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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

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| HONOLULU TRAFFIC.COM, *et al*.,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL TRANSIT ADMINISTRATION, *et al*.,<br><br>Defendants. | Case No. 1:11-cv-00307 AWT<br><br>FEDERAL DEFENDANTS' REMEDY BRIEF<br><br>Date: December 12, 2012<br><br>Time: 10:00 a.m.<br><br>Hon. A. Wallace Tashima |

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Pursuant to the Court's Order on Cross-Motions for Summary Judgment ("SJ Order"), ECF No. 182 (Nov. 1, 2012), and Scheduling Order Re Remedy, ECF No. 183, the Federal Defendants submit this brief "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." SJ Order at 45. As explained below, the Federal Defendants join in the separate brief and proposed order submitted by City and County of Honolulu Defendants ("the City").[1] For the reasons set forth below and in the City's brief, the Court should neither vacate the Record of Decision ("ROD") in this case, nor issue an injunction to halt work on the Honolulu High-Capacity Transit Corridor Project ("Project") pending Defendants' compliance with the Court's SJ Order. Instead, the Court should adopt the form of proposed order submitted by the Defendants and allow work to proceed as provided therein.

[1] Where context permits, the Federal and City Defendants are referred to collectively as "Defendants."

# I. OVERVIEW

## A. The Court's Decision

In its SJ Order, the Court ruled in favor of the Defendants on all of Plaintiffs' claims brought under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, and Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f. SJ Order at 29–44. The Court also ruled in Defendants' favor on most of Plaintiffs' claims under Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303. Specifically, the Court held that the Defendants made a "reasonable and good faith effort" to identify potential underground historic properties, SJ Order at 4–10; properly found no "constructive use" of three of the four historic sites at issue, *id*. at 12–19; properly rejected most of the alternatives advanced by Plaintiffs, because they did not meet the Project's "purpose and need" or were otherwise "infeasible" or "imprudent," *id*. at 21–25, 27–28; and properly considered "all possible planning," including appropriate mitigation measures, *id*. at 28–29.

In Plaintiffs' favor, the Court ruled *only* (1) that Defendants improperly deferred the identification and consideration of above-ground Traditional Cultural Properties ("TCPs"), other than the Chinatown District, and accordingly must supplement the analysis in the ROD and may need to perform additional NEPA analysis, *id*. at 10–12; (2) that Defendants must reconsider their determination that

the Project would not constructively use Mother Waldron Park and, if a constructive use determination is made, must consider prudent and feasible alternatives and appropriate mitigation measures, supplementing the ROD and Final Environmental Impact Statement ("FEIS") as necessary, *id*. at 19–21; and (3) that Defendants must reconsider the viability of the Beretania Street Tunnel Alternative as a prudent and feasible alternative to the downtown portion of the Project alignment, reissuing the ROD and FEIS if necessary, *id*. at 25–27.

As further discussed in the City's brief, all of the analysis that the Court has directed the Defendants to conduct may be performed while work on unaffected portions of the Project continues. Accordingly, compliance with the Court's SJ Order does not require that any injunction issue. As explained below, such a result is consistent with federal law and regulations and would best serve the public interest.

B. Legal Standard for Injunctive Relief

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010); *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to

grant an injunction for every violation of law.").

> [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.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), *quoted in Monsanto*, 130 S. Ct. at 2756; *see also Winter*, 555 U.S. at 20 (similar standard for preliminary injunction). Under this standard, "[i]t 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 that an injunction *should* issue." *Monsanto*, 130 S. Ct. at 2757 (emphasis added); *id*. at 2760 ("[A]n injunction should only issue if it is "needed to guard against any present or imminent risk of likely irreparable harm.").

Further, a finding of injury does not inexorably flow from an underlying violation of law, even in the context of environmental claims. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (rejecting presumption of injury as "contrary to traditional equitable principles"); *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 844 n.30 (9th Cir. 2007) (rejecting dissent's contention that "a NEPA violation requires an injunction prohibiting all action pending NEPA

compliance" as a rule that "would run afoul of Supreme Court precedent and [Ninth Circuit] precedent"); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124–25 (9th Cir. 2005) (acknowledging that "there is no presumption of irreparable harm in procedural violations of environmental statutes"). Instead, to secure injunctive relief, "the plaintiff must establish an immediate injury in the absence of injunctive relief, and, in so doing, 'conduct[] a proper analysis of the nexus between the challenged procedure and environmental injury.'" *Ctr. for Biological Diversity v. Provencio*, No. CV 10-330 TUC AWT, slip op. at 7 (D. Ariz. Sept. 28, 2012) (Tashima, J.) (quoting *Save Our Sonoran*, 408 F.3d at 1125).[2]

Finally, while an environmental plaintiff must demonstrate injury before an injunction may issue, proof of injury by itself is insufficient to secure such relief.

