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THE CITY AND COUNTY OF HONOLULU and
WAYNE YOSHIOKA, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

IN THE 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,

vs.

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

Defendants, and

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

Intervenors Defendants.

Civil No: 11-00307 AWT

MEMORANDUM OF CITY DEFENDANTS IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF (ECF NO. 188);
DECLARATION OF MATTHEW MCDERMOTT; EXHIBITS 16-19; SUPPLEMENTAL DECLARATION OF FAITH MIYAMOTO; EXHIBITS 20-30; EX PARTE APPLICATION FOR ORDER TO SHORTEN TIME; [PROPOSED] ORDER; DECLARATION OF ROBERT D. THORNTON; CERTIFICATE OF COMPLIANCE; AND CERTIFICATE OF SERVICE

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

Date Action Filed: May 12, 2011
Hearing Date: December 12, 2012
Time: 10:00 a.m.
Judge: The Honorable
A. Wallace Tashima

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ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
APA	Administrative Procedure Act
APE	Area of Potential Effect
AR	Administrative Record
City	City and County of Honolulu
Final EIS	Final Environmental Impact Statement
FTA	Federal Transit Administration
Grant Agreement	Full Funding Grant Agreement
NEPA	National Environmental Policy Act
Pls.' Req.	Plaintiffs' Request for Injunctive and Declaratory Relief ("Pls.' Req.") dated November 30, 2012 (ECF No. 188)
Project	Honolulu High-Capacity Transit Corridor Project
ROD	Record of Decision
Section 4(f) or 4(f)	49 U.S.C. § 303
SJ Order	Court's Order on Cross-Motions for Summary Judgment (ECF No. 182).
TCPs	Traditional Cultural Properties

I. INTRODUCTION

The City and County of Honolulu Defendants ("City") submit this Opposition in response to Plaintiffs' Request for Injunctive and Declaratory Relief ("Pls.' Req.") dated November 30, 2012 (ECF No. 188). While Plaintiffs purport to propose a limited remedy, the order they propose would have the legal and practical impact of stopping ***all*** design and construction work on the Project, block the imminent approval of the Project funding agreement, prevent the use of $200 million in federal funds allocated to the Project for Fiscal Year 2013, jeopardize the $1.4 billion in future federal funding, and put thousands of people out of work.

Plaintiffs purport to seek an injunction only affecting portions of the Project. But Plaintiffs then request that the Court issue a judgment that "partially" vacates the Federal Transit Administration's ("FTA") Record of Decision ("ROD"). However, completion of final design, right-of-way acquisition, and construction work, ***all*** require a final agency action, in this case the ROD. Thus, Plaintiffs' proposed "partial" vacatur in fact amounts to nothing less than a complete injunction of all Project activities. Plaintiffs' proposed remedy is flatly inconsistent with U.S. Supreme Court precedent governing equitable relief in Administrative Procedure Act ("APA") cases and with the FTA's regulations governing supplemental environmental analysis of transit projects. *Monsanto Co. v. Geertson Seed Farms,* ___ U.S. ___, 130 S.Ct. 2743 (2010); 23 C.F.R. § 771.130(f).

In contrast, Defendants' Proposed Remedy Order (ECF No. 189-19) would allow the design work to continue on the Project, would permit construction to continue in Phases 1 through 3, and would limit any injunction to Phase 4 pending compliance with the Court's Order on Cross-Motions for Summary Judgment ("SJ Order") (ECF No. 182). It focuses on the specific findings of the Court in its SJ Order. Defendants' Proposed Remedy Order ensures no environmental harm in the area which will be the subject of further analysis.

II. PLAINTIFFS' PROPOSED REMEDY IS OVERBROAD AND INCONSISTENT WITH THE RULES GOVERNING EQUITABLE RELIEF

The Court's SJ Order granted Plaintiffs' Motion for Summary Judgment with respect to three discrete Section 4(f) issues. SJ Order at 12, 20-21, 27. Thus, any equitable remedy granted by the Court should be limited to those issues. Importantly, the Court's SJ Order rejected Plaintiffs' NEPA and National Historic Preservation Act claims in their entirety. Thus, the FTA should be able to take actions in reliance on the Final EIS.

Plaintiffs' proposed remedy violates the principles established by the Supreme Court. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[c]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." (citation omitted)); *Monsanto*, 130 S.Ct. at 2757 ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue;

rather, a court must determine that an injunction *should* issue under the traditional four-factor test" (emphasis in original).

