ROBERT S. PERLMUTTER (State Bar No. 183333)
Perlmutter@smwlaw.com
SARA A. CLARK (State Bar No. 273600)
Clark@smwlaw.com
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816

Attorneys for Plaintiff
CITY OF BEVERLY HILLS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CITY OF BEVERLY HILLS,

Plaintiff,

v.

FEDERAL TRANSIT ADMINISTRATION; K. JANE WILLIAMS, in her official capacity as Administrator of the Federal Transit Administration; EDWARD CARRANZA JR., in his official capacity as Regional Administrator of the Federal Transit Administration's Region IX Office; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary, United States Department of Transportation; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, a public entity; PHILLIP A. WASHINGTON, in his official capacity as Chief Executive Officer of the Los Angeles Metropolitan Transportation Authority,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(to be related to No. CV 12-9861-GW (SSx), CV 13-1144-GW (SSx), CV 13-8609-GW (SSx), CV 13-8621-GW (SSx), CV 16-8390 (SSx), CV 18-0716-GW (SSx))

1. Violation of the National Environmental Policy Act;

2. Violation of Section 4(f) of the Department of Transportation Act;

3. Violation of Section 106 of the National Historic Preservation Act;

4. Violation of the Clean Air Act; and

5. Violation of the Administrative Procedure Act.

INTRODUCTION

1. By this lawsuit, Plaintiff the City of Beverly Hills ("City" or "Plaintiff") challenges the Federal Transit Administration's ("FTA") approval of the Westside Subway Extension Project ("Project"), a subway development located in the cities of Los Angeles and Beverly Hills. This action arises under federal law, including the National Environmental Policy Act (42 U.S.C. § 4321 et seq.), the Department of Transportation Act (including 49 U.S.C. § 303 and 23 U.S.C. § 138), the National Historic Preservation Act (54 U.S.C. § 300101 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq,), and the Administrative Procedure Act (5 U.S.C. § 500 et seq.).

2. Also named as defendants are: K. Jane Williams, in her official capacity as Administrator of the FTA; Edward Carranza Jr., in his official capacity as Regional Administrator, FTA Region IX; the United States Department of Transportation; Elaine L. Chao, in her official capacity as Secretary, United States Department of Transportation; the Los Angeles County Metropolitan Transportation Authority ("Metro," and collectively with the FTA, the "Agencies"); and Phillip A. Washington, in his official capacity as Chief Executive Officer of Metro (collectively, "Defendants")

3. The Project will operate as a nearly 9-mile extension of the existing Purple Line subway from its current terminus at the Wilshire/Western station to a new western terminus near the West Los Angeles Veterans Administration ("VA") Hospital.

4. Defendants Metro and the FTA are the co-lead agencies on the "Project." As one segment of the extension, the Agencies plan to construct a subway tunnel beginning at a new station in Century City (the "Constellation Station") and running directly beneath the heart of the Beverly Hills High School (the "High School") campus. To build the tunnel, the Agencies will undertake construction, boring, and excavation at construction staging areas located directly adjacent to the High School's fence line.

5. Pursuant to this Court's August 12, 2016 Order (adopting its February 1, 2016 Tentative Ruling), and under applicable law, the Agencies were legally required to

engage in a meaningful, reliable, and unbiased scientific analysis of the environmental impacts of the tunnel and construction staging areas. The Agencies also were required to consider feasible and prudent alternatives to the planned alignment and to select the alternative that poses the least possible harm.

6. In violation of their legal obligations, the Agencies improperly committed to a course of action rather than engaging in the required environmental analysis. This commitment skewed that environmental testing and analysis and resulted in a predetermined outcome. The outcome of the Agencies' process is not the one that is the most feasible and prudent or poses less overall harm to the High School's historic and recreational features. Instead, it is precisely the same outcome the Agencies have intended to arrive at since as early as 2010.

7. On November 22, 2017, the Agencies released their Final Supplemental Environmental Impact Statement ("FSEIS") and Supplemental Record of Decision ("ROD"). The FSEIS sets forth the Agencies' final determination to proceed with a tunnel alignment (the "Project Alignment") running at shallow depths beneath the heart of the High School's campus. It also states the Agencies' final decision to locate construction staging areas (the "Project Staging Areas") directly across from athletic fields on which the High School has placed temporary, portable classrooms.

8. The FSEIS fails to fairly, objectively, and adequately evaluate the harm to the City and its residents, the High School and High School students' health, and the High School's historical buildings. The Project Alignment will be constructed and operated directly beneath existing and long-planned Section 4(f)-protected sites on the campus. The FSEIS fails to account for and adequately analyze the effect that the construction and operation of the Project Alignment will have on those resources. It wrongly concludes, based on an inadequate and biased review, that there are no feasible and prudent alternatives to the Project Staging Areas, and improperly rejects obviously feasible and certainly less harmful alternative alignments. The Agencies likewise ignore, or fail to properly assess, the health risks and degradation posed by the construction and

operation of the subway alignment.

9. The FSEIS's conclusion that the Project Alignment and Staging Areas pose no threat of harm to the High School's campus, its students, or community members who use its recreational facilities is fundamentally flawed. The Project will cause substantial harm to health and safety of its students, undermine its learning environment, impede the renovation and modernization of its campus, and threaten the viability of its historic structures and recreational facilities. Prudent and feasible alternatives to the Project Staging Areas and less harmful subway alignments exist that would avoid or mitigate each of these harms. The Agencies' failure to adequately consider and adopt these reasonable alternatives was unlawful. Without taking the mandated hard look at the environmental impacts of the Project Alignment and Staging Areas, and without the proper consideration of prudent and feasible alternatives, the Agencies' actions were arbitrary, capricious, an abuse of discretion, and contrary to the applicable law.

10. The Agencies never meaningfully evaluated any change in the proposed location of the alignment or the staging areas. Instead, throughout the review period the FTA disbursed federal funds to further its predetermined Project Alignment and Staging Areas, and Metro used those federal funds to, among other things, acquire property along the planned route and for the staging areas. Defendants continue to do so today.

JURISDICTION AND VENUE

11. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States identified in Paragraph 1. Also, this Court has jurisdiction pursuant to 28 U.S.C. § 1361 because the suit is brought against officers of the United States. Declaratory, injunctive, and further necessary relief is proper pursuant to 5 U.S.C. § 703 and 28 U.S.C. §§ 2201, 2202 ("creation of remedy" and "further relief" provisions establishing power to issue declaratory judgments in cases of actual controversy).

12. Plaintiff has a right to bring this action pursuant to, inter alia, 5 U.S.C. §§ 701-706, and 23 U.S.C. § 139(k)-(l). Defendant FTA's issuance of the ROD

approving the FSEIS constitutes a final agency action. Moreover, there exists an actual controversy between the parties within the meaning of 28 U.S.C. § 2201.

13. This Court also has jurisdiction over Metro and Mr. Washington. This Court may issue an injunction under NEPA against a nonfederal party who received federal financial assistance in furtherance of the challenged activity. *Homeowners Emergency Life Protection Committee v. Lynn*, 541 F.2d 814 (9th Cir. 1976). Here, in furtherance of the challenged activity, Metro receives significant federal financial assistance. As the Project's sponsor and joint lead agency, Metro was required to comply with NEPA in preparing the environmental impact statement.

