defined the full rail route (from East Kapolei to Ala Moana Center) as the Project's "minimum

operable segment." AR 000855 at 001426. Therefore, *North Idaho* does not apply here.

c) FTA Must Comply With The Relevant Statutory And Regulatory Mechanisms For Supplementing Its Analysis

Plaintiffs respectfully submit that the FTA's efforts to remedy its violations of §4(f) should proceed in a manner consistent with the requirements governing supplemental environmental review and analysis. *See* 40 C.F.R. § 1506.1. This Court has already pointed to the prospect that a Supplemental EIS may be necessary; it goes without saying that any such document must comply with all applicable regulatory requirements. *See* Order at 12, 20, 27; 40 C.F.R. §§ 1500.1(b), 1502.2(g), 1502.9(c)(4), 1508.3, 1503.1, 1503.4, 1505.2; *see also* section I.B, *supra.* Likewise, once its reconsideration is complete, the FTA must supplement (or amend) its ROD to reflect its further review of Mother Waldron Park, TCPs, and the alternative of a tunnel beneath Beretania Street; that process should also comply with all applicable requirements. *See* 40 C.F.R. § 1505.2 (requirements for ROD); section I.B, *supra* (discussion).

2. Scope Of Requested Injunctive Relief Against The City Defendants

The Project will be built and implemented by the City rather than the FTA. As explained above, the City has indicated that it plans to continue implementing the Project, regardless of the Court's November 1 Order. There

record also shows that the City has previously ignored its obligation to remedy environmental violations. For example, one FTA employee warned his colleagues that "all should remain cognizant " of the City's "willingness to deceive the FTA without remorse." AR 151149. In particular, he noted the City's "defiance of direct FTA requests to develop a supplemental NEPA document for project changes" and the City's "start of construction without authority." *Id*. Thus, even if relevant portions of the FTA's ROD are set aside, there is a likelihood that the City will take actions resulting in irreparable environmental harm to Mother Waldron Park, TCPs, and/or the area that would be avoided by a tunnel beneath Beretania Street. Therefore, a narrowly-tailored injunction to protect those resources is necessary.

Plaintiffs respectfully submit that such an injunction should have the following scope:

- Mother Waldron Park: The City shall not take any Project-related action (1) affecting the physical environment within 500 feet of Mother Waldron Park or (2) otherwise affecting the feasibility or prudence of any alternative to the potential use of Mother Waldron Park.
- TCPs: The City shall not (1) take any Project-related action affecting the physical environment (a) in section 4 of the Project (extending from the proposed Middle Street Transit Center to Ala Moana Center)

or (b) within 500 feet of the portion of the rail line between the proposed East Kapolei rail station and the proposed Hoopili station (an area including those two proposed station areas) and/or (2) take any Project-related action affecting the feasibility or prudence of any alternative to the potential use of TCPs in those areas.

- Beretania Tunnel Alternative: The City shall not take any Project-related action (1) affecting the physical environment within 500 feet of any §4(f) resource that would be avoided by a tunnel beneath Beretania Street (including the Chinatown Historic District and the Dillingham Transportation Building) or (2) affecting the feasibility or prudence of such an alternative.

For the record, Plaintiffs do not intend this injunction to prevent the City or the FTA from undertaking any task necessary for their reconsideration process and/or their compliance with state law (*e.g.,* TCP research, archaeological studies, feasibility studies, etc.).

This injunction must remain in place while the case is remanded for reconsideration consistent with the Court's Order. Although Defendants' reconsideration will ultimately require them to exercise discretion, the procedures for supplementing the EIS and ROD (set out *supra*) delineate the process they must follow.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF

Under the Declaratory Judgment Act, "any court of the United States may declare [] rights and other legal relations…whether or not further relief is or could be sought." 28 U.S.C. § 2201; *see also Green v. Mansour*, 474 U.S. 64, 72 (1985). The Ninth Circuit has found that declaratory relief is proper where "there is a substantial controversy between parties having adverse interest, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Scott v. Pasadena Unified School District*, 306 F.3d 646, 658 (9th Cir. 2002).

This case presents a substantial controversy between the parties concerning the actions Defendants must take in order to comply with environmental laws applicable to the Project. As explained above, Defendants plan to implement the Project (regardless of the Court's November 1 Order). Therefore, the controversy has "sufficient immediacy and reality" to warrant relief. *See Scott*, 306 F.3d at 658.[27]

Accordingly, Plaintiffs respectfully request a declaratory judgment that (1) the FTA's January, 2011 ROD does not meet the requirements of Section 4(f); (2) before taking any action that requires a valid ROD, the Defendants

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[27] In *Green*, the Supreme Court suggested that equitable factors may also play a role in the issuance of declaratory relief. *See Green*, 474 U.S at 72. For the reasons set forth above, the equities of this case favor Plaintiffs.

must complete the reconsideration mandated in the Court's November 1 Order; (3) Defendants' reconsideration must follow federal requirements governing supplemental environmental information (discussed *supra*); and (4) in the interim, Defendants shall not take any action that would prejudice their reconsideration.

Respectfully submitted,

Dated: November 30, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. **PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
2. **PLAINTIFFS' UNOPPOSED REQUEST FOR RELIEF FROM LOCAL RULE 7.5**
3. **[PROPOSED] ORDER GRANTING PLAINTIFFS' UNOPPOSED REQUEST FOR RELIEF FROM LOCAL RULE 7.5**
4. **DECLARATION OF MATTHEW ADAMS IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
5. **DECLARATION OF DAVID KIMO FRANKEL IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
6. **DECLARATION OF WALTER MEHEULA HEEN IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
7. **DECLARATION OF MICHAEL KUMUKAUOHA LEE IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
8. **DECLARATION OF MICHELLE MATSON IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**
9. **DECLARATION OF CLIFF SLATER IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF**

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DATED: November 30, 2012

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