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Attorneys for Plaintiff
BEVERLY HILLS UNIFIED SCHOOL DISTRICT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BEVERLY HILLS UNIFIED SCHOOL DISTRICT,

Plaintiff,

v.

FEDERAL TRANSIT ADMINISTRATION; K. JANE WILLIAMS, in her official capacity as Administrator of the Federal Transit Administration; LESLIE T. ROGERS, in his official capacity as Regional Administrator of the Federal Transit Administration's Region IX Office; LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, a public entity; PHILLIP A. WASHINGTON, in his official capacity as Chief Executive Officer of the Los Angeles County Metropolitan Transportation Authority,

Defendants.

Case No. 2:18-cv-00716 GW(SSx)

Related to Case No. CV 12-9861-GW (SSx)

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' AND LOCAL DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Honorable George H. Wu
Courtroom 9D

Action Filed: January 26, 2018

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I. INTRODUCTION

The National Environmental Policy Act ("NEPA") is grounded in a simple idea—agencies must "look before they leap environmentally."[1] NEPA's procedure is designed to demand that agencies make important decisions informed by how they will affect the environment. Its legislative history is clear, "[p]roper timing is one of NEPA's central themes."[2] This case presents the question of whether, after entering into billion dollar contracts and spending hundreds of millions of dollars toward a preferred outcome, an agency and project proponent meaningfully considered environmental issues and alternative outcomes as demanded by our country's foundational environmental laws. The answer to this question, simply, is no.

This Court directed the Federal Transit Administration (the "FTA") and Los Angeles County Metropolitan Transportation Authority ("Metro" and together with the FTA, the "Agencies") to evaluate aspects of the health, safety and environmental impacts of Section 2 of the Westside Purple Line Extension (the "Project"), which they failed to properly account for during the initial 2012 environmental review. The Project will, if it proceeds as planned by the Agencies, tunnel directly beneath the heart of Beverly Hills High School, including its classrooms and planned recreational facilities (the "Project Alignment"). In addition, the major construction activity related to tunneling for this segment will take place at the High School's fence line (the "Staging Areas") immediately adjacent to vulnerable temporary classrooms where hundreds of children are educated each day.

While purporting to undertake its Court-ordered review of the Project—and before the analysis was complete—the Agencies committed billions of dollars to their chosen route and staging areas through the binding Full Funding Grant

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[1] Albert M. Ferlo, Karin P. Sheldon & Mark Squillace, The NEPA Litigation Guide 1 (American Bar Association, 2d ed. 2012).

[2] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988).

Agreement ("FFGA") and Design/Build Contract. Even as the Agencies repeatedly assured the Court that they could—and would—engage in the environmental analysis fairly and objectively, and without reliance on costs or bureaucratic momentum, the Agencies continued to disburse and spend hundreds of millions of dollars toward their chosen outcome pursuant to the FFGA and Design/Build Contract, and proceeded to reject reasonable alternatives on what the record shows to be pretext. The reality is that the Final Supplemental Environmental Impact Statement ("FSEIS") the Agencies prepared was infected by delay costs, bureaucratic momentum, and a hidden agenda—contrary to environmental law—to avoid inconveniencing wealthy homeowners by a change to the alignment.

As a result of their commitments, the Agencies prepared an arbitrary and capricious environmental analysis that neither acknowledges nor properly analyzes the risks of the Project Alignment and Staging Areas, much less adequately considers plainly reasonable alternatives. The Project Alignment will interfere with much needed planned recreational space and runs beneath century-old historic buildings susceptible to cracking. The existence of the tunnels will prevent the School District from constructing a long-planned recreational facility—Building C—that will be open to the entire community of Beverly Hills. Under the High School's existing historic buildings, the subway tunnel will traverse a designated methane zone, with known and potentially unknown abandoned oil wells. If the tunnel boring machine ("TBM") meets an unmapped oil well beneath existing buildings, the oil well would need to be removed from the surface (requiring the complete or partial demolition of the surface structure) or, in the alternative, Metro would need to employ an untested technique to remove the oil well from within the tunnel—a methodology the Agencies are forced to acknowledge increases the risk of methane gas migration beneath the schools. At the High School's fence line, construction staging will generate harmful levels of toxic emissions and airborne particulates that will be

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blown directly downwind toward the High School's temporary classrooms and outdoor recreational facilities used by students and the Beverly Hills community. Noise and vibration from construction activity will disrupt—and indeed already has disrupted—classroom instruction.

Despite these harms, the Agencies have rejected less harmful alternative alignments presented by the School District that vary only slightly the route the Agencies selected. These alternative alignments would traverse beneath open fields on campus, avoiding the prospect of any harm to historic buildings and permitting the construction of Building C as designed by the School District. The Agencies also have rejected an available staging area that is farther away from the High School's temporary classrooms and athletic facilities. The record demonstrates that the Agencies refused these concededly viable and preferable alignments and the available alternative staging area because of the hundreds of millions of dollars they have already committed to their chosen route and staging areas. The Ninth Circuit directed this Court to "evaluate whether the FTA's commitments—including those made via the Grant Agreement and Design/Build Contract—in fact infected the FTA's analysis of alternatives." If this Court follows that directive, which it must, it will necessarily conclude that those expenditures and commitments infected the process.[3]

For the reasons set forth in the Motion and herein, summary judgment should be granted in favor of the School District and against the Agencies.[4]

First, the FTA violated NEPA and section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)") by improperly predetermining the

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[3] *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, 694 F. App'x 622, 624 (9th Cir. 2017)

[4] The term "Motion" used herein refers collectively to the School District's Motion for Summary Judgment and its Memorandum of Law in Support of Motion for Summary Judgment, January 2, 2019, ECF Nos. 89 and 89-1, but citations to the Motion refer specifically to the Memorandum of Law.

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outcome of the FSEIS. While that review was ongoing, the Agencies, with the FTA's express authorization, entered into billion dollar contracts to construct the Project and disbursed and expended hundreds of millions of dollars for the Project, including for final design of the Project Alignment and acquisition of the Staging Areas. In doing so, the Agencies disregarded the laws, regulations, policies and binding Ninth Circuit precedent establishing that these activities prejudice the consideration of alternatives.

The Agencies made irreversible and irretrievable commitments invalidating their analysis, as a matter of law. During the pendency of the supplemental review, Metro admitted that it could not consider alternative alignments because it had issued a notice to proceed on the billion dollar Design/Build Contract and, under the contract, *delays* would "cost Metro conservatively $6 million per month ($72 to $108 million for 12 to 18 months)." The outcome of the FSEIS is predicated almost entirely upon the automatic advantage given to the Project Alignment because the Agencies: (1) improperly failed to undertake a proper Section 4(f) analysis during the original 2012 environmental review; and (2) proceeded with the FFGA and Design/Build Contract while they conducted the supplemental review. It is precisely because the Agencies disregarded NEPA's procedural requirements that the only option that would not result in *delays* to the Project from additional environmental review, design and engineering is the Project Alignment. And, having spent hundreds of millions of dollars to acquire the properties for the Staging Areas, the Agencies refused to relocate construction activity to an empty lot a short distance away to protect the High School's students and staff from the harmful toxins, particulates and noise that construction will generate, purportedly because the property (an empty lot) was not available despite evidence demonstrating otherwise.

The Agencies' commitments rendered the Court-ordered supplemental review a subterfuge designed to rationalize a decision already made. Binding precedent

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prohibits exactly the types of commitments the Agencies made here—because as the underlying facts establish, once an agency has committed to a course of action, it will not spend the time, energy and money needed to undo the earlier action and embark upon a new and different course of action, even if the new course is environmentally superior. The farther along the initially chosen path the agency has traveled, the less likely an agency is to seriously consider an alternative. The FSEIS here proves exactly that point.

The FTA twists itself into knots to distance itself from Metro's admissions that it could not and would not consider alternatives during the supplemental review because of its commitments. The FTA repeatedly avers that it exercised independent judgment and administered funds in a manner that preserved alternatives under review, but in reality the opposite is true. The FTA is directly responsible for the predetermination that infected the supplemental analysis. Despite Metro's demonstrated conflicts of interest and inability to objectively analyze alternatives to the Project Alignment and Staging Areas, the FTA utterly failed to establish even minimal safeguards to ensure a fair analysis and insulate the FSEIS from Metro's repeated concessions that it could not adopt alternatives because of the FFGA and Design/Build Contract. Indeed, the FTA continued to disburse monies and authorize expenditures for project activities that were directly affected by the supplement, limiting the choice of reasonable alternatives. In the end, the FTA adopted an arbitrary, capricious, irrational and patently pretextual FSEIS approving the Project Alignment and Staging Areas. It did so by flagrantly manipulating various factors—including misrepresenting, aggregating and double-counting impacts; inconsistently applying standards; and considering factors that have no place in a proper analysis at all—to present a "more compelling argument" for the Project Alignment. It is plain that if the Agencies had, in the first instance, engaged in the proper analysis and in the second instance not committed themselves to a billion dollar contract and spent

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hundreds of millions of dollars of federal funds on property acquisition and final design, the Project Alignment and Staging Area would have no advantages over alternatives that would inflict less harm on the High School and its students, staff and recreational and historic resources. For these reasons, the FTA's decision to approve the Project Alignment and Staging Areas is arbitrary and capricious and must be set aside.

Second, and relatedly, the FTA violated Section 4(f) by failing to undertake the proper analysis in approving a project that uses recreational or protected historic property. The Agencies' predetermination caused them to conduct an improper Section 4(f) analysis in the FSEIS, rendering the FTA's decision to approve the Project Alignment and Project Staging Areas (i.e., Staging Areas 2 and 3) arbitrary and capricious as a matter of law. The Section 4(f) analysis of subway alignment alternatives in the FSEIS demonstrates this in spades.

After conceding that the Project Alignment would directly use the High School's protected *recreational* resources, the Agencies erroneously concluded that no less harmful alternatives exist. The Agencies, however, were only able to reach this conclusion by failing to properly analyze the "least overall harm" factors under Section 4(f).[5] As a preliminary matter, because the Agencies improperly concluded that none of the subway alignments would "harm" the High School's Section 4(f) resources, they may analyze the "least overall harm factors" in terms of "use." There is no basis in law for this approach, which is fatal to the FSEIS's Section 4(f) analysis. This approach also evidences the Agencies' predetermination and demonstrates that their "least overall harm" analysis was a pretext to reject the

[5] Despite conceding that the Project uses Section 4(f) resources, the Agencies nevertheless devote substantial energy to arguing that the Project Alignment's direct "use" of the High School's Section 4(f)-protected historic properties would be "*de minimis*." This argument—besides being objectively and provably false—is designed to distract the Court from the analysis they proceeded to perform, which is so obviously slanted to support the Agencies' predetermined preference that it is, by definition, arbitrary and capricious.

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Camden and Linden Alignments—which the Agencies concede are viable alternatives. The Agencies' "least overall harm" analysis itself indicates the same thing, and their attempts to rebut these points fall flat.