14. Venue is proper in the Central District of California under 28 U.S.C. § 1391 because Plaintiff's principal place of business is located in the Central District; the properties affected by this action are located in the Central District; and a substantial part of the acts and omissions giving rise to this Complaint occurred in the Central District.

15. More specifically, venue is proper in the Western Division of the Central District of California because the properties affected by this action are located in Los Angeles County, and because a substantial part of the acts and omissions giving rise to this Complaint occurred in Los Angeles County.

16. Plaintiff has no adequate remedy at law. No monetary damages or other legal remedy can adequately compensate Plaintiff, its residents, or other members of the public for the harm caused by Defendants' actions.

17. Plaintiff has standing to sue. Plaintiff and its residents are adversely affected and aggrieved by Defendants' unlawful approval of the Project.

18. The alignment of the Project will extend through Plaintiff's municipal boundaries, including, without limitation, under residences and under Beverly Hills High School, the primary public high school serving Beverly Hills residents. Plaintiff supports a Westside Subway Extension that passes through Beverly Hills, and recognizes the benefits that the Project will provide for the entire Los Angeles region. However, those benefits must not be obtained as a result of decisions that are not supported by the

required "hard look" under NEPA, but that were instead the result of insufficient, incorrect, and conflicting information and a rush to judgment that risks the health, safety, and welfare of Plaintiff's residents.

19. The Project will result in the acquisition by eminent domain of numerous tax-paying properties that will be removed from the Plaintiff's property tax rolls, and will cause environmental impacts from construction activities that will result in adverse socioeconomic impacts and a reduction in sales tax revenues to the Plaintiff.

20. Much of the subway alignment will require construction of subway stations and tunnels under the public streets of the City of Beverly Hills. The massive volume of construction trucks required to haul away the spoils excavated from the tunneling and station caverns is expected to result in physical deterioration of the streets within the City of Beverly Hills, causing Plaintiff to incur additional maintenance costs. In addition, the Project planning anticipates calling upon Plaintiff to provide assistance with respect to the implementation of traffic control plans within the City of Beverly Hills to help mitigate construction impacts. Notwithstanding such mitigation, it is anticipated that the Project construction will result in significant adverse impacts with respect to the Plaintiff's provision of police, fire and rescue and ambulance service in and around construction work sites resulting in lane closures.

21. Plaintiff is concerned about the effects this Project will have on the people living, working, attending school, shopping, and recreating in Beverly Hills during the years in which the Project will be constructed and operated. Plaintiff also has a substantial interest in ensuring that Defendants' decisions are in conformity with the requirements of law, and in having those requirements properly executed and Defendants' public duties enforced.

22. Defendants' failure to comply with federal law will result in irreparable harm to the environment, protected historic resources, and Plaintiff and its residents. The relief requested will redress these injuries, in that Plaintiff seeks to enjoin Defendants from further action until they comply fully with federal law.

23. As Plaintiff has raised issues related to the impacts of the Project on the physical environment, including historic resources, Plaintiff's interests in this action fall within the zone of interests protected by the laws sought to be enforced in this action.

24. In addition, Plaintiff and other members of the public objected that the selection of the station location and alignment would violate Section 4(f) and the NHPA, because Beverly Hills High School is an historic resource protected by these statutes.

25. Plaintiff and other members of the public also objected that the proposed location of the construction staging area adjacent to Beverly Hills High School would cause an adverse impact on air quality, which would harm High School students and City residents.

THE PARTIES

26. Plaintiff is a municipal corporation, formed under and pursuant to the laws of the State of California, with its principal place of business located in the County of Los Angeles, State of California.

27. Plaintiff, along with its residents and representatives of the School District and others, actively participated in the Project's administrative process by providing written and oral comments and proposing alternative solutions to reduce or eliminate the significant environmental impacts that will be imposed upon them by the Project. Plaintiff has satisfied any and all conditions precedent to filing this action, including any and all requirements for the exhaustion of administrative remedies

28. Defendant FTA is the federal agency charged with approving projects for funding under the New Starts program, which is the primary federal funding mechanism for locally planned, implemented, and operated transit projects, including the Westside Subway Extension Project. The FTA is responsible for complying with NEPA in connection with any decisions involving major federal actions. The FTA is responsible for complying with Section 4(f) and Section 106 in connection with actions affecting historic or recreational properties. Together with Metro, which prepared the initial environmental impact statement ("EIS") on which the FTA relied (*see*, *e.g.*, 23 C.F.R.

§ 771.109(c)), the FTA issued the DEIS and the FEIS for the Project in September 2010 and March 2012, respectively. The FTA independently issued the ROD selecting the Constellation Boulevard Alternative on August 9, 2012. After this Court ordered a supplemental environmental analysis, the FTA, again together with Metro, issued the DSEIS and the FSEIS in May 2017 and November 2017, respectively. FTA independently issued the Supplemental ROD reaffirming its selection of the Constellation Boulevard Alternative on November 22, 2017.

29. Defendant FTA is a federal government agency within the U.S. Department of Transportation and is authorized to plan and implement new transit infrastructure or improvements to existing infrastructure. Regional FTA Offices prepare and participate in environmental impact assessments of federally-funded projects and have review authority for the final action decision. The FTA is the lead agency for the Project with regard to NEPA and is charged with the duty of ensuring compliance with NEPA, Section 4(f), Section 106, and other applicable federal laws.

30. Defendant K. Jane Williams is the Acting Administrator of the FTA, and she is responsible for all FTA activities. Defendant Williams is sued in her official capacity. As a federal official, Defendant Williams must comply with NEPA, Section 4(f), the NHPA, and other federal laws.

31. Defendant Edward Carranza Jr. is the Acting Regional Administrator of the FTA's Region IX Office and is the FTA official responsible for issuance of the ROD. Defendant Carranza is sued in his official capacity. As a federal official, Defendant Carranza must comply with NEPA, Section 4(f), the NHPA, and other federal laws

32. Defendant United States Department of Transportation is the parent department of FTA and maintains overall responsibility for compliance with NEPA, Section 4(f), the NHPA, and other federal laws.

33. Defendant Elaine L. Chao is the Secretary of the United States Department of Transportation and is responsible for all Department of Transportation activities, as alleged herein. Defendant Chao is sued in her official capacity. As a federal official,

Defendant Chao must comply with NEPA, Section 4(f), the NHPA, and other federal laws.

34. Defendant Metro is a county transportation commission created by California statute as the single successor agency to the Southern California Rapid Transit District and the Los Angeles County Transportation Commission. Metro serves as the transportation agency for the City and County of Los Angeles, California, and it is responsible for the planning, coordination, design, building and operation of the public transportation system for Los Angeles County, including but not limited to its bus, subway, and light rail system. Metro is the joint lead agency for the Project pursuant 23 U.S.C. § 139(c)(3). Metro, working with FTA, prepared the environmental documentation, including the EIS and SEIS, and developed the Project, as both an applicant for federal funding and joint lead agency pursuant to 23 U.S.C. § 139.