> Even where plaintiff has shown the requisite likelihood of irreparable harm, the court must weigh the impact of an injunction on the public interest, and balance the relative hardships between plaintiff and defendants. If irreparable environmental injury "is sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. *This is not inexorably true*, however, and the court remains obligated to balance all of the competing interests at stake. "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). Moreover, although "preserving environmental resources is certainly in the public's interest," protecting the "local economy" and "preventing job

[2] The Court's opinion in *Provencio* is attached to the accompanying Declaration of David B. Glazer.

> loss" are in the public's interest as well. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *see Carlton*, 626 F.3d at 475.

*Ctr. for Biological Diversity*, slip op. at 9 (emphasis added).

## II. ARGUMENT

### A. Vacatur is Not Warranted in This Case

To the extent that Plaintiffs believe that the ROD must be vacated pending compliance with the Court's SJ Order, that relief is not appropriate in this case. Whether an agency decision should be vacated depends upon whether the deficiencies identified by the reviewing court may be corrected while the challenged decision is left in place and, conversely, whether vacating the decision pending further analysis would be unduly disruptive. *See California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (leaving challenged rule in place pending remand); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755–56 (D.C. Cir. 2002) (whether vacatur is appropriate depends on seriousness of agency decision's deficiencies weighed against potentially disruptive effects of vacatur); *see also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080–82 (9th Cir. 2010) (leases may be deemed capable of extension after compliance with NEPA, rather than being invalidated). As explained in Sections C and D below, and in the City's separate brief, the balance of harms and the public interest favor leaving the ROD in place pending compliance with the Court's SJ Order.

B. An Order Directing How the Federal Defendants Should Comply with the Court's Order Would Not Be Appropriate

As outlined above, the Court's Order sets forth the direction that should guide the Federal Defendants' further analysis, consistent with the Court's decision. To the extent that the Plaintiffs may argue that a further order of Court should specifically guide or constrain the Defendants' analysis on remand, such relief would be inappropriate.

Where issues requiring further analysis concern how the Agencies should address procedural requirements of a statute, such as reconsidering certain evidence and supplementing material in the administrative record, the manner in which the agency satisfies those requirements on remand should be left to the Agency's discretion. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1178–80 (9th Cir. 2008) (allowing the agency on remand to determine whether to prepare an Environmental Assessment or Environmental Impact Statement); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2007) (amended 2008) (remand order should ordinarily not "direct the substance of the agencies' actions on remand"); *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994) (district court on remand properly left "substance and manner" of achieving compliance with statutory directive up to agency). Such limitations are consistent with the general principles governing

judicial oversight of agency action under the Administrative Procedure Act:

> [I]n the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency."

*Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947)). Indeed, the imposition on remand of procedural requirements such as deadlines is usually limited to those cases in which the challenged action was the agency's failure to comply with a statutory deadline, *see, e.g.*, *Alaska Ctr. for the Env't v. Browner*, 20 F.3d at 986 (time tables imposed on remand where agency failed to comply with statutory deadlines in Clean Water Act); *Public Citizen, Inc. v. Mukasey*, No. C 08–0833 MHP, 2008 WL 4532540, at *10–11 (N.D. Cal. Oct. 9, 2008) (deadlines imposed suit to compel action under National Motor Vehicle Title Information System), or where the course of prior litigation reveals special circumstances justifying the imposition of time constraints or other procedural requirements, *see e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 524 F.3d at 936–38 (imposing deadlines and reporting requirements given course of earlier

remands).

In this case, there is no "substantial justification" for any departure from the presumptive rule that a reviewing court on remand should not impose any "methods, procedures, and time dimension" on the Defendants' efforts to address the Court's concerns. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. at 333.

C. Allowing Defendants to Proceed with the Project Pending Compliance with the Court's Order is Consistent with Federal Law and Regulations

Department of Transportation ("DOT") regulations implementing Section 4(f) recognize that, in some cases, additional Section 4(f) analysis may be required for a project. 23 C.F.R. § 774.9(c). However, if a new Section 4(f) determination is to be made, "any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter [DOT NEPA regulations, discussed below]." *Id*. § 774.9(d).