For example, in concluding that the Camden and Linden Alignments would use more Section 4(f) historic resources than the Project Alignment, the Agencies fail to abide by their own policies requiring them to count subway tunneling as a Section 4(f) use only if the specific part of the property tunneled under (the High School and Residential Tract 7710) contributes to its historic significance. The Camden and Linden Alignments tunnel under no such contributing parts, whereas the Project Alignment tunnels under historic Building B1. Further, in evaluating use of the High School's recreational resources by the alignments, the Agencies failed to consider the relative importance of such resources and instead incorrectly focus on square feet alone. The Project Alignment tunnels under Building C, the planned gymnasium, and will prevent construction of a much-needed underground parking structure for greater community access; by contrast, the Camden and Linden Alignments tunnel under only open fields. By giving these considerations the same weight based on square footage alone, the Agencies violated their Section 4(f) obligations.

The Agencies concede that differences between the Project, Camden and Linden Alignments in terms of travel time, the number of subsurface easements required and project cost are insignificant. Yet they inexplicably use each of these factors in their "least overall harm" analysis in favor of the Project Alignment. This is arbitrary and capricious—as is the Agencies' attempt to manipulate language in the FSEIS to make admittedly insignificant differences (for example, an estimated two- to fifteen-second increase in commute time for the proposed alternative alignments) appear to substantially benefit the Project Alignment. Further, even though the Camden and Linden Alignments are both farther than the Project Alignment from the closest known oil well, face less risk of explosion when

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encountering unknown or unmapped oil wells because they tunnel under open fields, and routing under the fields would facilitate removal of unmapped oil wells if encountered during tunneling without any potential impact on an existing structure, the Agencies distort the data and their analysis to reach the opposite conclusion. In addition, the Agencies' briefs demonstrate that they did not adequately take into account the School District's preferences in selecting the alignment. The Agencies entirely fail to rebut these flaws in their Section 4(f) "least overall harm" analysis.

The Agencies' Section 4(f) analysis of construction staging areas in the FSEIS fares no better. First, the Agencies do not dispute that construction activities at Staging Areas 2 and 3 may create dangerous and disruptive levels of noise, vibration and airborne toxins for hundreds of children and staff, who will be *only 10 feet away* from the staging areas in temporary classrooms and on adjacent athletic fields. Their conclusion that Staging Areas 2 and 3 would not constructively use the High School's Section 4(f) historic and recreational resources is arbitrary and capricious as a matter of law.

Based on this no-constructive-use conclusion, the Agencies incorrectly determined that they were not required to analyze Staging Areas 1 or 4 as potential feasible and prudent alternatives. The Agencies thus entirely failed to conduct a required element of the Section 4(f) analysis. In response, the Agencies state that, if they were to conduct such an analysis, they would reach the same result because, for example, Staging Area 1 is too costly and is also unavailable due to an ongoing private real estate development on the same plot of land. The evidence relied on by the Agencies, however, does not support either point. Indeed, regarding the development project, documents show that the project is not fully permitted and not currently under construction, that the Agencies did conduct proper due diligence and that they never analyzed alternatives to outright acquisition, such as temporary

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easements. For each of these reasons, the Agencies' analysis is arbitrary and capricious.

Third, the Agencies violated NEPA by failing to take a "hard look" at toxic emissions, construction noise, abandoned oil wells and methane emissions and seismic issues. Construction activity at the Project Staging Areas will take place immediately adjacent to the High School and directly across from the High School's temporary classrooms. The impact on the temporary classrooms is significant, as these classrooms house 500-600 students at a time and are used by all of the High School's students at some point during the school day. The planned construction activity will generate high levels of toxic emissions and particulates, which will be blown into the area of the High School's classrooms, administrative buildings, athletic fields and grounds. These airborne toxins can cause or contribute to health problems, ranging from short-term effects such as coughing, dizziness, nausea and headaches, to long-term effects, such as cancer, chronic asthma and other respiratory illnesses.

In conducting their analysis of health risks posed by emissions and airborne particulates, the Agencies used plainly inappropriate exposure thresholds, yet the Agencies do not even address the appropriate 1-in-one-million standard cited by the School District. The Agencies also cite nothing that would support their decision to calculate the maximum cancer risk somewhere other than at the point that will receive the maximum amount of emissions, i.e., at the fence line between the staging areas and the portable classrooms. The maximum risk should have been calculated at the nearest property line to the emissions rather than spread out across the campus, consistent with California state and local laws and guidance designed to protect school children.

The FSEIS also fails to take a "hard look" at construction noise, which is already harming students' education. In concluding otherwise, the FSEIS improperly

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ignores its own predicted data and simply assumes that the noise levels will not in fact be exceeded (even though they already have been). The Agencies' approach reflects wishful thinking, not a "hard look," and it improperly minimizes the negative effects of the Project Alignment. The Agencies' other arguments fare no better. The Agencies assert that acceptable sound levels could be met if the School District were to "upgrade" the classrooms to meet the appropriate standard, but this is circular reasoning, and the Agencies do not even attempt to address how this might be done, either by the Agencies or by the School District. Given the harm posed by noise and vibration from construction activities immediately adjacent to the High School, the obvious solution would be to utilize Staging Area 1. The FTA claims this cannot be done because, among other things, it would potentially require the displacement of "commercial and/or residential properties"—but this response overlooks the fact that Staging Area 1 is, in fact, a vacant lot.

The Agencies' responses with respect to safety risks from abandoned oil wells and methane are utterly inadequate. First, the Agencies have completely failed to undertake the mandated "hard look" with respect to the alternative Camden and Linden Alignments. The Agencies purport to "dispute" the mitigating effect of the Camden and Linden Alignments by contending that these alignments are supposedly closer in proximity to mapped oil wells and thus more likely to encounter an abandoned oil well, but this is simply not true—or at the least, it is unsupported by the Agencies' own data. Second, and critically, the Agencies have collected insufficient information regarding the amount and location of methane on the High School campus. The California Department of Toxic Substances has declared the High School campus to be a "methane zone," yet the FTA and Metro have only taken soil gas samples *from a single borehole at the proposed tunnel depth* on the campus.

The Agencies' failure to take seriously the risk of methane on campus is even more egregious given the fact that explosive amounts of methane were found both on

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the campus itself as well as immediately adjacent to the campus. The FSEIS reports that methane was found on the Project Alignment at up to 51,000 parts per million on the High School campus *and 986,000 parts per million* (i.e., almost pure methane) immediately west of the campus at the proposed Constellation station site. Thus, the Agencies' claim that significant volumes of methane *do not exist along the alignment* is flatly contradicted by their own data. Contrary to the Agencies' assertions, methane was found at the one borehole on the Project Alignment on the High School campus that was sampled at anywhere near tunnel depth (AR107209, sample C-119B). Moreover, the Agencies' own data shows that explosive levels of methane were found at tunnel depth on the Project Alignment at the Constellation station site (AR107209, sample M-408), that explosive levels of methane were found on the Project Alignment at tunnel depth immediately adjacent to the campus (AR107209, sample M-407) and that elevated levels of methane, increasing with depth, were found at various locations on the High School campus (e.g., AR107210, samples A6-SG10, A6-SG6, A6-HP4).

The Agencies purport to dispute their understatement of risk from methane migration due to tunneling, but with the exception of a single borehole, the Agencies *did not even look* for elevated gas pressures at tunnel depth along the Project Alignment at the High School. The Agencies simply have *no basis* for asserting that there are no elevated subsurface methane concentrations under the section of the Project Alignment that travels underneath the High School. Moreover, their observation that gas entering the open atmosphere will dilute rapidly—which is undisputed—plainly supports the School District's alternative alignments, *since those alignments are over open fields rather than buildings*.

Finally, the FSEIS fails to take a "hard look" at seismic issues. The FSEIS does not properly consider fault investigations undertaken since the release of the original 2012 analysis, which have found no active faults on Santa Monica

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Boulevard. Metro asserts that it "reviewed" and "used" these reports, but Metro fails to mention the critical fact that not a single one of these reports found, and all refuted, the existence of an active fault where Metro's consultants had previously mapped one. Moreover, the Agencies never address the School District's point that there is simply no evidence of an active fault that is *actually on* Santa Monica Boulevard preventing the construction of the station. Indeed, instead of addressing the School District's actual argument about the flaws in the FSEIS, the FTA asserts that there are faults in the "area" of Santa Monica Boulevard, in a "broad zone along Santa Monica Boulevard" or "in the vicinity of Santa Monica Boulevard." But the mere presence of faulting in the general area of Santa Monica Boulevard is simply not the issue. The presence of *active* faulting is the issue, and no *active* faults have yet been found, much less active faults that are actually along (rather than in the general vicinity of) Santa Monica Boulevard. In addition, and notwithstanding the Agencies' arguments to the contrary, the FSEIS adopts an unsupported definition of an "active" fault, interprets the same geologic conditions at different locations differently and relies on poor quality, low-resolution photos of a 1972 excavation that no serious seismic professional would accept.

For each of these reasons, the FSEIS must be rejected, and the Agencies directed to select an alignment that conforms with their obligation to engage in all possible planning to minimize harm to the High School's recreational and historic resources.

II. ARGUMENT

A. The FTA Violated NEPA and Section 4(f) by Improperly Predetermining the Outcome of the Supplemental Environmental Analysis.

NEPA is a procedural statute, and proper timing is one of its central tenets. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). Agencies must analyze environmental issues *before* committing to a course of action, so that the "hard look"

mandated by NEPA will be "taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Id.*

The FTA agrees that the relevant inquiry is whether the FTA, prior to completing the requisite environmental analysis, made a firm commitment that swings the balance decidedly in favor of one outcome. (FTA Br. 23.) The FTA also agrees that before the supplemental review is complete, the Agencies must suspend activity directly impacted by the supplement and that the Agencies may not prejudice alternatives under review. (FTA Br. 13-14.) The Agencies violated these standards through their unprecedented contractual, financial and bureaucratic commitments to the Project Alignment and Staging Areas, preventing proper analysis of alternatives. (Mot. 9-11, 14-17, 21-34.) The commitments of a local co-lead agency is properly attributed to a federal agency where, as here, the federal agency was involved in the preparation of the environmental document and was aware of the conflict of interest but failed to insulate it from predetermination. *Davis v. Mineta*, 302 F.3d 1104, 1112-13 (10th Cir. 2002).

The FTA concedes, as it must, that it *disbursed* and Metro *spent* hundreds of millions of dollars for the Project during the supplemental review. The FTA's defense to its otherwise plain violation of the letter and purpose of NEPA is that it administered those funds in a manner that "ensured that all federal funds would be directed to advance the Project in a manner that preserved the alternatives under review in the FSEIS." (FTA Br. 14; *see generally* FTA Br. 12-26.) The FTA's "defense" is wholly undermined by its own record. Despite the fact that certain project activities limit the choice of alternatives as a matter of law—not to mention Metro's acknowledgment that it could not objectively analyze alternatives to the Project Alignment and Staging Areas after it received $1.187 billion in federal funds and entered into a $1.3765 billion Design/Build Contract—the FTA utterly failed to

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implement the most minimal safeguards so that it and Metro could or would be in a position to consider any alternatives to the Project Alignment and Staging Areas.