A. <u>Vacatur Is Not Appropriate Here</u>

Plaintiffs overreach in requesting that the Court's remedy include vacatur of the ROD. *See* Pls.' Req. at 39. Like an injunction, vacatur is an equitable remedy. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (applying equitable principles to decision whether to vacate improperly promulgated regulation). In fashioning an equitable remedy, courts are not required to vacate agency decisions upon remand to the agency for further proceedings. *Massachusetts v. U.S. Nuclear Regulatory Comm'n*, 924 F.2d 311, 336 (D.C. Cir. 1991) (allowing power plant license to remain in effect pending remand). Remand without vacatur is particularly appropriate where vacatur, as here, will cause the loss of substantial federal funds. *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 152-53 (D.C. Cir. 1993) (declining to vacate rule because of potential loss of $3.8 million).

Plaintiffs' citation to *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58 (D.D.C. 2010) (*see* Pls.' Req. at 39, n. 23) does not support their conclusion that partial vacatur of the ROD is warranted. First, the court there suggests precisely the opposite is the norm, noting that the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Id*. at 76 (quotations omitted). In any event, Plaintiffs neglected to

inform the Court that the D.C. Circuit reversed the district court decision on the merits that underlay the district court's remedy determination. The D.C. Circuit noted that it would be "suitable" for the court on remand to modify the remedy. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1157 (D.C. Cir. 2011). Continuing this pattern, Plaintiffs cite *Sierra Club v. United States Department of Transportation*, 664 F.Supp. 1324 (N.D. Cal. 1987) without informing the court that the Ninth Circuit reversed on the merits. *Sierra Club v. Dep't of Transp.,* 948 F.2d 568, 574 (9th Cir. 1991).

Plaintiffs' reliance on the Supreme Court's holding in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-414 (1971) is wholly inapplicable to the determination of whether vacatur is appropriate. The quoted language Plaintiffs cite in support of their proposition (*see* Pls.' Req. at 39) is found in the Court's discussion of the standard of review in APA cases, and not in a discussion of fashioning the appropriate equitable remedy. *See id. Overton Park* did ***not*** examine the issue of the appropriateness of vacatur of an agency decision pending additional review. *See id.* at 413-20.

B. Suspension of All Activities Pending Completion of the ROD Will Unduly Prejudice Defendants

Plaintiffs' proposed remedy is a transparent attempt to prevent the imminent federal funding for the Project – funding that is essential to complete final design, acquire rights-of-way and continue construction on Phases 1 through 3. Plaintiffs

state that the FTA must be prevented from approving the Full Funding Grant Agreement ("Grant Agreement") pending compliance with the Court's SJ Order with respect to the three specific findings requiring additional analysis under Section 4(f). Plaintiffs assert that absent this action, the analysis would be biased by the presence of the signed Agreement, essentially because no additional FTA funding would be available should the Project design need to change because of the additional Section 4(f) analysis. Plaintiffs' proposed remedy would effectively enjoin any work on the entire Project – including work that has no relation to the remaining three Section 4(f) issues in Phase 4.

A Grant Agreement is the vehicle through which the FTA provides funding for a project. 49 U.S.C. § 5309(d)(1). The City and FTA have completed many years of work needed to be in a position to execute the Grant Agreement. As Plaintiffs' acknowledge, as required by law, FTA has notified Congress of its intent to sign the Agreement. The FTA has allocated $200 million in federal funds to the Project for Fiscal Year 2013. Supplemental Declaration of Faith Miyamoto ("Miyamoto Supp. Decl."), ¶ 31; Ex. 29. Once the Grant Agreement is signed, the Project will be eligible to receive federal funding – including significant funding for design, right-of-way acquisition and construction in phases of the Project that are not implicated by the Court's order. For example, the scheduled federal funds will pay for about one-third of the costs of final design and engineering and one-third of the right-of-way costs of the Project. Miyamoto Supp. Decl., ¶ 30; Ex. 28.

Absent the Grant Agreement, the Project will not be able to receive the $200 million scheduled to be provided to the Project in Fiscal Year 2013 or the $250 million scheduled to be provided in Fiscal Year 2014. Declaration of Daniel A Grabauskas ("Grabauskas Decl."), ¶24.

The Grant Agreement establishes the level of federal funding that is made available for the Project, in this case $1.55 billion. That amount is established not by formula, but only after a competitive process applying the criteria established by Congress. 49 U.S.C. § 5309(d).