35. Defendant Phillip A. Washington ("Washington") is the Chief Executive Officer of Metro and is responsible for all Metro's activities. Washington is sued in his official capacity.

FACTUAL AND PROCEDURAL BACKGROUND

Background and Unique Impact to Beverly Hills and Historic Beverly Hills High School

36. Metro, has been planning the Project to some degree for nearly thirty years. As approved, the Project consists of a 9-mile extension of the heavy rail Purple Line subway from its existing terminus at the existing Wilshire/Western station to the VA Hospital in Westwood, and includes the development of seven new stations along this extension, including stations at Wilshire/La Brea, Wilshire/Fairfax, Wilshire/La Cienega, Wilshire/Rodeo, Century City, Westwood/UCLA, and Westwood/VA Hospital.

37. As ultimately approved, the Project has been designed to cross underneath the dense urban core of the Wilshire District and the commercial and residential properties along Wilshire Boulevard in Beverly Hills. The Project will then veer southwest and travel underneath residences in Beverly Hills and the Beverly Hills High

School to arrive at the Constellation Station in Century City. And then, the Project will veer back to the northwest to the Westwood/UCLA station and ultimately west to the Westwood/VA Hospital station.

38. In Beverly Hills, the Wilshire Boulevard corridor is a primarily commercial street containing office, retail, hotel, and some multi-family residential uses. Areas immediately adjacent to Wilshire Boulevard contain single and multi-family residences. The Beverly Hills High School is the primary public high school located in Beverly Hills, and serves its high-school age children who attend public school.

39. The High School is over 80 years old, and it is eligible for listing on both the California and national historic registers. The School District has developed a Master Plan for the renovation of the High School, and a bond measure was passed by the Beverly Hills voters in 2008 to pay for construction of those renovations.

40. Defendants knew about the Master Plan at all times when deciding upon the locations for the Century City station and the alternative routes between that station and the Wilshire/Rodeo station. Moreover, portions of the Project's tunnel are planned for a depth so shallow that it will cause vibrations, noise disruptions, and other adverse impacts to the High School. Yet Defendants still concluded that tunneling underneath the High School would not result in any impairment to the High School, despite its historic status and the Master Plan.

Defendants 2012 EIS/EIR and the City and School District's 2012 litigation challenging FTA's initial approval of the Project

41. In September 2010, the Agencies released a Draft EIS/EIR for the Project, which analyzed two station options in Century City: one on Santa Monica Boulevard at Avenue of the Stars and one on Constellation Boulevard (one block south of Santa Monica Boulevard) between Avenue of the Stars and Century Park East; however, the Constellation Boulevard location was not analyzed as extensively as the Santa Monica Boulevard location.

42. The tunneling alignment for a subway station on Santa Monica Boulevard

does not require tunneling under Beverly Hills High School or residential properties in the vicinity. By contrast, the proposed tunneling alignment for a station located on Constellation Boulevard requires tunneling underneath the High School and residential properties.

43. The route associated with the station location on Constellation Boulevard was determined in the Draft EIS/EIR, and later in the Final EIS/EIR, to be slightly longer and therefore more expensive than the route associated with locating the station on Santa Monica Boulevard.

44. Plaintiff, the School District, and many concerned Beverly Hills residents and parents commented on the Draft EIS/EIR. They raised concerns regarding the Project's many adverse environmental impacts. They also raised concerns regarding the failure by Defendants to adequately identify, investigate, and analyze the many dangers that tunneling through Beverly Hills and beneath the High School would impose upon Beverly Hills and its citizens, businesses, homes, schools, and students.

45. On October 28, 2010, in response to public concern, Metro committed to analyze the impacts of the two Century City stations and the alignments associated with them. In particular, Metro committed to analyze in depth the potential impacts of tunneling under the High School and consider alternatives that would avoid tunneling under the High School altogether.

46. Plaintiff and the School District alleged that those studies, which were published in Fall 2011 and which Plaintiff refers to herein as "Defendants' Subsequent Studies," should have been performed prior to publication of the Draft EIS/EIR, so that full public discourse on the adequacy of the studies and the risks discussed therein could have taken place before Metro and FTA honed their focus on the Constellation Boulevard site.

47. As early as February 2011, without any public discussion and with virtually no public notice, Defendants relocated the proposed Santa Monica Boulevard station from the Boulevard's intersection with the Avenue of the Stars one block east to the

Boulevard's intersection with Century Park East, apparently out of concern for seismic risks. At that time, the only public disclosure of this change came in an article posted in "CurbedLA," a local blog.

48. Understandably concerned about the purported identification of a new active fault in the vicinity of the City's public high school, Plaintiff and the School District retained experts to assess the validity of the agencies' claims. The studies commissioned by Plaintiff and the School District were ultimately provided to Defendants. These studies raised concerns that the Century City subway station at Constellation Boulevard is also within the same complex fault zone identified by Metro and may be more vulnerable to lateral racking from ground shaking due to the presence of deep fill soils.

49. Plaintiff and the School District repeatedly asked Metro and FTA to delay the release of the Final EIS/EIR and any decision on the location of the Century City station until the seismic issues could be addressed and the impacts from the newly identified Constellation site could be adequately analyzed in a revised EIS/EIR.

50. Rather than wait for Plaintiff's and the School District's additional seismic reports, and rather than engage in the requested analysis of seismic issues, Defendants released their joint Final EIS/EIR in March 2012, identifying the Constellation Boulevard site as the newly recommended location for the Century City station.

51. Metro approved the proposed Project shortly thereafter, without waiting for the bulk of the City's and School District's studies.

52. FTA approved the Project on August 9, 2012, well aware that the California Geologic Survey – the state agency tasked with identifying active faults – and experts retained by the School District were still conducting crucial seismic studies.

53. The Final EIS/EIR disclosed that substantial changes had been made to the design of the Project after the release of the Draft EIS/EIR.

54. In addition, as discussed above, the Final EIS/EIR contained substantial new information and analyses not included in the Draft EIS/EIR on which the public, including Plaintiff, has not had an adequate opportunity to review and comment, as

required by NEPA. This substantial new information includes the Defendants' Subsequent Studies and other changes and purported "refinements" to the Project disclosed for the first time in the Final EIS/EIR.

55. On August 23, 2012, FTA announced its final agency action, including its determinations regarding Section 4(f) and Section 176, as well as the August 9, 2012 ROD for the Project.

56. The City and School District thereafter challenged FTA's ROD and approval of the FEIS/EIR in this Court.

This Court Finds Serious Flaws in the Agencies' FEIS and Orders a Supplemental Environmental Analysis.