Instead, the record is clear that the FTA allowed these massive financial and contractual commitments to infect the supplemental environmental analysis. After entering into the FFGA and the Design/Build contract, the cost of changing the alignment, bureaucratic inertia and other plainly pretextual bases were used to reject feasible—indeed, superior—alternatives to the Project Alignment. The FTA's failure to "consider[] . . . environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete" resulted in a prohibited predetermined outcome in violation of NEPA. *Com. of Mass v. Watt*, 716 F.2d 946, 953 (1st Cir. 1983) (Breyer, J.) (steps taken toward course of action analyzed in SEIS would limit the agency's choice of reasonable alternatives). The FSEIS therefore must be set aside.

1. An Agency May Not Limit the Choice of Alternatives During An Environmental Analysis

Before a supplemental impact statement is complete, an agency may not prejudice alternatives under review, and it may continue only project "activity not directly affected by the supplement." (FTA Br. 13-14); 23 C.F.R. § 771.130(e)(3) (only project "activity not directly affected by the supplement" may continue, and agencies must suspend "activities that would . . . limit the choice of reasonable alternatives" until the SEIS is completed). Activities prohibited prior to the issuance of a record of decision ("ROD")—final design, property acquisition and project construction—limit the choice of reasonable alternatives as a matter of law. *See* 23 C.F.R. § 771.113(a); *see also* Recine Decl.[6] Ex. 17 (FTA Policy on "Property Acquisition and Relocations") ("acquisition of property would prejudice the

[6] The Recine Declaration refers to the Declaration of Jennifer S. Recine in Support of the Motion, January 2, 2019, ECF No. 89-3.

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consideration of alternatives");[7] FHWA Order 6640.1A, FHWA Policy on Permissible Project Related Activities During the NEPA Process (authorizing final design activities before NEPA decision limits the choice of alternatives).[8] Thus, although a ROD has been issued, § 771.113(a) remains a relevant determination—for all activities that are directly affected by the supplement—of project activities that limit the choice of alternatives.

Final design and property acquisition for the Project Alignment and Staging Areas are activities directly affected by the supplement. The FSEIS purports to conduct an analysis of whether the Project uses Section 4(f) property and whether there are alternatives that are feasible and prudent or cause less overall harm. (AR107049; AR107356-420.) The results of this analysis directly affect whether the Agencies should proceed with final design of the Project Alignment or with an alternative alignment. The FSEIS also purports to analyze under NEPA and Section 4(f) the air quality and potential public health impacts of NOx and diesel particulate emissions, as well as noise impacts, resulting from the relocation of major construction activities from 1950 Avenue of the Stars to staging areas at 1940 and 1950 Century Park East and 2040 Century Park East, and alternative construction staging approaches to address potential impacts. (AR107049.) The results of this analysis directly affect whether Staging Areas 2 and 3 should be approved, or less harmful alternatives adopted.[9] Final design and property acquisition for the Project Alignment and Staging Areas thus must be suspended until the FSEIS is complete.[10]

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[7] FTA policy prohibits acquisition of property before issuance of a ROD "[e]ven if the property in question is needed for all of the 'build' alternatives under consideration" because "the CEQ regulations require that the No Action (or No Build) alternative be given fair consideration," and "[p]roperty acquisition would bias consideration of the No Action alternative." (Recine Decl. Ex. 17.)

[8] https://www.fhwa.dot.gov/legsregs/directives/orders/66401a.cfm.

[9] The Court should reject the Agencies' claim that the analysis conducted in the SEIS is of limited scope. Section 4(f) requires the Agencies to analyze "relocation of [a project] through another portion of the Section 4(f) area . . . as a means of minimizing harm." *City of S. Pasadena*, 56 F. Supp. 2d 1106, 1116 (C.D. Cal.

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As the federal lead agency, the FTA is responsible for preventing itself or Metro from predetermining the outcome of the supplemental analysis. Metro is a joint lead agency along with the FTA and is responsible for preparing (and did prepare) the FSEIS. *See* 23 U.S.C. § 139(a)(4), (c)(3). In its supervisory role, the FTA must prevent Metro from any action that would limit the choice of reasonable alternatives. *See* 40 C.F.R. § 1506.1(a), (b); 23 C.F.R. § 771.130(e). The FTA also must "furnish[] guidance" and "independently evaluate[]" information considered in the environmental review and take responsibility for its accuracy. 23 U.S.C. § 139(c)(3); *see also* 40 C.F.R. § 1506.5; 23 C.F.R. § 771.109(c)(5). The FTA failed to do so here, even as Metro's own statements repeatedly demonstrated that it could not objectively analyze alternatives in the face of its irretrievable commitments to the Project Alignment and Staging Areas.

1999). In the 2012 EIS, the FTA committed a threshold error in excluding "tunneling from the definition of 'use,' when one of those definitions specifically indicates that 'use' occurs '[w]hen land is permanently incorporated into a transportation facility,'" 23 C.F.R. § 774.17— an interpretation "plainly at odds with regulatory guidance." (AR075776.) In reaching that conclusion "*in consequently failing to undertake the follow-on Section 4(f) analysis with respect to the impact on the High School—including its existing facilities and its Master Plan—of tunneling, the FTA acted arbitrarily and capriciously*." (AR075776 (emphasis added).) The FTA thus never analyzed alternatives crossing another portion of the High School property as required by law. A change in the Section 2 alignment—never studied before—cannot be deemed an issue of limited scope for the Project.

[10] In a footnote, Metro argues that it is not clear whether Section 4(f) prohibits predetermination. Section 4(f) regulations establish that it does. Section 4(f) is subject to the same timing requirements that underlie NEPA jurisprudence. 23 C.F.R. § 774.9(a) ("The potential use of land from a Section 4(f) property shall be evaluated as early as practicable," and the Section 4(f) evaluation must be completed concurrent with the EIS and before an agency issues a ROD); *see also FTA Full Funding Grant Agreement Guidance*, C. 5200.1A, Chapter II.4 ("Before FTA may award an FFGA . . . FTA must find that . . . no feasible and prudent alternative [ ] exists and all reasonable steps have been taken to minimize the effect."). Where, as here, the FTA's initial "use" determination was wrong and Section 4(f) approval is required following the approval of a ROD, only "activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with Section 771.130." *Id.* § 774.9(d); *see also* § 771.130(e)(3). Metro's citation to *Opus Woods Conservation Ass'n v. Metropolitan Council*, No. 15-1637 (JRT/SER), 2016 WL 755617 (D. Minn. Feb. 25, 2016), is unavailing. The district court in *Opus* merely held that Section 4(f) does not provide an independent cause of action. The Court should reject Metro's attempts to sidestep the requirement to perform a properly timed analysis.

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2. The Agencies Made Irreversible Commitments in Favor of the Project, Preventing An Objective Analysis of Its Impacts.

The Agencies did not suspend project activities impacted directly by the supplement but instead pressed forward with irreversible and irretrievable commitments to the Project Alignment and Staging Areas before the analysis was complete. There is no dispute that the Agencies entered into billion dollar contracts in favor of the Project Alignment and Staging Areas and disbursed and expended hundreds of millions of dollars for final design and property acquisition for the Project Alignment and Staging Areas. The Agencies also relied on bureaucratic inertia towards the Project Alignment and other improper or pretextual factors to reject viable, even preferable, alternatives. (Mot. 9-11, 14-17, 21-34.)

a. The Agencies' Billion Dollar Contractual Commitments Are Irreversible and Irretrievable Commitments That Limited the Choice of Reasonable Alternatives.

The FFGA and Design/Build Contract are binding billion dollar contractual commitments to the Project Alignment. (Mot. 9-11, 14-15, 23; Pl.'s UF ¶¶ 23, 27, 43.)[11] The fact that the Court did not prohibit the Agencies from executing these contracts does not mean, as the FTA argues (FTA Br. 12-13), that these contracts cannot (or did not) predetermine the outcome of the supplemental environmental review process. To the contrary, the Court recognized that upon execution of the FFGA and Design/Build Contract, the School District's "argument for predetermination get[s] much stronger." (Pl.'s UF ¶ 15; Recine Decl. Ex. 4.) The Court directed the Agencies that, "[h]aving represented to the Court that [the FFGA and Design/Build Contract] may be changed, the FTA (and/or Metro) will not be heard at a later date to claim . . . that doing so would be too costly as a basis for

[11] The parties' respective statements of uncontroverted facts and statements of genuine disputes are referred to as "UF" and "Resp. to," respectively.

asserting that the alignment cannot be changed" or "rely on execution of the [contracts], or any inertia caused thereby, to support the suitability of any further NEPA analysis the Court has ordered the FTA to undertake." (Pl.'s UF ¶ 16; Recine Decl. Ex. 15 at 4.) Similarly, the Ninth Circuit did not find that the District Court's ruling, which failed to grant the presumptive remedy of vacatur of the ROD in the face of FTA's serious violations of NEPA, insulated the Agencies from liability for improper commitments of money to the Project Alignment through the FFGA and Design/Build Contract. Instead, in denying the School District's appeal of this Court's decision permitting FTA and Metro from proceeding with those contracts in the first place *as premature*, the Ninth Circuit directed this Court to "evaluate whether the FTA's commitments—including those made via the Grant Agreement and Design/Build Contract—in fact infected the FTA's analysis of alternatives." *Beverly Hills Unified Sch. Dist.*, 694 F. App'x at 624 (citing *Metcalf*, 214 F.3d at 1145).[12]

The FFGA and Design/Build Contract limited the choice of reasonable alternatives and infected the supplemental analysis. While the supplemental review was in progress—and before it was purportedly complete—Metro told the School District that the agency could not consider the School District's Proposed Alternative Alignments because of existing contractual commitments to the Project Alignment. Specifically, Metro stated that a delay to the Design/Build Contract resulting from a

[12] The Agencies' contentions that this Court should ignore as extra-record evidence their publicly filed remedy-phase representations to this Court and the Ninth Circuit, and the Court's own and the Ninth Circuit's directions regarding the analysis on remand, should be rejected. The Agencies' prior representations, made to avoid vacatur or an injunction against the execution of the FFGA and Design/Build Contract, and this Court and the Ninth Circuit's direction to the parties regarding the preparation of the FSEIS, are obviously pertinent to this action. Additionally, the Court should reject the FTA's attempts to characterize the 2012 litigation as separate from this action. The parties agreed that the School District would file a new action to challenge the FSEIS only to "simplify review and prevent confusion." *Beverly Hills Unif. Sch. Dist. v. Fed. Transit Admin.*, 12-cv-9861-GW(SSx), ECF No. 274 (C.D. Cal. Dec. 22, 2017).

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change in alignment would "cost Metro $6 million per month ($72 to $108 million for 12 to 18 months)." (Pl.'s UF ¶ 43; AR104468-69.)[13] The very existence of this contract corrupted the Section 4(f) analysis, which ultimately *admits* that "[a]ll alternatives, aside from the Project, would delay the Project's purpose and need." (AR107081; Pl.'s UF ¶¶ 61, 70; AR107417; *see infra* § II.A.2.e.) The FSEIS also expressly relied upon work performed under the Design/Build Contract—in the form of design and engineering completed for the Project—as a basis for rejecting alternatives. (Pl.'s UF ¶ 70; AR107413 ("If a different alternative was selected for implementation, then it would require . . . additional engineering and design efforts. This would result in a delay in project construction and a delay in the realization of Project benefits.").) In this way, the Agencies went ahead with design plans for the Project Alignment with money from the FFGA and through a notice to proceed on the Design/Build Contract before they evaluated alternatives and then, in a naked display of bureaucratic inertia, relied on that work as a reason not to consider or select alternatives to the Project Alignment. This is precisely the opposite of the way NEPA analysis is supposed to proceed. Finally, the Agencies used the execution of these contracts as a basis for even further commitments of hundreds of millions of dollars to the Project Alignment and Staging Areas.