There is very intense competition for the available federal funds for new transit projects. The FTA awards funds for new transit projects based on the rating of each project to meet the criteria established by Congress and the readiness of the project to use the federal funds. *See*, 77 Fed.Reg. 63,670, 64,687 (Oct. 12, 2012); *see also* FTA Circular 9300.1B, *Capital Investment Program Guidance and Application Instructions* available at www.fta.dot.gov.

The Project successfully competed for federal Fixed Guideway funds. Indeed, the Project is among the Obama Administration's highest transportation priorities. The Administration recommended that Congress appropriate $250 million for the Project in Fiscal Year 2013 – the largest single appropriation request for any transit project in the nation. Miyamoto Suppl. Decl., ¶ 32; Ex. 30 [FY 2013 Annual Report on Funding Recommendations]. The recently-enacted two-year transportation funding bill allocates a total of $1.9 billion to new transit

projects under the Fixed Guideway Capital Investment Program. Pub. L. No. 112-141, § 20028, 126 Stat. 145, 726 (2012), codified at 49 U.S.C. § 5338(g). Plaintiffs' cavalier suggestion that vacating the ROD and enjoining construction in Phases 1 through 3 would not have an adverse impact is belied by the realities of severe limitations on federal funding and the intense competition for transit funding.

The City has worked for many years to advance the Project so that it will qualify for federal funding. FTA has advised Congress that it intends to enter into the Grant Agreement and to allocate $200 million to the Project in Fiscal Year 2013. Miyamoto Supp. Decl., ¶ 31; Ex. 29. If the Court grants Plaintiffs' requested relief, the Project will be set back for an indefinite amount of time, with very adverse economic and environmental consequences for the residents of Hawai'i.

Setting aside the ROD would result in the FTA not being able to approve the Grant Agreement. There is no guarantee of funding levels for the Fixed Guideway Capital Grant Program after Fiscal Year 2014 (September 30, 2014), the last year in which funds are authorized to be appropriated pursuant to the current transportation authorizing legislation. Pub. L. No. 112-141, § 20028, 126 Stat. 145, 726 (2012), codified at 49 U.S.C. § 5338.

Should the Court adopt the Plaintiffs' proposed remedy with respect to vacatur of the ROD, the City would not be able to seek a new Grant Agreement

until after completion of the additional studies required by the Court's SJ Order. Moreover, the level of funding that might be available to the City in the future is uncertain. If the FTA is not able to allocate funds to the Project in Fiscal Year 2013, the funds will likely be made available to other projects. The effect of enjoining the issuance of the Agreement would be to place Honolulu in this disadvantaged position in spite of the massive investment of time, energy, local financial commitments and public support dedicated to the Project to date.

Plaintiffs also argue that once the Grant Agreement is executed the amount of federal funding for the Project is fixed, and thus execution of the Agreement should await the outcome of the additional studies ordered by the Court in case the scope of the Project changes. Pls.' Req. at 42.

The terms of the Grant Agreement itself provide three alternatives should the Project cost increase. The Agreement contemplates that, in some circumstances, the additional costs may be borne by the grantee. Miyamoto Supp. Decl., ¶ 30; Ex. 28 (Section 10 of the Full Funding Grant Agreement.)[1] Second, the City remains free to seek other sources of federal funding for which the Project might be eligible. *Id.* (Section 9 of the Full Funding Grant Agreement.) Third, the terms of the Agreement itself provide for amendment, which would be required if the

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[1]A copy of the proposed Grant Agreement is attached as Exhibit 28 to the Supplemental Declaration of Faith Miyamoto.

City wished to increase the amount of federal funds available under the Agreement. *Id.* (Section 7(b) of the Full Funding Grant Agreement.)[2]

In any case, there is no reason to assume that FTA's analysis of alternatives under Section 4(f) ordered by the Court would be biased by any change in Project cost. Should FTA decide that the Project must be modified as a result of the analysis ordered by the Court, that would become a condition of all further federal funding for the Project, whether or not additional federal funds are made available to the City. The Court has already ruled that a cost increase of $650 million for the King Street Tunnel alternative was a lawful basis for the FTA to conclude that the alternative was not feasible and prudent under Section 4(f). SJ Order at 25.