57. On February 1, 2016, this Court issued a 217-page Tentative Ruling. The Tentative Ruling found that the FTA had committed multiple serious violations of NEPA and Section 4(f), including that:

- The EIS failed to complete any analysis of the public health-related impacts of construction, depriving FTA decision makers of information that could impact the selection of construction sites, the mine shaft location, and mitigation measures;
- The EIS failed to disclose risks associated with methane migration and a possible explosion, even though such information could impact FTA's willingness to tunnel under unprotected buildings without mitigation measures;
- The EIS wrongly presented its conclusions about seismic safety as though they were "above reproach," even though revelations about seismic uncertainty could impact FTA's evaluation of alternative station locations;
- FTA erred in refusing to prepare a supplemental EIS after generating and receiving significant new seismic information, cutting off public comment and response and precluding decision making based on complete information;
- FTA acted arbitrarily and capriciously in determining that tunneling under the High School is not a "use" under Section 4(f), depriving FTA decision makers

of the information required by Section 4(f)'s follow-on analysis of "prudent and feasible alternatives" and "all possible planning" to minimize any harm arising from such use.

58. The Court also determined that it was a "***very close question***" whether the Agencies predetermined the location of the Century City station before engaging in their original environmental analysis and that the analysis underlying the decision to move the station from Santa Monica Boulevard to Constellation Boulevard "certainly appear[ed] to have been slanted in one direction," but did not meet the standard for predetermination *at that time.*

59. On August 12, 2016, the Court adopted as final its February 1, 2016 Tentative Ruling and remanded the FTA's decision with instructions to prepare a supplemental environmental impact statement ("SEIS") as follows:

(1) Identify direct and constructive "use" of the High School campus from subway construction and operation on, beneath, or near the campus, and if construction or operation causes a "use," an evaluation of "prudent and feasible alternatives" to such use and "all possible planning" to minimize harm under Section 4(f);

(2) Discuss the completeness of the available seismic risk information;

(3) Discuss post-DEIS seismic and ridership studies available to FTA;

(4) Analyze potential public health impact of NOx emissions during construction of the Constellation Station and tunneling and, depending on the results of that analysis, an assessment of the feasibility and efficacy of mitigation measures and alternatives to address such potential impacts;

(5) Analyze potential public health impacts of dust and diesel particulate matter emissions (PM_{10} and $PM_{2.5}$) from Constellation Station construction and, depending on the results of that analysis, an assessment of the feasibility and efficacy of mitigation measures and alternatives to address such potential impacts; and

(6) Analyze potential risks of soil gas migration from tunneling or other

construction activities related to Section 2 and, depending on the results of that analysis, disclosure of any information required by 40 C.F.R. §§ 1502.9, 1502.22, and *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), and an assessment of the feasibility and efficacy of mitigation measures and alternatives to address such potential risks and disclosures.

60. While the Court declined to apply the presumptive remedy of vacatur during remand, it warned that "if on remand the FTA does act impermissibly or inappropriately so as to raise a basis for the charge or pre-determination or bad faith, Plaintiffs are free to raise that contention again and the Court will consider it."

The Agencies Subsequent Environmental Review and Section 4(f) Determinations

61. On January 24, 2017, the FTA sent the City its preliminary section 4(f) determination, informing the City that it intended to make a *de minimis* impact determination regarding the use of the recreational facilities at Beverly Hills High School and requesting the City to concur in that *de minimis* finding. In this preliminary determination, the FTA informed the City that it had "refined" the proposed construction staging area for Century City "due to a proposed commercial development" at the selected site. As a result, the FTA informed the City that the new construction staging area would be located in part on a site directly adjacent to the High School campus.

62. The City responded on February 2, 2017, explaining that the FTA's letter lacked the information necessary to support such a finding and did not demonstrate that FTA had conducted the required evaluation of "prudent and feasible alternatives" and "all possible planning to minimize harm" to the recreation area.

63. The City accordingly requested that FTA provide it with "(a) data and documentation sufficient to allow the City to determine whether concurrence is appropriate for the Project's potential impacts to recreational resources, (b) data and documentation sufficient to allow the City to participate in consultation regarding the Project's impacts on historic resources. *Cal. Wilderness Coal. v. United States DOE*, 631

F.3d 1072, 1093 (9th Cir. 2011) ("Consultation requires an exchange of information and opinions before the agency makes a decision. This requirement is distinct from the opportunity to offer comments on the agency's decision")."

64. On April 4, 2017, having received some of the information it requested on February 2nd, the City again wrote the FTA, explaining that this information did not satisfy the City's earlier concerns and raised a number of new concerns, including apparent errors in the FTA's air quality modeling, a failure to determine whether the construction-related emissions will cause or contribute to a contravention of the 24-hour and annual PM2.5 NAAQS, the failure to document or explain key assumptions, and the absence of the "hot-spot" analysis required by the Clean Air Act and applicable guidance (USEPA, *Transportation Conformity Guidance for Quantitative Hot-spot Analyses in PM2.5 and PM10 Nonattainment and Maintenance Areas* (Nov. 2015)).

65. The City also pointed out that the prolonged massive-scale construction activity immediately adjacent to the High School would so adversely affect the air quality at the campus so as to be deemed to constructively "use" this Section 4(f) resource. And it raised several concerns about the dangers associated with potential methane seepage into buildings on the High School Campus and other buildings above the proposed tunnel alignment.

66. On June 2, 2017, the Agencies released a Draft Supplemental EIS and Section 4(f) evaluation. This document confirmed that the Agencies intended to relocate the Century City construction staging area to a site directly adjacent to the High School Campus, rather than rely on the site previously identified in the 2012 EIS.

67. On July 24, 2017, the City submitted detailed comment letter on DSEIS and Section 4(f) evaluation. A copy of this letter is attached hereto as Exhibit 1 and incorporated herein by this reference. Among other things, and as further detailed in Exhibit 1, the Agencies' DSEIS: (1) failed to adequately assess the threat to public health from the Project's lengthy construction period and construction-related air pollution; (2) failed to adequately assess increases in fine particulate matter (PM2.5); (3) improperly

concluded that the Project will cause no adverse health impacts to the children at Beverly Hills High School or to other City residents or visitors; (4) erroneously concluded that the construction activity adjoining the High School will not result in a "constructive use" of the protected Section 4(f) resources on the High School campus based on the assumption that the construction-related air pollution levels at the High School would not result in a public health impact; (5) failed to select an alternative construction staging area at further distance from the High School in order to comply with Section 4(f); (6) improperly identified active fault strands under numerous City residences and businesses based almost entirely on inferences and clearly erroneous information; and (7) failed to include a proper transportation conformity analysis and determination as required by the Clean Air Act, and (8) failed to fully and accurately to inform decision-makers, and the public, of the Project's environmental consequences.

68. On November 22, 2017, the Agencies issued the Final SEIS and the Supplemental ROD. The Final SEIS did not adequately respond the City's comments on the DSEIS.

69. On December, 8, 2017, the Federal Defendants filed a Notice of Satisfaction of Remand reporting that they have "satisfied all of the requirements of the Court's remand order" by evaluating the topics outlined in the Court's Remedy Order. By stipulation dated December 22, 2017, the parties agreed that the Federal Defendants completed the procedural tasks outlined in the Remedy Order and that the subject actions would be dismissed, while expressly preserving the right of the City and the School District to challenge the Final SEIS and Supplemental ROD by filing new complaints.