The FTA's argument that the "scope of the Project" described in the FFGA is sufficiently broad to allow for alignment change" is without merit. (FTA Resp. to Pl.'s UF ¶ 22.) The Scope of the Project as described in the FFGA includes a Revenue Service Date of December 31, 2026. (SUP000725.) The FFGA further

[13] This statement is consistent with Mr. Washington's deposition testimony that a change in alignment is a "cardinal change" that would require "a change order of high magnitude" to the Design/Build Contract (Recine Decl. Ex. 3), his declaration which establishes that a stop-work order on a design/build contract for which a notice to proceed had been issued would be considered "owner caused delay" resulting in increased costs to Metro (Recine Decl. Ex. 2 ¶¶ 6-9) and Metro's public statement shortly after the FSEIS was issued that "changing the alignment is no longer a viable option at this stage of the project." (Pl.'s UF ¶ 53).

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states that "[t]he Grantee [Metro] agrees and promises to achieve revenue operations of the Project on or before December 31, 2026, the Revenue Service Date, in accordance with the terms and conditions of this Agreement. The Revenue Service Date is a significant term of this Agreement. The Grantee's failure to achieve the operational functions of the Project on or before the Revenue Service Date will constitute a breach of this Agreement." (SUP000714.) If an alternative alignment is selected, project construction will be delayed approximately 12 to 18 months (Pl.'s UF ¶ 43; AR104468-69; *see also* AR168993), in turn delaying the Revenue Service Date and resulting in a *breach of contract*. Thus, the "Scope of the Project" merely re-confirms that the FFGA is a commitment to the Agencies' chosen alignment. *Metcalf*, 214 F.3d at 1144 (agency's contractual agreement to support an outcome, made while an environmental analysis was in progress—the result of which could put the agency "in breach of contract"— was predeterminative); *Mineta*, 302 F.3d at 1112 (where consultant hired by local agency "was contractually *obligated* to prepare a FONSI and to have it approved, signed and distributed by FHWA by a date certain," consultant "had an inherent, contractually-created bias in favor of issuance of a FONSI rather than preparation of an EIS").

b. The Agencies Allocated, Disbursed and Spent Hundreds of Millions of Dollars for the Acquisition of Property Rights, Relocations and Final Design Work Useful Only for a Predetermined Alternative—the Project Alignment and Staging Areas.

Financial commitments are an "irreversible and irretrievable commitment of resources" where they "limit the choice of reasonable alternatives." *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008). Here, through the FFGA and other sources of federal funding, FTA disbursed and Metro spent hundreds of millions of dollars for the acquisition of property rights, relocations and final design work useful

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only for predetermined alternatives—the Project Alignment and Staging Areas. As of November 2017, Metro spent a total of $408,912,000 (Metro UF ¶ 316), representing 16.4% of the $2,499,239,536 Section 2 Project cost (Metro UF ¶ 309). Federal funds accounted for $253,313,000 of Metro's expenditures, representing 15.2% of the $1.663 billion in federal funds obligated to the Project. (SUP015340.) Metro had committed $230,081,000 to real estate acquisitions,[14] more than half of its real estate budget. (Pl.'s UF ¶ 51; SUP015336.) Additionally, Metro spent $32,283,008 on final design work for the Project and completed 43.7% of final design. (SUP000010; SUP015330; Metro UF ¶ 324.) Metro thus spent a significant portion of its overall budget and federal funds committed to the Project, and most of its real estate budget during the pendency of the supplemental environmental review.

The Court should reject Metro's attempts to downplay its expenditures or their significance to the analysis. (Metro Br. 15.) The Ninth Circuit has recognized that financial commitments constitute "irreversible and irretrievable commitments" of resources where they limit the choice of alternatives. This standard does not require that an Agency spend most of its budget. *WildWest Inst.*, 547 F.3d at 1169 (agency's financial commitments limit choice of reasonable alternatives where "*for example*, . . . an agency spent most or all of its limited budget on preparations useful for only one alternative") (emphasis added); *Beverly Hills Unif. Sch. Dist.*, 694 F. App'x at 624 (same). Thus, in *WildWest*, an expenditure of a mere $208,000 was deemed not to limit the choice of alternatives.

In contrast, an expenditure of $408,912,000 is objectively significant. "[S]pending hundreds, tens, or even millions of dollars," even where such

[14] The $230,081,000 commitment consists of $130,756,000 in expenditures and $99,325,000 in "offers accepted for purchase of real estate" or other Metro acquisition-related actions that "result in the obligation of specific expenditures at a further time." (SUP015336; SUP015355; SUP000731-32 (Standard Cost Category 60 relates to "purchase or lease of real estate" and "relocation of existing households and businesses").) Expenditures alone accounted for more than a third of the real estate budget.

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expenditures do not constitute all or most of an agency's budget, "creat[es] a significant risk of bias in the NEPA process." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 3:01-CV-0640-SI, 2017 WL 1829588, at *14 (D. Or. Apr. 3, 2017), *aff'd in part*, 886 F.3d 803 (9th Cir. 2018). The Agencies' expenditures of "millions of dollars in land acquisition and site planning and development" compromised their ability to objectively evaluate alternatives and "impermissibly biased" the process in favor of the Project Alignment and Staging Areas. *See Washington Cty., N. Carolina v. U.S. Dep't of Navy*, 317 F. Supp. 2d 626, 633 (E.D.N.C. 2004) ("Under NEPA, the Navy is obligated to maintain its objectivity and fairness as a decision maker. No one can act as the judge in his own case and be expected to be a fair arbiter. Once the land acquisition, site preparation, and construction on the OLF begin, the Navy's impartiality will be compromised, and it will be committed to proceeding with the project.").

The Court likewise should reject Metro's attempts to characterize its real estate expenditures as a minor percentage of the entire Section 2 budget. (Metro Br. 15.) The Agencies' overall budget for Section 2 is comprised of fixed budgets for specific elements of Section 2, and completing the Project within budget requires that the Agencies not exceed the budget for its specific elements. The real estate budget for Section 2, for instance, is $426,396,000. (Pl.'s UF ¶ 50; SUP015336.) Given that Metro committed more than half of the real estate budget before completing the supplemental analysis, it is appropriate for the Court to consider whether Metro could realistically change the Project without budgetary consequences, which it would be unwilling to voluntarily endure. (Pl.'s UF ¶¶ 50-51) Indeed, Metro admitted it cannot. Mr. Washington rejected alternative alignments because they would require acquisition of additional property. (AR104469 ("For the proposed alignments, additional property of similar size, would need to be obtained . . . .").) Likewise, Metro cannot complete the Project without federal funds. Accordingly, it

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is appropriate for the Court to consider that Metro expended more than 15 percent of $1.663 billion of federal funds committed to the Project. (SUP015340.)[15]

Acquisition and relocation of properties at the Staging Areas limit the range of reasonable alternatives. The Agencies admit that they acquired property rights for 1940 and 1950 Century Park East before the completion of the FSEIS. (FTA Br. 17-18; Metro Br. 12.) The FTA argues, however, that acquisition of the properties did not prejudice alternatives under review because both properties are required for all alignments and construction scenarios under review. (FTA Br. 16-18.) This argument must be rejected.

First, as demonstrated below, the result of the analysis of air quality, noise and public health impacts resulting from relocation of major construction activity to Staging Areas 2 and 3 directly affects whether these staging areas should be approved, or less harmful alternatives adopted. It was thus incumbent upon the Agencies to suspend acquisition of properties required for Staging Areas 2 and 3 until the FSEIS was complete. *See* 23 C.F.R. § 771.130(e)(3) (only project "activity not directly affected by the supplement" may continue, and agencies must suspend "activities that would . . . limit the choice of reasonable alternatives" until the supplemental analysis is complete); Recine Decl. Ex. 17 (FTA Policy on "Property Acquisition and Relocations") ("acquisition of property would prejudice the consideration of alternatives").

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[15] Metro attempts to characterize funds received under the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program as local because Metro will repay the loan of federal funds with local funds. As recent guidance demonstrates, however, TIFIA funds pledged to a Project are properly considered a federal, not local, contribution. *See* FTA June 29, 2018 Policy Letter ("FTA considers U.S. Department of Transportation loans in the context of all Federal funding sources requested by the project sponsor . . . and not as separate from the Federal funding sources."), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/policy-letters/117056/fta-dear-colleague-letter-capital-investment-grants-june2018_0.pdf. In any event, the FTA administers and disburses these funds, and it disbursed them towards property acquisition and final design.

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Second, had the Agencies selected Staging Area 1 for construction staging, the hundreds of millions the Agencies spent to acquire and relocate 1940 and 1950 Century Park East would not have been necessary. Ultimately, the Agencies' irretrievable commitments to Staging Areas 2 and 3 prevented them from properly analyzing the availability of 1950 Avenue of the Stars as an alternative staging area. Having spent nearly $131 million (nearly a third of its real estate budget) and committed up to $230 million (more than half of its real estate budget, including expenditure) to real estate acquisition and relocation at 1940 and 1950 Century Park East before completing the FSEIS (Pl.'s UF ¶¶ 50-51; SUP015336; SUP015355), the FSEIS simply dismissed 1950 Avenue of the Stars as unavailable, without any analysis of the Section 4(f) factors and despite the plethora of evidence demonstrating its availability. (Pl.'s UF ¶¶ 86, 92-94; AR118517-18; Recine Decl. Ex. 21.) Importantly, Metro knew that 1950 Avenue of the Stars was available as an alternative staging area. As Metro was drafting the FSEIS, the City of Los Angeles provided Metro with a link to the Department of Building and Safety website, which revealed that only 25% of the 5.5 acre property—for just one of the originally proposed towers—was under development. (Pl.'s UF ¶ 92; AR118517; Recine Decl. Ex. 21.) The remaining 75% of the property provides more than enough space for a 3-acre staging area. And it is not certain that the 25% of the property that is under development will be imminently constructed, as the building is still under "plan check" and to date the building permit has not been issued. (*Id.*) Yet, the FSEIS does not even purport to analyze whether the remaining 75% of the property is available. Likewise, the FSEIS fails to analyze the cost of acquiring a temporary construction easement for even part of the property. These failures demonstrate that the Agencies' expenditures to acquire the properties for Staging Areas 2 and 3 rendered them unable to consider obviously available safer (and indeed, better) alternatives.