The City's calculations of delays and cost increases assumed that engineering and design, geotechnical investigations, and right-of-way acquisitions and relocations would continue in all phases. Decl. of Thomas J. Willoughby ("Willoughby Decl."), ¶11(e). The practical effect of a loss of or delay to the Project's federal funding would be an inability to continue this work, additional delays to the Project and very significant additional cost increases. *Id.*

Plaintiffs were fully aware that the FTA authorized the City to commence final design work a year ago. Miyamoto Suppl. Decl., ¶¶ 28-29; Exs. 26-27. Despite this knowledge, Plaintiffs took no steps to enjoin final design of the

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[2] *See also* FTA Circular C 5200.1A, at http://www.fta.dot.gov/12349_4119.html

Project pending resolution of this litigation. Now, they attempt to do so by prohibiting any activities that require a ROD. Such litigation tactics should not be rewarded by the Court, especially where such relief is not necessary to avoid environmental harm.

Plaintiffs argue that it is necessary to enjoin actions that require the ROD to prevent agency momentum on the Project. *Monsanto* makes it clear that fear of agency inertia or of project momentum is not grounds for an injunction. *Monsanto*, 130 S.Ct. at 2757, 2759 ("No such thumb on the scales is warranted." ¶"Nor can the District Court's injunction be justified as a prophylactic measure. . . .").

The Ninth Circuit also discredited the claim that an injunction may be justified by "bureaucratic inertia." *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010) ("[w]hile bureaucratic inertia may be a risk, we presume that agencies will follow the law."); *see also N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) ("Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by the Secretary . . . . We assume the Secretary will comply with the law").

Plaintiffs' requested relief is also directly contrary to FTA's regulations that state that project activities outside of the area addressed by the supplemental analysis may continue during the preparation of a supplemental NEPA document. 23 C.F.R. § 771.130(f). As FTA explained:

> While the 1980 regulation was silent on whether activities in progress under the prior approval should be suspended [when a supplemental EIS is being prepared], it has generally been held that such activities need not be suspended. In addition, it has been held that new approvals outside the scope of the supplemental EIS may be granted while a supplemental EIS is being processed.

See 1987 Amendments to 23 C.F.R. part 771, 52 Fed. Reg. 32,646, 32,657 (Aug. 28, 1987).

Plaintiffs' proposed vacatur of the ROD and preclusion of final design activities pending the completion of the additional Section 4(f) analysis is also contrary to federal law governing final design of new transit projects. Federal law specifically allows for the Project to proceed to the engineering phase "upon completion of activities" under NEPA. 49 U.S.C. § 5309(f). The Court rejected all of Plaintiffs' NEPA claims. *See* SJ Order at 29-44. Thus, continuation of final design work pending the completion of the additional Section 4(f) studies required by the SJ Order complies with federal law.

C. The Court Should Not Enjoin All Project Activities Pending Additional Section 4(f) Reviews

Plaintiffs suggest that prior case law allows for courts to completely suspend project implementation until violations have been cured. *See* Pls.' Req. at 37. All of the cases cited by Plaintiffs predate the decision in *Monsanto Company v. Geertson Seed Farms* and do not reflect the more rigorous injunction standard established by the Supreme Court. Plaintiffs' suggestion that special rules apply to injunctions in environmental cases is no longer the law. Romero-*Barcelo*, 456

U.S. at 313; *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 555 (1987) (rejecting presumption of irreparable injury as a result of violation of Alaska Conservation Act). In very analogous facts, a district court recently denied a motion to enjoin construction of a transit project pending compliance with the court's order because "there are significant public benefits to the . . . Project and the interest of the general public to continue moving forward with the construction . . . of the [Project] outweighs any harm to the public." *St. Paul Branch of the NAACP v. U.S. Dep't of Transp.*, 2012 U.S. Dist. LEXIS 167634, *9 (D. Minn. 2012).

The cases Plaintiffs cite in support of a blanket injunction are also factually inapposite. In *Stop H-3 Association v. Dole*, 740 F.2d 1442 (9th Cir. 1983), the Ninth Circuit enjoined the entire project because of the Federal Highway Administration's failure to consider an alternative that would have constituted a massive realignment of the selected alternative, and the inadequate consideration of the "No Build" alternative. *See id.* at 1450-58. Thus, the additional review contemplated in *Stop H-3 Association* potentially necessitated massive shifts in project alignment or abandonment of the project altogether. That is not the case here, where activities in Phases 1 to 3 will not result in adverse environmental effects or foreclose alternatives in Phase 4 pending the additional Section 4(f) review.