70. On December 27, 2017, pursuant to the parties prior stipulation, this Court entered an order providing that the City and the School District could challenge the Final SEIS and Supplemental ROD by filing new complaints by January 19, 2018. The Court also provided that the parties could agree to extend that deadline by stipulation. The City and the Federal Defendants thereafter entered into a series of stipulations extending the date by which the City could file such a complaint until May 10, 2018.

71. The City now challenges the Final SEIS and Supplemental ROD on the grounds set forth below.

STATUTORY AND REGULATORY BACKGROUND

A. National Environmental Policy Act ("NEPA")

72. NEPA requires federal agencies undertaking any major federal action to review the environmental impacts of the proposed action and to "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(C), (E). NEPA's purpose is two-fold: first, to ensure that federal agencies undertaking a major federal action take a hard look at the proposed project's environmental impacts before deciding how to proceed and, second, to ensure that relevant information about the impacts of a proposed project and its alternatives is made available to members of the public in order to provide the public with a meaningful opportunity for comment and participation in the federal decision-making process.

73. The Council on Environmental Quality ("CEQ") has promulgated regulations applicable to all federal agencies undertaking a NEPA review. 40 C.F.R. Part 1500. Individual agencies supplement the CEQ regulations with agency-specific regulations; NEPA regulations applicable to FTA and Federal Highway Administration ("FHWA") actions are set forth at 23 C.F.R. Part 771.

74. The CEQ regulations direct federal agencies to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse impacts of these options upon the quality of the human environment." 40 C.F.R. § 1500.2(e). The regulations stress that the alternatives analysis of an EIS "is the heart of the environmental impact statement," and therefore require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14.

75. Essential to an agency's obligations under NEPA is the duty to insure that "high quality" environmental information is available to the public before decisions are

made and before actions are taken. *Id.* § 1500.1(b). Agencies are to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." *Id.* § 1506.6(a).

76. The CEQ NEPA regulations provide for coordination between federal agencies subject to NEPA and state and local agencies "to reduce duplication between NEPA and State and local requirements." *Id.* § 1506.2(a); 23 U.S.C. § 139(f)(4)(E). State and local agencies such as Metro may act as joint lead agencies, together with at least one federal agency, to prepare an EIS. 40 C.F.R. § 1501.5(a), (b); 23 U.S.C. § 139(c)(3). As a joint lead agencies, both Defendants have the responsibility "to prepare or ensure that any required environmental impact statement or other document required to be completed under [NEPA] is completed in accordance with [Section 139] and applicable Federal law." 23 U.S.C. § 139(c)(6). The FTA, as federal lead agency, bears the responsibility of "independently evaluating such document" before approving it. 23 U.S.C. § 139(c)(3). Indeed, both the CEQ and FHWA-FTA regulations require federal agencies to "independently evaluate" information considered in the environmental review and "take responsibility for its accuracy." 40 C.F.R. at § 1506.5; 23 C.F.R. § 771.109(c)(2) (state or local government entities that serve as joint lead agencies with the FTA "may prepare environmental review documents" if the FTA "furnishes guidance and independently evaluates the documents") and (c)(5) (state or local agency "may prepare the EIS and other environmental review documents with the [FTA] furnishing guidance, participating in the preparation, and independently evaluating the document").

77. The CEQ NEPA regulations emphasize that "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made*." *Id.* § 1502.2(g) (emphasis added). Thus, the environmental impact statement "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." *Id.* § 1502.5. Moreover, "[a]gencies shall not commit resources prejudicing selection of alternatives before

making a final decision." *Id.* § 1502.2.

78. To ensure meaningful analysis, the regulations impose "[l]imitations on actions during the NEPA process." *Id.* § 1506.1. "Until an agency issues a record of decision as provided in § 1505.2 . . . , no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives." *Id.* § 1506(a). Moreover, the CEQ regulations place an affirmative responsibility on a federal agency to prevent such action: "[I]f any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would" either have an adverse environmental impact or limit the choice of reasonable alternatives, "the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved." *Id.* § 1506.1(b).

79. An agency preparing an EIS must discuss in detail the environmental impacts of the proposed action and its alternatives, including issues related to "urban quality, historic and cultural resources, and the design of the built environment." *Id.* § 1502.16(g). A ROD must "[i]dentify all alternatives considered by the agency" and "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted." *Id.* § 1505.2.

80. The FTA-FHWA joint regulations supplementing the CEQ regulations provide that the agencies should evaluate alternatives and make decisions "in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals." 23 C.F.R. § 771.105(b). The Final EIS must "be reviewed for legal sufficiency prior to Administration approval." *Id.* § 771.125(b).

81. Like the CEQ regulations, the FTA-FHWA joint regulations impose restrictions on "administration activities" prior to the issuance of a record of decision. *Id.* § 771.113. "[F]inal design activities, property acquisition, purchase of construction

materials or rolling stock, or project construction shall not proceed until . . . [a] final EIS has been approved and available for the prescribed period of time and a record of decision has been signed." *Id.* Acquisition means "activities to obtain an interest in, and possession of, real property." *Id.* § 710.105. "The process of acquiring real property includes appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnations." *Id.* § 710.305.

82. Pursuant to Section 771.113 of the NEPA regulations, the FTA website states that, "an FTA grant applicant may not acquire (by any means, including through donation) real property or real property rights for a transit project until the NEPA process has been completed with a ROD . . . by FTA. The reason for this prohibition is that the acquisition of property would prejudice the consideration of alternatives. Even if the property in question is needed for all of the 'build' alternatives under consideration, the CEQ regulations require that the No Action (or No Build) alternative be given fair consideration. Property acquisition would bias consideration of the No Action alternative."

83. Moreover, "Letters of Intent . . . to indicate an intention to obligate future funds . . . will not be issued by FTA until the NEPA process is completed." *Id.* § 771.113(c); *see also FTA Full Funding Grant Agreement Guidance*, C 5200.1A, at 9 ("[T]he appropriations subcommittee directed FTA to enter into an FFGA for any given project only when there are no outstanding issues that would have a material effect on the estimated costs of the project . . . . The subcommittees also direct that FTA not award an FFGA unless the project had entered final design.").

84. Where supplemental analyses are required, NEPA regulations are clear that the administrative process for completing a SEIS must follow "the same process and format (*i.e.*, draft EIS, final EIS, and ROD) as an original EIS." 23 C.F.R. § 771.130(d); *see also* FTA Standard Operating Procedure ("SOR") No. 17, Re-Evaluations and Supplemental Documents, at § 5.6 ("FTA's practice is to prepare amended decision

documents that incorporate the supplemental analysis and record all of FTA's determinations for the project in one location."). Additionally, NEPA regulations provide that if the changes to an environmental impact statement "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." 23 C.F.R. § 771.130(f)(3).

85. CEQ regulations require that agencies "make every effort to disclose and discuss at appropriate points in the draft environmental impact statement all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. § 1502.9(a). Agencies are required to discuss at appropriate points in the FEIS any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised. *Id.* § 1502.9(b).