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The FTA is wrong that all construction staging scenarios studied in the original EIS and FSEIS require acquisition and relocation of both 1940 and 1950 Century Park East. Construction Staging Scenario A ("Scenario A") which was originally adopted by Metro in May 2012, included "an approximately 5.5-acre construction staging and laydown area" at 1950 Avenue of the Stars and an additional laydown area (with no surface disturbing construction) at 1950 Century Park East. (AR107111-13; AR075622.) It did not require acquisition of 1940 Century Park East. (AR107111; AR041619; AR041621.) Moreover, Scenario A as approved by Metro would have required only 3 relocations (for 1950 Century Park East), as compared with the 21 relocations required for Staging Areas 2 and 3 as approved in the FSEIS (3 for 1950 Century Park East and 18 for 1940 Century Park East). (SUP015021.) Thus, even assuming that 1950 Century Park East would have been required for construction staging along with 1950 Avenue of the Stars—and it was not[16]—Metro would not have had to acquire 1940 Century Park East and relocate its 18 tenants. Another alternative staging area the FSEIS purports to analyze is a tunnel boring launch site at Wilshire/La Cienega, which would not have required acquisition of either 1940 or 1950 Century Park East. (AR107355-56.) Additionally, because both Scenario A and a Wilshire/La Cienega launch site are compatible with the alignments under review, it is not true that all alignments require acquisition of both properties. (AR107355 (requiring only that "launch site [ ] connect directly to the tunnels, either through a side shaft or through a shaft directly above the tunnels"); AR107361 ("The construction staging area must be along the alignment so that it can correct directly to the tunnels under construction");

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[16] Had the Agencies conducted a proper analysis of feasible and prudent alternatives to the construction staging areas, they could have adopted a modified Scenario A. For example, the Agencies could have determined that the 5.5 acre 1950 Avenue of the Stars was sufficient to support all construction and laydown activity, and that it was not necessary to acquire 1950 Century Park East. (AR107355 ("Approximately 3 acres is required to support tunneling operations.").)

AR107113 ("tunnel access shaft must be located on or immediately adjacent to the tunnel alignment").[17] The FTA thus should not have authorized the acquisition of these properties.

Metro's argument that it can simply resell the properties it acquired in the event there is a change (Metro Br. 15) is unavailing. If an alternative staging area is selected, the millions of dollars in federal funds that FTA and Metro expended on the 21 relocations at Staging Areas 2 and 3 would be irretrievable. The federal funds that FTA and Metro expended certifying and appraising the properties and litigating eminent domain proceedings likewise would be irretrievable. Moreover, the FTA and Metro would have to begin a new acquisition process for alternative staging area properties, which generally takes "18 to 24 months" (SUP015423)—a delay that Metro has already conceded is unaffordable because it would cost Metro $6 million per month in penalties under the Design/Build Contract (Pl.'s UF ¶ 43; AR104468-69). In the meantime, the tens to hundreds of millions of dollars that Metro actually paid to acquire the property rights would be locked up while Metro tries to sell the properties.[18]

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[17] The Agencies also disregard Metro's progress in acquiring 2040 Century Park East (which also was not required for Scenario A adopted by the Metro Board in 2012 or a Wilshire/La Cienega launch site). Acquisition of 2040 Century Park East was effectively complete as of July 2017. Mr. Washington admitted that Metro "ha[d] acquired . . . the 2040 Century Park East site south of the ATT building (current parking lot) to support tunnel operations." (Pl.'s UF ¶ 43; AR104469.) Moreover, before the FSEIS was complete, Metro had negotiated an "Early Access Agreement" with JMB to gain access to the property "as soon as possible" (SUP015421), and JMB was willing to provide a "Right of Entry" whenever the property was needed (SUP015297-98). The only reason Metro had not yet appraised and acquired the property is that property rights for several JMB properties were required and Metro intended to "perform appraisals at the same time" for all JMB properties. (AR105421.)

[18] Because the Agencies redacted and refused to include in the Record the dollar amounts spent on specific properties, the School District cannot establish the precise amounts Metro spent acquiring each property. (*See* Recine Decl. Ex. 23 at 17:19-18:4.) Metro admits that SUP14356 includes information regarding the cost of acquiring 1940 Century Park East. This document is a stipulation for possession that states that $46.15 million will be deposited by Metro, and withdrawal "will include final payment to holder of first deed of trust." (SUP014356.) It is not clear that this

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Final design of the Project Alignment and Staging Areas also limited the choice of reasonable alternatives. The FTA disbursed and Metro spent tens of millions of dollars for final design of the Project Alignment and Staging Areas. As of November 2017, Metro had spent $32,283,008.02 on final design work for the Project. (Pl.'s UF ¶ 50; SUP000010.) These expenditures accounted for nearly half of the overall final design work for Section 2. (Metro UF ¶ 323.) The contractor was in the process of preparing the 100% design package for utility/civil design at the TBM launch box, the 85% design package for remaining utility conflicts outside the TBM launch box and the 60% design package for the tunnel reaches, stations, track and systems. (*Id.*) If an alternative alignment and staging areas were selected, the tens of millions expended for final design of the Project Alignment and Staging Areas would be irretrievable sunk costs, and Metro would have to spend those funds again to redesign the alignment and staging areas. The FTA permitted Metro to proceed with final design of the Project Alignment and Staging Areas in direct contravention of relevant regulations. *See* FHWA Order 6640.1A (agency should ensure that it does not authorize final design until it completes NEPA with the selection of an alternative, including by restricting awards of federal funds and withholding a notice to proceed for final design). The FTA also made no effort to restrict awards of federal funds to preliminary design only. Instead, the FSEIS ultimately relied upon design and engineering work performed for the Project Alignment to reject alternative alignments. (Pl.'s UF ¶ 70; AR107413.) The FTA's failures violated its independent obligation to ensure that Metro did not violate NEPA by predetermining the outcome of the supplemental analysis.

is the full price paid for the property. In addition to this amount, Metro paid for the relocation of 18 tenants at this property, at the cost of $40,000 to $2 million per tenant. (SUP014745-48.) Other irretrievable costs to Metro for this property include those for appraisal, legal fees, title and escrow costs and environmental surveys.

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c. Federal Funds Allocated to Final Design and Property Acquisitions Were Irretrievable Commitments.

The Agencies also argue that the FTA did not "irretrievably commit" federal funds because the FFGA "establishes restrictions on the use of grant monies" and requires Metro to reimburse the FTA for any expenditures of federal funds that the FTA deems 'ineligible.'" (FTA Br. 15-16; Metro Br. 15.) This argument ignores the FTA's direct role in approving each of Metro's expenditures for the Project. The FFGA defines "eligible" and "ineligible" costs by reference to the Master Agreement. An "ineligible" cost is one that the FTA *excludes* in connection with the Award. (FTA Master Agreement (Oct. 1, 2015) at 22.)[19] Ineligible costs include those lacking FTA approval or those ineligible for FTA participation as provided by applicable federal law, regulation or guidance. (*Id.*) The provision does not establish that a later change would render such expense "ineligible." (*Id.*)

This is particularly true where, as here, the FTA itself deemed all such expenses eligible. The FTA supervised and authorized Metro's expenditures of hundreds of millions of dollars in federal funds for final design and property acquisitions. It disbursed funds for property acquisition, participated in monthly real estate calls with Metro to discuss status of acquisition and relocations of specific properties needed for the Project, concurred in Metro's appraisal of just compensation values, authorized Metro to make offers for the purchase of property rights, approved Metro's filing of eminent domain proceedings and received monthly reports on Metro's expenditures, which kept the FTA fully apprised of Metro's financial undertakings. (Pl.'s UF ¶¶ 22-32, 45-51.)

The fact that the FFGA requires Metro to complete the Project and accept responsibility for cost overruns does not, as the FTA claims, insulate the FTA from

[19] https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/22-Master_Agreement_FY2016_-_3-1-15_-_FINAL.pdf.

predetermination. (FTA Br. 15-16.) It instead demonstrates the Agencies' incentive to accept the Project without deviations so as not to exceed the New Starts financial contribution and the Baseline Cost Estimate for the Project (which is calculated based on the Project Alignment's specifications). (SUP000712.) Moreover, the FTA's interpretation of this provision to mean that its participation is capped is a concession that it violated its promise to the Court that, even if the Agencies executed the FFGA, the Project can be changed. In asking this Court not to vacate the ROD, the FTA relied on the importance of the Project to Los Angeles County. It represented that federal funding is vital to the Project, and the ability to proceed on the Project hinged on securing the FFGA. The FTA promised the Court that it and Metro would be able to analyze alternatives fairly and objectively, notwithstanding the execution of the FFGA, because the FFGA could be changed and the Agencies would not rely on costs expended on the Project as a basis for rejecting alternatives. Implicit in the FTA's representations was that federal funding would be available to cover the cost of a change. The FTA's new position that federal funding is *not* available to cover changes that would increase the cost beyond the funding cap in the FFGA violates the substance of its statements to the court. (Recine Decl. Ex. 7 (FTA's description of process for amending the FFGA in scope or budget); Recine Decl. Ex. 6 (this Court's determination that "if they get full funding and they can't make a change thereafter, then it seems to me that is a major problem, and I would consider that to be in a way predeterminative").) The FTA should not be permitted to now rely on a purported cap on its participation to argue that its massive commitment of federal funds is not an irretrievable commitment of resources.

d. The Court Did Not Authorize Final Design and Property Acquisition.

Metro argues that in allowing the Agencies to enter into the FFGA and Design/Build Contract, the Court understood that Metro would expend funds on

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design and property acquisition. (Metro Br. 14.) But the Court did not authorize final design and property acquisition; rather, it permitted certain "*initial and/or preparatory steps*" that the FTA and Mr. Washington represented needed to be completed. (AR079133 (emphasis added).) The Court's decision not to prevent the Agencies from executing the FFGA and Design/Build Contract was to avoid the 16-month delay that Mr. Washington represented would occur if, as a result of vacatur, Metro lost its federal funding and had to redo its design/build contract procurement process.[20] (AR079133-38; AR079133 (relying on Washington Decl.); Recine Decl. Ex. 15 at 2; *see also* Recine Decl. Ex. 2 ¶¶ 5, 10-16.) Similarly, based on Mr. Washington's representations, the Court permitted advanced utility relocation—the only pre-construction activity described as necessary for Section 2—to allow Metro to stay on schedule. (AR079135; AR079140; *see also* Recine Decl. Ex. 2 ¶¶ 10-16.) No part of the Court's decision authorized or even discussed final design and property acquisition, neither of which can be deemed "initial" or "preparatory" steps. *See* 23 C.F.R. § 771.113(a) (prohibiting final design, property acquisition and project construction before environmental analysis is complete). In the absence of the Court's authorization, the Agencies cannot rely on the Court's *understanding* that such work would commence. And, even if final design and property acquisition were permitted—and it was not—the Court prohibited the Agencies from relying on costs of redoing work performed on the alignment to reject alternatives, a directive that the Agencies plainly have violated.

[20] The delay on which the Agencies rely in the FSEIS—a delay from additional environmental analysis required for every alternative that is not the Project—is not the delay discussed in the Court's remedy order, which was a delay from Metro having to redo the design/build contract procurement process.

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e. Consideration of Schedule Delays and Costs from an Alternative Selection Foreclosed Reasonable Alternatives and Predetermined the Outcome of the Environmental Analysis.

The Agencies' consideration of schedule delays and costs of changing the alignment granted the Project Alignment an automatic advantage over alternatives based on bureaucratic momentum in favor of the Project and violates this Court's order that the FTA and Metro may not rely on inertia in favor of the Project Alignment or costs of realigning the Project as a basis for rejecting alternatives. (Mot. 26-28.) The Agencies do not dispute that the FSEIS discusses schedule delays and costs of realigning the Project, but argue that it is proper to consider schedule delays "in the context of assessing the degree to which each alternative meets the purpose and need for the project" (FTA Br. 19-20; Metro Br. 31) and that consideration of delays does not reflect improper consideration of costs (FTA Br. 21). These arguments must be rejected.