The remaining cases granted injunctions for the entire project for violations where the court determined that the agency violated NEPA because the court determined that the environmental reviews were woefully inadequate or completely absent. *See Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 443 (5th Cir. 1985) (EIS not prepared and Section 4(f) statement "belated and inadequate"); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1024-28 (5th Cir. 1972) (no NEPA or Section 4(f) review of project); *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1334 (no Section 4(f) review of project conducted). Here, however, the Court has granted Defendants summary judgment on all of Plaintiffs' NEPA and National Historic Preservation Act claims. The court found fault with the Section 4(f) analysis of three 4(f) issues – out of the dozens of 4(f) claims asserted in the First Amended Complaint.

Plaintiffs grossly mischaracterize the facts in asserting that prior correspondence with Defendants' counsel confirms "that the City would have the economic and technical wherewithal to implement an equitable remedy." Pls.' Req. at 26. The exchange between counsel occurred in the context of discussion concerning the briefing schedule on the summary judgment motions and whether Plaintiffs intended to seek a ***preliminary*** injunction while the summary judgment motions were pending. In the correspondence dated January 5, 2012, counsel for the City expressly limited the statement to work occurring "on or before ***June 30***,

2012." *See* Decl. of Matthew Adams ("Adams Decl.") ¶ 9, Ex. 8 (emphasis added). Indeed, in subsequent correspondence, the City's counsel informed Plaintiffs that Project activities were commencing that were ***not*** reversible. Adams Decl., ¶ 9, Ex. 9. As the City has documented in its papers, an injunction in the form requested by Plaintiffs will cause enormous harm to the public and will disserve the public interest.

D. Plaintiffs' Unsubstantiated Claims Regarding Adverse Impacts in Phases 1 to 3 Are Without Merit

The Section 4(f) violations at issue here relate to three discrete issues – all within Phase 4. Defendants have completed the evaluation of the effects of the Project on potential above-ground TCPs in Phases 1 through 3 in consultation with the State Historic Preservation Officer and other consulting parties in compliance with Section 4(f) and as provided in the Programmatic Agreement. Miyamoto Decl., ¶ 26. The FTA has determined through this additional review that the Project will not adversely affect any above-ground TCPs in Phases 1 through 3 of the Project. Miyamoto Decl., ¶ 26. The State Historic Preservation Officer reviewed these additional TCP studies for Phases 1 through 3 and concurred with the FTA's determination. Miyamoto Decl., ¶¶ 17, 24.

Relying on the statements of one individual, Michael Kumukauoha Lee, Plaintiffs claim that these additional studies "fail to address the impacts of the Project on (a) the karst cave system and (b) traditional cultural practice of planting

and gathering certain seaweed (or "*limu*") species in an area of section 1 known as Ewa." Pls.' Req. at 17-18.

Plaintiffs' assertion is incorrect. Defendants were aware of concerns raised by Michael Kumukauoha Lee regarding the karst cave system. The FTA and the State Historic Preservation Officer reviewed Mr. Lee's issues and concluded that the Project would not have an adverse effect on any karst cave system or on the collection of seaweed. Miyamoto Decl., ¶¶ 14-18; Exs. 6-9. None of the consulting parties disagreed with the conclusions of the FTA and the State Historic Preservation Officer.[3] Miyamoto Decl., ¶¶ 16-18; Exs. 7-9.

Since June 2011, HART and its contractors have responded to Mr. Lee's issues. This issue is most recently documented in a letter dated April 2, 2012, when Hawaii's State Historic Preservation Officer sent a letter to HART that contained questions about the possibility of encountering water in karst cavern systems that could affect limu gathering areas. Miyamoto Decl., ¶ 14; Ex. 5. On April 12, 2012, HART responded to the State Historic Preservation Officer's concerns. Miyamoto Decl., ¶ 15; Ex. 6. HART noted that the archaeological and

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[3] Moreover, to the extent that the Plaintiffs are attempting to use the map prepared by Matthew McDeremott, the Project's archaeologist, (Exhibit B to the Lee Declaration (ECF No. 188-23) and the second map included within Exhibit 18) as "proof" or to insinuate that (1) karst caverns exist in Honouliuli, (2) they intersect with the Rail Project's alignment and (3) they will be affected by the Rail Project, Mr. McDermott has no knowledge of the existence of any karst cave systems or their locations in Honouliuli. *See* McDermott Declaration at ¶¶ 1-10; Exhibit 16-

geotechnical investigations completed had not encountered any indication of karst caverns in the Project's Area of Potential Effect ("APE"). Miyamoto Decl., ¶ 15; Ex. 6. Based on this information, the State Historic Preservation Officer concurred with the FTA's determination that no potential TCPs in the Honouliuli ahupuaa will be affected by the Project. Miyamoto Decl., ¶ 17; Ex. 8. No Native Hawaiian organization or any of the other consulting parties disagreed with the conclusion of the FTA and the State Historic Preservation Officer that the Project would not have any effect on the karst cave system or practices involving harvesting of seaweed.[4]