86. Agencies must supplement a draft or final EIS if "(1) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* § 1502.9(c)(1); 23 C.F.R. § 771.130(a). Agencies may supplement an EIS when "the agency determines that the purposes of [NEPA] will be furthered by doing so." 40 C.F.R. § 1502.9(c)(2). The FHWA-FTA NEPA guidelines further provide that a supplemental DEIS "may be necessary for major new fixed guideway capital projects proposed for FTA funding [such as the Westside Subway Extension Project] if there is a substantial change in the level of detail on project impacts during project planning and development." 23 C.F.R. § 771.130(e). The regulations provide that, in such cases, the supplement shall address "site-specific impacts and refined cost estimates that have been developed since the original [DEIS]." *Id.*

87. Under the CEQ NEPA regulations, "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an

environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." 40 C.F.R. § 1502.22. Further, if the incomplete information "is essential to a reasoned choice among alternatives" and the costs to obtain complete information are "not exorbitant," the agency *must* include complete information in the EIS. *Id.* § 1502.22(a).

B. Federal Funding Programs

88. The Project receives federal funding from three sources: (1) the New Starts Program, (2) the Congestion Mitigation and Air Quality Program, and (3) the Transportation Infrastructure Finance and Innovation Act. Each of these federal assistance programs requires compliance with NEPA and its implementing regulations, including 49 C.F.R. §§ 1500-1508 and 23 C.F.R. § 771. Thus, the limitations on administration activities set forth in 49 C.F.R. § 1506.1 and 23 C.F.R. § 771 apply to each of these programs. The lead agencies are prohibited from using federal funds to engage in "final design activities, property acquisition, purchase or construction materials or rolling stock, or project construction" until a ROD has been signed. *Id.* § 771.113(a). The reason for these prohibitions is that the acquisition of property would prejudice the consideration of alternatives. 40 C.F.R. § 1506.1.

C. Department of Transportation Act of 1966, Section 4(f)

89. Section 4(f) of the Department of Transportation ("DOT") Act of 1966, codified at 49 U.S.C. § 303 and 23 U.S.C. § 138, allows the Secretary of Transportation to "approve a transportation program or project … requiring the use of publicly owned land of a public park, recreation area … of national, State, or local significance, or land of an historic site of national, State, or local significance … *only if* (1) there is no prudent and feasible alternative to using that land; *and* (2) the program or project includes all possible planning to minimize harm to the park, recreation area, … or historic site resulting from the use." 49 U.S.C. § 303(c) (emphasis added). Further, the FTA "shall review all Section 4(f) approvals . . . for legal sufficiency." 23 C.F.R. § 774.7(d).

90. "The potential use of land from a Section 4(f) property shall be evaluated as

early as practicable." *Id.* § 774.9(a). The Section 4(f) approval is made in the final EIS and ROD. *Id.* § 774.9(b). "After the . . . ROD has been processed, a separate Section 4(f) approval will be required . . . if [the FTA] determines that Section 4(f) applies to the use of a property." *Id.* § 774.9(c). Section 4(f) regulations limit activities in furtherance of a project that may be affected by the additional Section 4(f) analysis: "Where a separate Section 4(f) approval is required, any activity *not directly affected* by the Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter." *Id.* (emphasis added); *see also* FHWA Policy at 58 (same). Moreover, "[i]f a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval." 23 C.F.R. at 774.9(d). If changes to an environmental impact statement "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). "Before the FTA may award an FFGA or any other type of grant under the Section 5309 capital program, FTA must find that "no adverse environmental effect is likely to result from the project, or no feasible and prudent alternative to the effect exists and all reasonable steps have been taken to minimize the effect." *FTA Full Funding Grant Agreement Guidance*, C 5200.1A, at Chapter II.4. "The steps for environmental review of an FTA-funded project are set forth in . . . 23 C.F.R. Part 771." *Id.*

91. The FTA and FHWA regulations implementing Section 4(f) specify that a "use" occurs "(1) [w]hen land is permanently incorporated into a transportation facility; (2) [w]hen there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in [40 C.F.R.] § 774.13(d); or (3) [w]hen there is a constructive use of a Section 4(f) property as determined by the criteria in [23 C.F.R.] § 774.15." 23 C.F.R. § 774.17.

92. A temporary occupancy of a Section 4(f) property constitutes a use unless

all of the following criteria are satisfied: "(1) [d]uration must be temporary, *i.e.*, less than the time needed for construction of the project…; (2) [s]cope of the work must be minor, *i.e.*, both the nature and the magnitude of the changes to the Section 4(f) property are minimal; (3) [t]here are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, feature, or attributes of the property, on either a temporary or permanent basis; [and] (4) [t]he land being used must be fully restored, *i.e.*, the property must be returned to a condition which is at least as good as that which existed prior to the project … ." *Id.* § 774.13(d).

93. A "constructive use" occurs when a transportation project does not incorporate land from a Section 4(f) property but nonetheless has such a severe impact on the property, due to the project's proximity, "that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired." *Id.* § 774.15(a). "Substantial impairment" occurs when "the protected activities, features, or attributes of the property are substantially diminished." *Id.* The FHWA's Section 4(f) policy explains that, in the context of tunneling projects, "substantial diminishment" occurs when "the value of the resource in terms of its Section 4(f) significance will be meaningfully reduced or lost. The degree of impact and impairment should be determined in consultation with the officials having jurisdiction over the resource." FHWA Section 4(f) Policy Paper (2012) ("FHWA Policy") at 33. The FHWA Policy further provides that, in the case of tunneling, Section 4(f) applies where, *inter alia*, the tunneling "[s]ubstantially impairs the value of [a] historic site," or where tunneling "would permanently harm the purposes for which the park [or] recreation [area] … was established." *Id.* at 59.

94. Additionally, with respect to Section 4(f)'s applicability to historic districts, the FHWA Section 4(f) policy explains: "FHWA's long-standing policy is that Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district." *Id.* at 28. However, "[w]hen a project requires land from a *non-historic or non-contributing*

property lying within a historic district and does not use other land within the historic district that is considered contributing to its historic significance, FHWA's longstanding policy is that *there is no direct use of the historic district for purposes of Section 4(f)*." *Id.* at 35 (emphasis added).

95. FHWA-FTA regulations require determinations regarding constructive use to be based upon the following: (1) identification of the current activities, features, or attributes of the property which render it a Section 4(f) property and which may be impacted due to proximity of the project; (2) an analysis of the net (*i.e.*, taking into consideration mitigation) proximity impacts of the project on the Section 4(f) property; and (3) consultation regarding the foregoing factors with the official(s) having jurisdiction over the Section 4(f) property. 23 C.F.R. § 774.15(d). Constructive uses occur in certain situations including, *inter alia*, where the project "results in a restriction of access which substantially diminishes the utility of a [Section 4(f) property]" or where "[t]he vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property . . . ." *Id.* § 774.15(e)(3)-(4).

96. The FTA may not approve the use of a Section 4(f) property unless either (1) "the use of the property . . . will have a *de minimis* impact . . . on the property"; or (2) no "feasible and prudent alternative" exists *and* "all possible planning" has been included to minimize harm to the 4(f) property resulting from such use. *Id.* § 774.3.