The Camden and Linden Alternatives meet the purpose and need for the Project, which is to improve mobility and transit services to major activity and employment centers through a fast, reliable and environmentally sound transit alternative to meet population and employment growth and ease traffic congestion. (AR107411-12 (reflecting similar ridership and travel time); *see also* UF ¶ 122.) The Agencies' narrow construction of the Project's purpose and need to require that they must be met without delay (which, according to the FSEIS, only the Project can satisfy given that "[a]ll alternatives, aside from the Project, would delay the Project's purpose and need") is arbitrary and capricious. The Agencies are not permitted to "define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives." *Mineta*, 302 F.3d at 1119-20 ("if the purposes and needs of the Project were so narrowly construed as to mandate [the travel corridor] only at 11400 South,

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we would conclude that such a narrow definition would be contrary to the mandates of NEPA").

By incorporating delay into the analysis of purpose and need, the Agencies put their thumb on the scale of the Project Alignment, improperly relying on cost and bureaucratic momentum they intentionally created by proceeding with final design and engineering in parallel with the supplemental analysis. There is no debate that these expenditures towards the final alignment while the NEPA analysis was underway effectively foreclosed any alternative, no matter how reasonable, because all other alternatives would require different design and engineering, so by definition would delay Segment 2 more than the Project Alignment.

The fact that the FSEIS does not expressly state the dollar cost of a schedule delay does not mean that these costs did not infect the FSEIS. *See Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 716 (10th Cir. 2010) (to "judg[e] whether an agency has impermissibly committed itself to a course of action before embarking upon a NEPA analysis," a court "look[s] to evidence outside of the environmental analysis itself," including intra-agency comments and drafts). While the supplemental analysis was ongoing, Metro admitted (and the FTA knew) that Metro could not accept the School District's Proposed Alternative Alignments because of its prior contractual commitment—a delay to the Design/Build Contract would "cost Metro conservatively $6 million per month ($72 to $108 million for 12 to 18 months)." The FTA is directly implicated in this predetermination because it allowed Metro to rely on the costs of schedule delays by characterizing the delay as one in meeting purpose and need. (UF ¶¶ 58-72.) Delay was *not* part of the "purpose and need" analysis for least overall harm alternatives in the DSEIS, before the introduction of the Camden and Linden Alignment proposals.[21] (*See* AR088399-

[21] "Delay meeting the Project's purpose and need" was just one of a host of new factors the Agencies introduced to the FSEIS's "least overall harm" analysis to manufacture differences between the Project and the Camden and Linden

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422.) In fact, the FTA initially proclaimed that "potential schedule delays" were not to be considerations in the decision-making process. (Pl.'s UF ¶¶ 59-60, 67.) The FTA's transparent reversal on this point—knowing the costs—demonstrates that these costs directly infected the FSEIS analysis. (*Id.*) This violates the Court's order prohibiting the FTA and Metro from relying on the costs of changing the alignment and inertia caused by the execution of the FFGA and Design/Build Contract. (Pl.'s UF ¶¶ 13-20.)

Moreover, the discussion of delay in the FSEIS is improper in itself. The FSEIS states that the selection of any alternative other than the Project Alignment would result in a delay to the Project. (Pl.'s UF ¶ 61; AR107413; AR107081 ("All alternatives, aside from the Project, would delay the Project's purpose and need.").) The reason for this delay is that the Project Alignment "has completed the NEPA and CEQA review process," whereas all other alternatives "would require detailed analysis and an opportunity for public review, resulting in a likely one-year delay in project construction and consequent delay to meeting the Project's purpose and need." (Pl.'s UF ¶ 61; AR168993; *see also* AR107413 ("If a different alternative was selected for implementation, then it would require additional analysis under CEQA and NEPA and additional engineering and design efforts. This would result in a delay in project construction and a delay in the realization of Project benefits.").) And, aside from the delay, the "*differences in harm between the alternatives are small*" and "*do not indicate an alternative that would clearly have the least harm.*" (Pl.'s UF ¶ 65; AR168998-99.) The delay was thus a, if not *the*, determinative factor in rejecting alternatives. (AR107420 ("taking into account the adverse impact to the

alternatives. Other factors that the DSEIS did not consider include the square footage of impact to Section 4(f) property, proximity to oil wells and necessity for cross-passages. (*See* AR088399-422.) Instead, these factors were added to the analysis after the School District presented the Camden and Linden Alignments—each as a mark against these alternatives.

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public that would result from the delay in Project benefits under the other alternatives" to determine that the Project would generate the least overall harm)).

The Agencies cite no authority for their contention that they may consider the schedule delays resulting from additional NEPA analysis required by an alternative—here, *because of their own inertia in favor of the Project Alignment and failure to conduct a proper Section 4(f) analysis in the first place*—as part of a Project's purpose and need. To the contrary, the Agencies' application of an automatic advantage to the Project Alignment because of analysis and design/engineering they already performed for one alternative is precisely the "bureaucratic steam roller" that NEPA jurisprudence is designed to prevent. *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.) (citing *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988)); *see also* 23 U.S.C. § 139(f)(4)(D) (if preferred alternative is "developed to a higher level of detail than other alternatives . . . the development of such higher level of detail [shall] not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered").

As Judge (later Justice) Breyer explained in *Marsh*, the timing of administrative activities is important because each step towards a course of action "represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues" *id*. at 500:

> The important fact of administrative life . . . [is] as time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies . . . may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a

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> new and different course of action. Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice . . . will prove an exercise in futility.

872 F.2d at 503-04 (citing *Com. of Mass v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (Breyer, J.) ("[NEPA's] purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.") (steps taken toward course of action analyzed in SEIS would limit agency's choice of alternatives).[22] Moreover, rejecting alternatives because they would require further environmental analysis violates Section 4(f)'s substantive mandate that the FTA may not approve the use of the High School's recreational and historic properties unless it determines that the Project causes the *least* overall harm among alternatives that use the Section 4(f) properties,

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[22] Courts in the Ninth Circuit have adopted the reasoning that bureaucratic momentum can result in a predetermined outcome. *See W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1239 (D. Idaho 2018) (collecting cases); *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."); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) ("Here, if the Biological Opinion had been rendered before the contracts were executed, the [U.S. Fish and Wildlife Service] would have had more flexibility to make, and the Bureau [of Reclamation] to implement, suggested modifications to the proposed contracts. . . . The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal."); *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("This case raises a concern over BLM's ability to fulfill its procedural obligations without favoring a predetermined outcome. Mr. Ott's testimony leaves the strong impression that he is motivated by an executive policy to maximize energy development. The wheels are in motion."); *Idaho ex. rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1264 (D. Idaho 2001) ("[T]he purpose of NEPA 'is to required consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.'") (quoting *Watt*, 716 F.2d at 953); *Nat'l Wildlife Fed*, 2017 WL 1829588, at *12 ("The Court is persuaded by the reasoning in *Sierra Club* . . . , which discusses what is sometimes described as the 'bureaucratic steamroller' or 'bureaucratic momentum' theory . . . ."); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 913 (W.D. Wash. 1988) ("[T]he risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation.") (citing *Watt*, 716 F.2d at 952-53).

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considering the relevant factors set forth in Section 4(f) regulations. Considered this way, as it must be, the delay has no place in the analysis of the Project's purpose and need, and the emphasis on the Agencies' self-created delay violates the core tenets of NEPA and Section 4(f).[23]

In any event, the FTA and Metro concede that cost-estimate worksheets included in Appendix L of the FSEIS include $4.4 million for "Additional Geotech Investigations, SEIS, CEQA & Contract Docs" required for all "least overall harm" alternatives. (FTA Br. 22; Metro Br. 32; UF ¶ 71.) Thus, even setting aside whether the discussion of schedule delays in the FSEIS reflects consideration of costs, the Agencies admit that they considered at least some costs of changing the alignment (and again, momentum in favor of the Project) in violation of the Court's order that such costs may not be considered as a basis for asserting that the alignment cannot be changed. (Pl.'s UF ¶ 16; *see also* Pl.'s UF ¶ 18-19 (Metro's statement to the Ninth

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[23] The Agencies have previously relied on *Pit River Tribe v. U.S. Forest Service (Pit River II)*, 615 F.3d 1069 (9th Cir. 2010), to argue that bureaucratic momentum does not necessarily result in predetermination. *Pit River II* is distinguishable. In a prior ruling in that case, *Pit River Tribe v. U.S. Forest Service (Pit River I)*, 469 F.3d 768, 788 (9th Cir. 2006), the Ninth Circuit determined that the agency erred in failing to prepare a timely environmental analysis for certain lease extensions and by approving a ROD for a development based upon the invalid lease extension. The Ninth Circuit remanded to the district court with instructions that the lease extensions "be undone" and the ROD approving the project based on the invalid lease extension be "set aside" while the agency conducted its analysis on remand. *Pit River II*, 615 F.3d 1069 at 1074. The district court, following the Ninth Circuit's instruction, vacated the lease extensions and the ROD. In so doing, the Ninth Circuit and district court ensured that there was no real danger that bureaucratic momentum would prejudice the analysis, as protections were in place to prevent the agency from building on any inertia. The Ninth Circuit thus could presume, *in that circumstance*, that the agency would follow the law in preparing its environmental analysis on remand. *Id.* In any event, here, recognizing that the billion dollar FFGA and Design/Build Contract could predetermine the outcome of the analysis, this Court expressly warned the Agencies that "***the Court will not allow the FTA to rely on execution of the FFGA or design/build contract for Phase 2, or any inertia caused thereby, to support the suitability of any further NEPA analysis the Court has ordered the FTA to undertake.*** (Recine Decl. Ex. 15 (emphasis added); *see also* Recine Decl. Ex. 4 ("should Metro follow down that path [of obtaining the FFGA and executing the Design/Build Contract in the absence of a vacatur, Plaintiffs' argument for predetermination get[s] much stronger if they return to the Court with that contention").)

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Circuit that "the district court expressly prohibited Metro or FTA from later arguing that it would be too costly to change the project alignment").[24]

3. The FTA Is Directly Implicated in Predetermining the Outcome of the Supplemental Environmental Analysis.

The FTA is responsible for the predetermination that infected the FSEIS. *Mineta* establishes that predetermination is properly attributed to a federal agency where, as here, the federal agency has failed in its supervisory responsibilities despite being "involved throughout the NEPA process." 302 F.3d at 1112-13. In *Mineta*, the local agency and its consultant entered into a contract providing for the consultant's preparation of a finding of no significant impact (FONSI). *Id.* at 1112. The federal agency was "implicat[ed] . . . directly" in the contractually predetermined result because it wanted evidence that the FONSI had been prepared to be removed from the environmental analysis circulated for public review and because it violated its own regulations providing that a FONSI should not be prepared until the federal agency has received public comments. *Id.*at 1112-13. It also failed to conduct sufficient steps to insulate the FSEIS from the biases of the local agency and its contractor, failing to fix problems raised by an independent expert. *Id.* at 1113.