Similarly, the DOT NEPA regulations recognize that, in some circumstances, new information may come to light in the course of project development that may require supplementation of the agency's analysis. 23 C.F.R. § 771.130(a) (discussing when NEPA documentation may need supplementation). Where potentially new impacts not previously analyzed are of uncertain significance, the

agency may conduct an Environmental Assessment ("EA")[3] "to assess the impacts of the changes, new information, or new circumstances" and to determine whether supplementation is, in fact, necessary.[4] *Id*. § 771.130(c). Where supplementation is deemed necessary "to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project[,]" the preparation of a supplemental document "shall not necessarily":

(1) Prevent the granting of new approvals;

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[3] Under NEPA's regulations, an EA is a "concise public document" that "[s]hall include brief discussions of the need for the proposal, of alternatives . . . , of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(a), (b). If, after preparing an EA, the agency finds that the proposed action would have no significant impact, the agency issues a Finding of No Significant Impact. *Id*. Otherwise, the agency proceeds to an EIS. The CEQ regulations further encourage agencies to incorporate material in their NEPA analysis by reference, in order to reduce paperwork. 40 C.F.R. § 1502.21. That approach is consistent with recent legislative authorization directing agencies to streamline NEPA documentation. *See* Pub. L. No. 112-141, Div. A, tit. I, subtit. C, § 1319, 126 Stat. 405, 551 (2012), *codified at* 42 U.S.C. § 4332a.

[4] Consistent with the Section 4(f) regulations at 23 C.F.R. § 774.9(b), the Defendants documented potential impacts on historic properties and compliance with Section 4(f) in the FEIS, 4:AR00000501–51 (Visual Effects), *id*. at 554–64 (Noise and Vibration), *id*. at 617–37 (Archeological, Cultural, and Historic Resources), *id*. at 680–752 (Section 4(f) Evaluation), as well as in extensive supporting reports, 169:AR00037883, at 37883–8097 (Historic Resources Technical Report); 177:AR00039555, at 39555–40206 (Historic Effects Report). Similarly, supplemental NEPA analysis will, as needed, include the documentation necessary to support new Section 4(f) determinations. *Id*. § 774.9(d).

> (2) Require the withdrawal of previous approvals; or
>
> (3) Require the suspension of project activities; [sic] for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

*Id*. § 771.130(f).

In this case, as noted above, the focused direction that the Court has provided the Defendants requires a limited degree of further analysis, narrowed to specific sites or locations (Mother Waldron Park, or the downtown portion of the alignment relevant to the Beretania Tunnel Alternative), or to particular areas of documentation (identification of above-ground TCPs, already completed for Phases 1 through 3 of the Project). And as discussed in the City's separate remedy brief, the City should be allowed to proceed with Project activities in Phases 1 through 3, which remain unaffected by the Defendants' supplemental analysis, without prejudicing the Plaintiffs. Accordingly, there is no reason why, under 23 C.F.R. §§ 771.130(f)(3) and 774.9(d), those activities would need to be halted at this time. Conversely, as documented by the City, suspension of those activities would have immediate and serious consequences for the City and for the Project as a whole.

D. Allowing Defendants to Proceed with the Project Pending Compliance with the Court's Order Furthers the Public Interest

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312. The public interest is thus an important factor to weigh in deciding whether courts should grant injunctive relief. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("[I]f . . . the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) ("[The court] will not grant a preliminary injunction . . . unless th[e] public interests [favoring an injunction] outweigh other public interests that cut in favor of *not* issuing the injunction.").

Congress has declared that the federal encouragement of transit projects, such as the City's Project, is in the interest of the United States. The statute authorizing New Starts program under which the City has sought Project funding specifically recites that

> [i]t is in the interest of the United States, including its economic interest, to foster the development and revitalization of public transportation systems that —
>
> (1) maximize the safe, secure, and efficient mobility of individuals;
>
> (2) minimize environmental impacts; and

> (3) minimize transportation-related fuel consumption and reliance on foreign oil.

49 U.S.C. § 5301(a); *see also* SJ Order at 31 (discussing goals of New Starts program).

Given that Defendants are able to comply with the Court's Order while continuing to work on unaffected portions of the Project, it would be contrary to the congressional objectives underlying the New Starts program and, therefore, to the public interest, to unnecessarily issue a broader injunction. Accordingly, no injunction halting work on unaffected portions of the Project should issue pending the further, focused analysis that the Court has directed the Defendants to perform.

## III. CONCLUSION

For the reasons set forth above, the Federal Defendants respectfully request that the Court not vacate the ROD or issue any injunction pending the Defendants' compliance with the Court's Order on summary judgment.

Respectfully submitted,

DATED: November 30, 2012

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.5

I hereby certify that the foregoing document was prepared with Microsoft Word using Times New Roman 14-point proportionally spaced font. The document contains 3,035 words, including headings, quotations, and footnotes, but excluding the caption pages, tables, this Certificate of Compliance, the Certificate of Service, and signature blocks. That word count was given by the word-count feature of the Microsoft Word program with which this document was created.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 30, 2012 /s/*David B. Glazer*
David B. Glazer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 30, 20102, a true and correct copy of the foregoing was served on the following through the Court's ECF system:

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