97. A "*de minimis* impact" means that, for historic sites, "no historic property is affected by the project or that the project will have 'no adverse effect' on the property in question"; for parks and recreation areas, a *de minimis* impact is one that "will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f)." *Id.*

98. A "feasible and prudent alternative" is one that "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." *Id.* § 774.17. An alternative is not "feasible" if it cannot be built as a matter of sound engineering

judgment. *Id.* An alternative is not "prudent" if: "(i) [i]t compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need; (ii) [i]t results in unacceptable safety or operational problems; (iii) [a]fter reasonable mitigation, it still causes: (A) [s]evere social, economic, or environmental impacts; (B) [s]evere disruption to established communities; (C) [s]evere disproportionate impacts to minority or low income populations; or (D) [s]evere impacts to environmental resources protected under other Federal statutes; (iv) [i]t results in additional construction, maintenance, or operational costs of an extraordinary magnitude; (v) [i]t causes other unique problems or unusual factors; or (vi) [i]t involves multiple factors in paragraphs (3)(i) through 3(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude." *Id.*

99. If the FTA determines that there is no feasible and prudent alternative, the FTA may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the "least overall harm" in light of the statute's preservation purpose. The "least overall harm" is determined by balancing: "(i) [t]he ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property); (ii) [t]he relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection; (iii) [t]he relative significance of each Section 4(f) property; (iv) [t]he views of the official(s) with jurisdiction over each Section 4(f) property; (v) [t]he degree to which each alternative meets the purpose and need for the project; (vi) [a]fter reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and (vii) [s]substantial differences in costs among the alternatives." *Id.* § 774.3. "When comparing the alternatives under these factors, FHWA policy is to develop comparable mitigation measures where possible. In other words, the comparison may not be skewed by over-mitigating one alternative while under-mitigating another alternative for which comparable mitigation could be incorporated." FHWA Policy at 15.

100. Additionally, the FTA must include "all possible planning" to minimize harm to Section 4(f) property before approving the use of such property. *Id.* "All possible planning" means that "all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project." *Id.* § 774.17. For public parks and recreation areas, the measures may include, but are not limited to, design modifications or design goals, replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways. *Id.* For historic sites, measures should preserve the historic activities, features, or attributes of the site. *Id.* "Minimization and mitigation measures should be determined through consultation with the official(s) with jurisdiction." FHWA Policy at 19.

101. FHWA policy makes plain that determinations regarding applicability of Section 4(f) should consider planned uses for properties. The FHWA Policy provides that Section 4(f) applies in situations where a "planned facility is presently publicly owned, formally designated, and significant." FHWA Policy at 58. While a mere expression of interest in pursuing plans does not rise to the level of "formal designation," the inclusion of the publicly-owned land and its function as a Section 4(f) resource "into a city or county Master Plan" triggers application of Section 4(f). *Id.* at 57.

D. National Historic Preservation Act, Section 106

102. The NHPA contains congressional findings, among others, that the nation's historic resources should be preserved; that the preservation of this irreplaceable heritage is in the public interest; and that it is necessary and appropriate for the federal government to accelerate its preservation programs and activities. 16 U.S.C. § 470(b). The NHPA further provides that it shall be the policy of the federal government to provide leadership in the preservation of America's historic resources. *Id.* § 470-1.

103. Section 106 of the NHPA prohibits federal agencies from engaging in any federal undertaking (or federally assisted, licensed, or permitted undertaking) unless the agency first (1) takes into account the potential effects of the undertaking on historic

properties; and (2) affords the Advisory Council a reasonable opportunity to comment on the undertaking. *Id.* § 470f.

104. The NHPA and the Section 106 regulations define undertaking as follows: "a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out with Federal financial assistance." *Id.* § 470w(7); *see also* 36 C.F.R. § 800.16(y).

105. The NHPA and the Section 106 regulations define historic property as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register." 16 U.S.C. § 470(w)(5). Thus, a historic property need not be formally listed on the National Register to receive NHPA protection, it need only meet the National Register criteria.

106. The first step in the Section 106 process is for an agency to determine whether the proposed action is an undertaking as defined in § 800 and, if so, "whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a).

107. If the action is an undertaking that has the potential to cause effects to historic properties, the agency must proceed with the consultation to identify historic properties within the Area of Potential effects, assess effects, and resolve adverse effects. *Id.* §§ 800.4, 800.5, 800.6.

E. Section 176 of the Clean Air Act

108. Section 110(a)(1) of the Clean Air Act requires each State to adopt and submit to the EPA a State Implementation Plan ("SIP") that "provides for implementation, maintenance and enforcement" of the NAAQS. 42 U.S.C. § 7410(a)(1).

109. Section 176(c)(1) of the Clean Air Act prohibits federal involvement in – including federal funding of – actions unless the responsible federal entity has made a determination that the action it seeks to fund conforms to the requirements of the applicable SIP. 42 U.S.C. § 7476(c)(1). This requirement is known as the "conformity determination."

110. In 1990, Congress expanded and made more specific the definition of conformity, adding the following statutory requirement to Section 176(c)(1) of the Clean Air Act: "(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and (B) that such activities will not — (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. § 7476(c)(1).

111. The implementing regulation allows the conformity analysis to exclude "temporary" construction-related emissions, but defines "temporary" as less than 5 years at one location. 40 C.F.R. § 93.123(c)(5) ("CO, PM10, and PM2.5 hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established 'Guideline' [dispersion modeling] methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site."). Here, however, Project construction in the area west of the High School is expected to last more than five years and therefore requires a transportation conformity finding.

112. In a June 21, 2017 letter, Metro provided a document titled "PM Conformity Hot Spot Analysis – Project Summary for Interagency Consultation." The document asserts that the criteria for preparing a hot-spot analysis set forth in 40 C.F.R. § 93.123(b)(v) does not apply because, according to Metro: "The Project is not in or affecting a site of PM10 or PM2.5 air quality standard violation. Therefore, the proposed project would not be considered a Project of Air Quality Concern under this criterion." But Metro's statement is inaccurate, because even the air quality analysis presented in the SEIS, which improperly omits analysis of the annual PM2.5 NAAQS, establishes that the construction activity will cause and contribute to a contravention of the PM2.5 and NO2

NAAQS.

F. Administrative Procedure Act

113. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, provides for judicial review of federal agency determinations such as those at issue here. The APA requires a reviewing court to hold unlawful and set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

FIRST CAUSE OF ACTION

(Violations of NEPA, Implementing Regulations, and the APA)

114. Plaintiff incorporates by reference each of the allegations of Paragraphs 1 through 113, inclusive, of this Complaint as though set forth in full.

115. Defendants violated the APA, 5 U.S.C. § 501 et seq., by acting arbitrarily and capriciously and in violation of federal law by failing to comply with the requirements of NEPA, 42 U.S.C. § 4321 et seq., and its implementing regulations, 40 C.F.R. § 1500 et seq., and 23 C.F.R. Part 771 by unlawfully approving the Project.