As in *Mineta*, the FTA here failed to take the most basic steps to prevent Metro from limiting the choice of alternatives and insulate the FSEIS from Metro's biased analysis. The FTA relied solely on research and analysis performed by Metro and its contractors, despite knowing Metro's conflict of interest, and the FTA did not hire independent experts to review Metro's work. *See Mineta*, 302 F.3d at 1113 (predetermination attributable to federal defendants even where they employed

[24] The Agencies argue that inclusion of the $4.4 million is not significant because it does not change the conclusion that the Camden Alignment would still cost less than the Project and the Linden Alignment would still cost more, but the School District's point is that inclusion of this amount demonstrates that the FSEIS considered costs of changing the alignment, in violation of the Court's order.

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independent law firm to review comments to the environmental analysis, because they failed to fix problems in the analysis). The FTA did not in any way restrict Metro's use of federal funds for final design or acquisition work directly impacted by the supplemental review. *See Burkholder v. Peters*, 58 F. App'x 94, 100 (6th Cir. 2003) (FHWA insulated itself from local agency's conflict of interest by refusing to commit federal funds to any final design work prior to completion of the environmental analysis and even making clear it would not reimburse such expenses). The FTA did not restrict Metro from issuing a notice to proceed with final design, as provided in relevant guidance. *See* FHWA Order 6640.1A (describing safeguards to prevent final design from limiting choice of alternatives). And it ignored its own policy determination that "acquisition of property would prejudice the consideration of alternatives." (Recine Decl. Ex. 17 (FTA Policy on "Property Acquisition and Relocations")); *Mineta*, 302 F.3d at 1112-13 (federal agency implicated in predetermination where it violated its own regulations).

The Court should reject the Agencies' baseless attempts to narrow the realm of legitimate evidence that this Court must consider. (*See* Plaintiff's Opposition to Local Defendants' Request for Evidentiary Ruling On Specified Objections; Plaintiff's Request for Judicial Notice ("Opposition to Evidence Brief") at 2-6, filed concurrently.) In "judging whether an agency has impermissibly committed itself to a course of action before embarking upon a NEPA analysis," a court must look to all relevant evidence of predetermination, even if it is "outside of the environmental analysis itself." *Forest Guardians*, 611 F.3d at 716. Limiting inquiry to the environmental analysis alone "could fail to detect predetermination in cases where the agency has irreversibly and irretrievably committed itself to a course of action, but where the bias is not obvious from the face of the environmental analysis itself." *Id.* at 717 (citing *Metcalf*, 214 F.3d at 1144 (although EA was not facially flawed, it was "highly likely" that because of defendants' prior commitments, the "EA was

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slanted in favor of finding that the . . . proposal would not significantly affect the environment")).

This Court has already determined that *Forest Guardians* sets forth the applicable standard for the realm of evidence it must consider "to meaningfully assess the issue" of predetermination. (ECF No. 62 at 8-9.) Relevant evidence of predetermination includes "intra-agency comments on [] draft[s]," as well as "e-mails, letters, memoranda, meeting minutes, [] statements made at a press conference . . . [and] the agency's issuance of permits and entrance into binding contracts." *Forest Guardians*, 611 F.3d at 716-17 n.19. In accordance with this standard, this Court directed the Agencies to include predetermination-relevant evidence in the Record. (ECF No. 62 at 8-9; ECF No. 76 at 2-3.)[25]

The FTA nevertheless argues that because it is the "ultimate decisionmaker" the Court should ignore drafts, redlines and intra-agency comments on drafts as well as Metro's statements and testimony. (FTA Br. 21-22.) This argument must be rejected. The statements that the FTA seeks to have the Court ignore were before the FTA and bear on whether the FTA satisfied its obligation to prevent its co-lead agency from limiting the choice of alternatives and to insulate the FSEIS from Metro's conflicts of interest. *See Mineta*, 302 F.3d at 1112-13 (reviewing local agency's contractual commitments and intra-agency communications for predetermination).

While much of the predetermination-relevant evidence on which the School District relies, such as drafts and redlines, intra-agency comments and Mr. Washington's July 2017 letter to the School District rejecting proposed alternative alignments, is in the Record, certain evidence is not—namely, Mr. Washington's

[25] The Court also rejected the Agencies' attempts to withhold drafts and intra- and inter-agency communications from the Record, determining that the Agencies must complete the Record with drafts and redline versions of the FSEIS and related comment matrices, as well as documents considered "directly and indirectly" in the specific categories set forth by the School District. (ECF No. 76 at 1-2.)

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deposition testimony regarding the Full Funding Grant Agreement ("FFGA") and the Design/Build Contract and his declaration setting forth the supposed impacts of vacatur—both of which were submitted in remedy proceedings in this action. This evidence is relevant, it was before the FTA, and it should not be ignored. Mr. Washington's statements that the execution of the FFGA and Design/Build Contract *would* impact Metro's ability to consider alternative alignments is entirely consistent with his July 2017 letter to the School District—which is in the Record—that Metro could not accept the School District's alternative alignments because a change in alignment would "cost Metro conservatively $6 million per month ($72 to $108 million for 12 to 18 months)" in delays to the Design/Build Contract, for which a Notice to Proceed had been issued. (*Compare* Recine Decl. Ex. 3 *with* AR104468-69.) Mr. Washington's Declaration, which the FTA itself submitted to the Court in remedy proceedings and upon which the Court relied in declining to vacate the ROD, is also consistent with the July 2017 letter. (Recine Decl. Ex. 2 ¶¶ 6-9.) In describing impacts to Section 1 of the Project resulting from a potential vacatur of the ROD, Mr. Washington explained that issuing a stop-work order on the Section 1 design/build contract would be an "owner caused delay" under the contract, resulting in cost increases for which Metro would be responsible. (*Id.*)

Mr. Washington's deposition testimony and declaration were both before the FTA and must be evaluated, together with other relevant evidence in the Record, to determine whether the FTA satisfied its obligation to prevent itself and Metro from limiting the choice of reasonable alternatives and insulated the FSEIS from Metro's conflicts of interest. *See New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 636 (S.D.N.Y. 2019) (considering decisionmaker's sworn testimony because a court "*may* consider material outside the administrative record in evaluating whether [the decisionmaker's] decision was made in bad faith or was pretextual"). The evidence overwhelmingly establishes that the FTA did not.

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Finally, contrary to the Agencies' contentions, bad faith is not a prerequisite for a finding of predetermination. Predetermination jurisprudence is based on the *timing* of an agency's point of commitment. Where an agency has committed *before* conducting the proper environmental analysis, it is presumed that the subsequent environmental document is an "exercise in form over substance . . . to rationalize a decision already made." *Metcalf*, 214 F.3d at 1142, 1144 ("It is highly likely that because of the Federal Defendants' prior written commitment to the Makah and concrete efforts on their behalf, the EA was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment."); *Save the Yaak*, 840 F.2d 718-19 (where "contracts were awarded prior to the preparation of the EAs . . . the agency did not comply with NEPA's requirements concerning the timing of their environmental analysis, thereby seriously impeding the degree to which their planning and decisions could reflect environmental values"); *Thomas v. Peterson*, 753 F.3d 754, 760 (9th Cir. 1985) ("[b]uilding the road swings the balance decidedly in favor of timber sales even if such sales would have been disfavored had road and sales been considered together before the road was built").

Nevertheless, the School District has established the FTA's bad faith. Instead of satisfying its supervisory responsibilities and its representations to the Court that it could objectively analyze alternatives and that alternatives could be selected and built without cost as an excuse, the FTA approved a patently flawed FSEIS, which sanitized references to the "costs" of changing the alignment. Instead, it disingenuously relies entirely upon delay—which is directly equivalent to cost—as the justification not to select viable, preferable, alternative routes. (*See* Mot. 26-28.) The FTA manipulated various factors—misrepresenting or aggregating impacts, double-counting them or inconsistently applying standards—in order to present a "more compelling argument" for the Project. (*See id.* at 28-31.) The FTA also failed to undertake any reasonable analysis of the availability of 1950 Avenue of the Stars

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as an alternative staging area property because it had already acquired 1940 and 1950 Century Park East. (*See id.* at 31-34; *infra* § II.B.5.c.) And, despite Metro's demonstrated inability to review alternatives objectively, the FTA authorized Metro's expenditures of funds for project activities directly affected by the supplement. Because the Agencies' firm commitments have "infected" the supplemental analysis, the FSEIS must be set aside as arbitrary and capricious.

B. The FTA Violated Section 4(f) by Failing to Undertake the Proper Analysis In Approving a Project That Uses a Protected Recreational and Historic Property.

1. The Agencies Did Not Objectively Evaluate Alternatives, Rendering Their Section 4(f) Determinations Arbitrary and Capricious.

The Agencies' predetermination undermined the FSEIS's Section 4(f) analysis, which purported to support the selection of the Project Alignment and Staging Areas 2 and 3. (Mot. 34-42; *see id.* at 26-33.) Predetermination renders the outcome of the analysis arbitrary and capricious as a matter of law. In response, the FTA asserts that the Court should disregard the School District's entire argument because it merely "disagrees with *how* FTA weighed" the Section 4(f) factors, which "is a classic matter of agency discretion." (FTA Br. 42.) The FTA is incorrect. Unlike a classic NEPA analysis, Section 4(f) is a *substantive* mandate that prohibits the FTA from approving the use of Section 4(f) protected property unless no *feasible and prudent alternatives exist that do not use the protected property*, and if no such alternatives exist, the chosen alternative causes *the least overall harm* of alternatives that use protected properties. *See* 23 C.F.R. §§ 774.3(a)(1), (c); *Mineta*, 302 F.3d at 1112 ("Thus, our review . . . has a substantive component as well as a component of determining whether the agency followed procedural prerequisites" where a "'clear error in judgment'" can lead to reversal of agency action). Section 4(f) also prohibits

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the use of Section 4(f) protected property if the agency does not engage in *all possible planning* to minimize harm. 23 C.F.R. § 774.3(a)(2).

The Court therefore must find the Agencies' conclusions in the FSEIS arbitrary and capricious if they failed to undertake their Section 4(f) obligations "rigorously or objectively." *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1121 (C.D. Cal. 1999); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]his inquiry into the facts is to be searching and careful."). Because the Agencies failed to rigorously and objectively, the Court should set aside the conclusion of the Section 4(f) analysis.

Courts have found that Section 4(f) analyses were arbitrary where they relied on biased criteria favoring the project, accepted erroneous factual assumptions, made material mistakes of fact or failed to properly evaluate constructive use impacts or to examine viable project alternatives. *See City of S. Pasadena*, 56 F. Supp. 2d at 1119, 1121; *Mineta*, 302 F.3d at 1110 (environmental analysis can be "fatally flawed by its use of vague, unsupported conclusions and inadequate, incomplete analysis"). Here, the Agencies' Section 4(f) analysis suffers from each of these flaws; thus, the Court should find that the Agencies' decision to approve the Project is arbitrary and capricious.

2. The Agencies Arbitrarily and Capriciously Rejected the Camden and Linden Alignments, Each of Which Is Less Harmful to the High School's Section 4(f) Resources Than the Project Alignment.