Because the additional review and evaluation of the Project's potential effects on above-ground TCPs for Phases 1 and 3 is now complete, the three issues identified in the Court's Summary Judgment Order are limited to Phase 4. *See* Miyamoto Supp. Decl., at ¶¶ 26-27 (stating that the Beretania Street Tunnel alignments begin to veer off from the current Rail Project alignment approximately 6,910 feet from the beginning of Phase 1, and Mother Waldron Park is located approximately 3 miles from the beginning of Phase 4); Exhibit 15 (map of Phase 4).

Plaintiffs new allegations regarding implementation of the Programmatic Agreement are irrelevant to the remedy proceeding and are without merit. The

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18.

[4] Mr. Lee's allegations regarding the purported existence of karst cave systems in the Project area were also considered and rejected by the Hawaii State Land Use

City has responded to amici's assertions regarding implementation of the Programmatic Agreement. Miyamoto Supp. Decl., ¶¶ 21-22; Ex. 23. The City and FTA are implementing the requirements of the Programmatic Agreement in a diligent and responsible fashion.

III. DEFENDANTS' PROPOSED REMEDY ORDER AVOIDS ANY ADVERSE IMPACTS IN PHASE 4

Defendants' Proposed Remedy Order strikes a reasonable balance in fashioning equitable relief to address the Court's SJ Order. It would enjoin Phase 4 activities that may result in environmental harms pending the required additional reviews contemplated under the SJ Order, but it would allow activities in Phases 1 through 3, which have been found to have no adverse environmental effects, to continue. The Proposed Remedy Order would not foreclose Defendants' ability to modify the Project to address potential harms in Phase 4 should such modification be deemed necessary upon completion of the required reviews. This approach minimizes, or eliminates, Plaintiffs' claimed harm, while also minimizing the harm to Defendants and the public resulting from delays associated with the additional reviews.

The facts are clear: Defendants have completed the additional review of above-ground TCPs for Phases 1 through 3 of the Project, and the Hawaii State Historic Preservation Officer has concurred in the determination that the Project

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Commission. Miyamoto Supp. Decl., ¶ 11.

will not adversely affect any TCPs in these Phases. Thus, all environmental reviews for Phases 1 through 3 of the Project have been completed; there is no evidence that the Project will have an adverse affect on TCPs in these phases.

Plaintiffs' attempt to distinguish the Ninth Circuit decision in *North Idaho Community Action Network v. Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008), fails. In *North Idaho*, the Ninth Circuit allowed construction to continue on one phase of a highway project while the Federal Highway Administration completed Section 4(f) studies on certain other phases. *Id.* at 1160-61. As in *North Idaho*, the FTA has completed additional TCP analysis in Phases 1 through 3, and the State Historic Preservation Officer concurred that the Project will have no adverse effect on TCPs in these phases.

The Final EIS notes that construction of the Project would be completed in phases and that, as portions of the Project are completed, they would become operational so that transit benefits, even if limited, could be realized prior to completion of the entire Project. AR1:00000247 at 362. As documented in the Final EIS, the completion of Phases 1 to 3 of the Project will provide Project-related benefits as additional Phase 4 analyses are being completed. *See North Idaho*, 545 F.3d at 1160-61 (allowing phase 1 to continue will accomplish "many goals of the overall Project"). Here the Phase 3 terminus is at a transit center and will provide benefits prior to the completion of Phase 4. Similar to *North Idaho*, Defendants here have demonstrated that no harm will result to the environment for

the first three Project phases, and that these phases will provide benefits pending the additional Section 4(f) analyses in Phase 4.

IV. CONCLUSION

The Project's environmental impacts relevant to the three issues in the SJ Order, if any, are limited to Phase 4 of construction. Environmental reviews for Phases 1 through 3 have been completed, and no adverse effects will result. Thus, any proposed remedy should be limited to Phase 4 of the Project. Plaintiffs' remedy goes too far in seeking to enjoin all work pending a new ROD. Defendants' proposed remedy, enjoining all construction activities in Phase 4 until the Section 4(f) concerns are addressed, strikes the proper balance in crafting an equitable remedy.

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