116. Plaintiff makes the following additional allegations with regard to the Defendants' approval of the Project:

117. Defendants failed to take the required hard look at the Project's environmental impacts including, but not limited to, the Project's geotechnical/seismic impacts; noise and vibration impacts; traffic/access impacts; air quality impacts; paleontological impacts; economic and social impacts; public health impacts and safety impacts. These impacts relate specifically to the location of the Century City station, the related alignment, and the proposed construction staging areas. Defendants also failed to include a "full and fair discussion" of potential mitigation measures to address these impacts.

118. Defendants failed to take the required hard look at and properly analyze alternatives to the Project including, but not limited to, alternatives to tunneling under the High School campus;

119. Defendants abused their discretion in prematurely making their determination to locate the Century City subway station, the associated alignments, and the construction staging areas prior to undertaking the required analysis and hard look;

120. Defendants failed to properly and accurately "specify the underlying purpose and need to which the [Project] is responding" (*see* 40 C.F.R. § 1502.13) and thus failed to properly consider reasonable alternatives;

121. Defendants failed to adequately respond to comments from Plaintiff and members of the public;

122. Defendants failed to include "high quality" information and "accurate scientific analyses" in the SEIS, instead relying on incorrect assumptions and data related to air quality and seismic risk;

123. Defendants actions as set forth above were arbitrary, capricious, and an abuse of discretion in violation of NEPA and the APA.

SECOND CAUSE OF ACTION

(Violations of Section 4(f), Implementing Regulations, and the APA)

124. Plaintiff incorporates by reference each of the allegations of Paragraphs 1 through 123, inclusive, of this Complaint as though set forth in full.

125. Defendants violated Section 4(f) and the APA through their determination that the new subway line and associated construction activities will result in no adverse effects on the High School Recreational Facilities and a de minimis impact on Beverly Hills High School, which was arbitrary, capricious, and not in accordance with law, because:

a. Defendants determined that Section 4(f) does not apply to part of Building C, despite the fact that Building C—the High School's future gymnasium—is a recreational resource protected under Section 4(f) and the underground parking structure will permit community access to the gymnasium and other recreational resources;

b. Defendants determined that construction and operation of the Project Alignment will result in a *de minimis* impact on historic Building B1 on the High School campus, despite that ground settlement beneath the historic building is likely to result in exterior cracking and thus cause significant adverse impact; and

c. Defendants determined that the Project Staging Areas do not result in a "constructive use" of the High School's recreational resources, despite the fact that harmful emissions and particulates, noise and vibration from construction activity will adversely affect the High School's athletic fields.

126. Additionally, Defendants violated Section 4(f) and the APA through their arbitrary, capricious, and unlawful determination that there are no feasible and prudent alternatives to the Project Alignment because they:

a. Failed to properly weigh the factors under 23 C.F.R. § 774.3, including the relative significance of each Section 4(f) property, the severity of harm to each Section 4(f) property, and the views of the officials with jurisdiction over each Section 4(f) property; and

b. Failed to use a point system to weigh alternatives, which rendered their analysis opaque and meaningless.

127. Defendants also violated Section 4(f) and the APA through their arbitrary, capricious, and unlawful determination that the Project Alignment causes the "least possible harm" of the alternatives that use Section 4(f) resources, because they:

a. Failed to properly weigh the factors under 23 C.F.R. § 774.3, including the relative significance of each Section 4(f) property, the severity of harm to each Section 4(f) property, and the views of the officials with jurisdiction over each Section 4(f) property;

b. Failed to use a point system to weigh alternatives, which rendered their analysis opaque and meaningless; and

c. Improperly rejected the School District's proposed Camden and Linden Alternatives, which will cause the least overall harm, by failing to properly weigh the relevant factors and manufacturing additional Section 4(f) impacts that do not exist and that contradict longstanding Section 4(f) policy with regard to historic districts.

128. Defendants also violated Section 4(f) and the APA through their arbitrary, capricious, and unlawful determination that there are no "feasible and prudent" alternatives to the Project Staging Areas, because they failed to engage in any analysis of the factors under 23 C.F.R. § 774.17 before rejecting Project Staging Area 1, instead conclusorily stating that the site is unavailable.

129. Defendants also violated Section 4(f) and the APA by failing to engage in all possible planning to mitigate harm to Section 4(f) resources.

130. Such determinations were arbitrary, capricious, and an abuse of discretion in violation of Section 4(f) and the APA.

THIRD CAUSE OF ACTION

(Violations of the NHPA, Implementing Regulations, and the APA)

131. Plaintiff incorporates by reference each of the allegations of Paragraphs 1 through 132, inclusive, of this Complaint as though set forth in full.

132. Defendants violated the procedural and substantive provisions of the NHPA, including Section 106, its implementing regulations, and the APA when they determined that the High School would not be affected by the construction of a subway tunnel beneath the High School, because:

133. The construction activities will cause noise and vibrations that will affect the historic buildings and diminish the integrity and feeling of the High School; and

134. The operation of a subway tunnel beneath the High School would cause noise and vibrations that would introduce atmospheric and audible elements that diminish the integrity of the property's significant historic features.

135. The construction of the subway tunnel, and associated geotechnical

investigations and other activities specified above, will be disruptive.

136. Such determination was arbitrary, capricious, and an abuse of discretion in violation of the NHPA and the APA.

FOURTH CAUSE OF ACTION

(Violation of the Clean Air Act, Implementing Regulations, and the APA)

137. Plaintiff incorporates by reference each of the allegations of Paragraphs 1 through 138, inclusive, of this Complaint as though set forth in full.

138. Defendants violated Section 176(c)(1)(B) of the Clean Air Act and acted arbitrarily and capriciously within the meaning of the APA by failing to include the required transportation conformity analysis. *See* Exhibit 1 at 9-11.

139. Defendants' apparent assertion that the Project's construction activities will not cause or contribute to a contravention of the NAAQS is without any support in the record and is arbitrary and capricious within the meaning of the APA.

140. Such determinations were arbitrary, capricious, and an abuse of discretion in violation of the Clean Air Act and the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant relief, as follows:

A. Adjudge and declare that the Defendants have violated NEPA, Section 4(f), the NHPA, the Clean Air Act, and the APA by issuing the Supplemental ROD approving the Final SEIS;

B. Issue a temporary restraining order and/or injunction requiring Defendants to comply fully with the provisions of NEPA (including, but not limited to, preparation of a Second Supplemental EIS), Section 4(f), the NHPA, the Clean Air Act, and their implementing regulations as alleged above, and specifically to ensure that Defendants take no actions proceeding with the Project until they have fully complied with said laws and regulations;

C. Issue a temporary restraining order and injunction prohibiting FTA from

obligating further federal funds to the Project until FTA has fully complied with the provisions of NEPA and other federal law;

D. Adjudge and declare that the Final Supplemental EIS is invalid;

E. Adjudge and declare that the ROD dated November 22, 2017 be vacated, set aside, and/or rescinded;

F. Award Plaintiff the costs of this action, including its reasonable attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and other applicable laws; and

G. Award such other and further relief as the Court deems just and proper.

DATED: May 9, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter
ROBERT S. PERLMUTTER
SARA A. CLARK

Attorneys for Plaintiff
CITY OF BEVERLY HILLS

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