The Agencies correctly concede (as they must) that the Project Alignment will directly and permanently use the High School's Section 4(f) protected *recreational* resources and that such use would *not* be *de minimis*.[26] (Metro Br. 24; FTA Br. 41-

[26] The Agencies devote substantial energy to the meritless argument that any use of historic recourses was *de minimis* and therefore no Section 4(f) analysis was required. (*See infra* at § II.B.3.) Yet, the Agencies' simultaneously acknowledge that they proceeded to engage in a Section 4(f) analysis with respect to historic resources in any event. The reason for their effort to convince the Court that an

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42, 44-45; AR107347.) As a result, the Agencies proceeded to conduct the required follow-on, two-step Section 4(f) analysis and concluded there were no feasible and prudent alternatives that avoid using the High School's recreational resources. (FTA Br. 45; AR107356-87.) Yet, the manner in which the Agencies weighed the "least overall harm" factors and selected the Project Alignment as the least harmful alternative was arbitrary and capricious.

a. The Agencies' "Least Overall Harm" Analysis Fails as a Threshold Matter by Incorrectly Focusing on "Use" Rather Than "Harm."

The Agencies argue that because the FSEIS concluded that none of the alternatives to the Project Alignment (including the Camden and Linden Alignments) would *harm* any Section 4(f) recreational or historical resources, the "FTA's [least overall harm] analysis conservatively focuses on whether the alternatives would 'use' such resources in weighing the factors" under 23 C.F.R. § 774.3(c)(1), even if they also concluded the use was *de minimis*. (Metro Br. 24, 27-28; FTA Br. 46-47; *see* AR107388; AR107405-10.) The Agencies assert that even "if the Project is only slightly better than the alternatives, FTA is allowed to choose that alternative." (Metro Br. 27; *see* FTA Br. 47.) On this basis, the Agencies conclude the Project Alignment would cause the least overall harm. (Metro Br. 24; FTA Br. 47.)

As a preliminary matter, the Agencies are wrong that the Project Alignment would not "harm" any Section 4(f) resources. (*See* Mot. 17-18.) In addition, and critically, the Agencies' "least overall *harm*" analysis incorrectly analyzes "use"

analysis they performed was unnecessary is evident—the Agencies' comparative analysis of the use of historic resources puts their bad faith on full display. The FTA and Metro eliminated two alternative alignments in part because they purportedly burdened an entire community of historically eligible Spanish Colonials. However, those alternatives in fact impacted only one structure within the "tract" that was demolished decades ago, was rebuilt in a modernist style and is not a historic resource. The record demonstrates that the Agencies were aware of this fact, but nevertheless relied on that property's purported "historical" status as a reason not to proceed with the alternatives in the FSEIS.

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rather than "harm" among the alternatives. Accordingly, the Agencies have applied the wrong legal standard. *See* 23 C.F.R. § 774.3 (after finding both (1) a use of Section 4(f) resources and (2) that there are no feasible or prudent alternatives, Agencies must balance seven "least overall harm" factors of remaining alternatives). This is arbitrary and capricious and renders their selection of the Project Alignment erroneous as a matter of law.[27] Nevertheless, as set forth below, the Agencies' Section 4(f) analysis fails even under own incorrect standard.

b. The Agencies Fail to Rebut Evidence They Conducted an Arbitrary and Capricious "Least Overall Harm" Analysis of the Project, Camden and Linden Alignments.

The Agencies' "least overall harm" analysis in the FSEIS, as related to the Project Alignment and the Camden and Linden Alignments, was arbitrary and capricious as a matter of law. As explained in the Motion, their inclusion and consideration of several inappropriate factors in the analysis demonstrates their predetermination and bias in favor of the Project Alignment and against the Camden and Linden Alignments. The Agencies do nothing to counter these dispositive points. This is fatal to their Section 4(f) analysis and the FSEIS as a whole.

i. The Camden and Linden Alignments Would Cause Less Harm to Historic Section 4(f) Resources Than the Project Alignment.

The Camden and Linden Alignments would each cause less harm to Section 4(f) historical resources than the Project Alignment because the Camden and Linden Alignments do not tunnel beneath (1) historic and vulnerable Building B1 or (2) any

[27] The Agencies' use of an incorrect legal standard is also further evidence of their predetermination, as their version of the "least overall harm" analysis plainly is biased against the Camden and Linden Alignments. Indeed, as discussed below, their view of Section 4(f) appears to be specifically designed to create a pretext for rejecting the School District's proposed subway alignments (the Camden and Linden Alignment) in the Agencies' Section 4(f) analyses.

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Section 4(f)-protected properties in Residential Tract 7710. (Mot. 35-36.) The Agencies' responses, each of which fail, are addressed below.

The Agencies argue that it was not arbitrary and capricious to conclude that the Camden and Linden Alignments have more impact on historic Section 4(f) properties because they tunnel under more square feet of the High School as a whole than does the Project Alignment. (Metro Br. 25-26; FTA Br. 47-48.) The Agencies insist that "Section 4(f) *required*" their selection of the Project Alignment because the High School is considered a single historical unit. (Metro Br. 26 (emphasis in original); *see* FTA Br. 47-48.) This contention is undermined, however, by the Agencies' own conclusions in the FSEIS and the Section 4(f) Policy Paper (2012) (the "Policy Paper") on which they rely.

The FSEIS repeatedly acknowledges that only certain buildings—namely Buildings B and F—are "contributing resources to the [High School's] historic property" and subject to Section 4(f) protection, to the exclusion of Buildings A, C and L. (AR107324-25; Pl.'s UF ¶ 81; Mot. 30.)[28] This demonstrates that, in fact, the Agencies do not think that "Section 4(f) *required*" them to consider the High School as one historical unit. It is arbitrary and capricious for the Agencies to take a contrary position in their "least overall harm" analysis. Indeed, this contradictory reasoning is one of many obvious pretexts the Agencies employ to reject the Camden and Linden Alignments—alignments that are concededly prudent and feasible and minimize harm to the High School's Section 4(f) resources.[29]

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[28] To clarify, the FSEIS states that only "Buildings B, E, F, and H [ ] are contributing resources to the historic property." (AR107324.) As Buildings E and H are being removed as part of the School District's Master Plan, the FSEIS's "Section 4(f) analysis considers the remaining historic buildings (Buildings B and F) as Section 4(f) properties, but does not consider Buildings E and H." (AR107325.)

[29] Metro's reliance on the Court's tentative decision to support its position fails because the cited part of the Court's opinion only states that underground tunneling is considered a direct use, and therefore the follow-on, two-step Section 4(f) analysis is required. (*See* Metro Br. 26; AR075776.) This opinion does not address the

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There also is nothing in the Policy Paper supporting the Agencies' position. The Policy Paper dictates that "[w]hen a project requires land from a non-historic or non-contributing property lying within a historic district . . . there is no direct use of the historic district for purposes of Section 4(f)." (AR059676; Mot. 29.) It also states that, "[i]n any case, appropriate steps, including consultation with the SHPO/THPO on the historic attributes of the district and impacts thereto, should be taken to establish whether the property is contributing or non-contributing to the district and whether its use would substantially impair the historic attributes of the historic district." (AR059676.) In other words, the Policy Paper does not state that all structures within a historic district are eligible or contributing Section 4(f) historic properties. Rather, the Policy Paper recognizes that only certain properties within a historic district may contribute to its historic significance. The Policy Paper makes it incumbent on the Agencies to consult with the SHPO to determine which parts of the High School contribute to its historic significance because subsurface tunneling under *non-contributing* parts is not a "direct use of the historic district for purposes of Section 4(f)." (AR059676.)[30] Here, the Agencies conveniently failed to do so.

Accordingly, the square footages relied on by the Agencies in Table 5-13 of the FSEIS are meaningless, as they count tunneling under both contributing *and non-contributing* parts of the High School, thereby overstating every alignments' "use" of historical resources. (FTA Br. 47 (citing AR107408).) Instead, pursuant to the

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historical character of the High School as a whole or direct the FTA to treat tunneling under *non-contributing* parts of the campus as a direct use.

[30] In its attempt to undermine the School District's reliance on the Policy Paper, Metro actually concedes this point. Metro falsely asserts that the Motion "ignores" a part of the Policy Paper stating that "[e]lements within the boundaries of a historic district are assumed to contribute, unless they are determined by FHWA in consultation with the SHPO/THPO not to contribute." (Metro Br. 27 n.13 (citing AR059669).) As the discussion above shows, the Motion does not ignore this point; it relies on it. Regardless, under Metro's own logic, if certain aspects of a historical district are deemed non-contributing in consultation with SHPO—as was the case with the High School except Buildings B and F—then subsurface tunneling does not directly use those aspects under Section 4(f).

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Policy Paper, the Agencies were required to consider the amount of tunneling under *only* the contributing parts of the High School, and nothing else. The Camden and Linden Alignments *do not tunnel under any contributing parts of the High School*, but the Project Alignment tunnels under the vulnerable Building B1. (Mot. 30; AR107409 (Table 5-14).) The FSEIS's conclusion, therefore, that the Camden and Linden Alignments "use" more square feet of the High School's historic properties is arbitrary and capricious as a matter of law, and further evidences the Agencies' predetermination.

Like the Project Alignment, the Camden and Linden Alignments do not tunnel under any Section 4(f) historic properties in Tract 7710. The FTA is wrong that "the City identifies this group of properties as a single historic resource." (FTA Br. 47-48 (citing AR114896-97).) The pages of the 2004 City of Beverly Hills Historic Resources Survey Report (the "2004 Historic Resources Report") cited by the FTA expressly state that "due to demolition or . . . significant inappropriate alterations" to properties within Tract 7710, there are "138 contributors and 56 non-contributors out of a possible 196 residences in the district." (AR114896-97.) The same report goes on to identify 301 South Linden, the single property impacted by the Camden and Linden Alignments, as one of these "demolished," and thus non-contributing, properties. (AR114924; AR114888.)

The Agencies argue that "'for the purposes of planning and screening,' the residential grouping [Residential Tract 7710], as a whole, is considered an NRHP-eligible historic district," and therefore it was reasonable to find greater "use" by the Camden and Linden Alignments because these alignments "'would . . . require subsurface easements from one or more properties'" within Tract 7710. (Metro Br. 26-27 (quoting AR107408); *see* FTA Br. 47-48.) This argument fails chiefly because nothing requires the Agencies to consider Tract 7710 "as a whole" in terms of historical significance (and indeed the 2004 Historic Resources Report expressly

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determined that 301 South Linden was a "non-contributor"). Rather, the Policy Paper rejects the notion that all properties within a historic district are necessarily eligible or contributing Section 4(f) historic properties and places the onus on the FTA to consult with the SHPO to determine which parts contribute to the tract's historical significance, because tunneling under *non-contributing* parts is not a direct use of the contributing parts under Section 4(f). (AR059676.) The Agencies failed to undertake this effort. Instead, in violation of the Policy Paper, they chose to count *any* subsurface easements by the Camden and Linden Alignments in Tract 7710 as a Section 4(f) "use" regardless of whether the specific properties tunneled under were contributing. (*See* Pl.'s UF ¶¶ 73, 79; AR107418-20.)

The Agencies have no excuse for failing to consult the SHPO about contributing properties within Tract 7710. Several documents demonstrate that the Agencies *knew* that the Camden and Linden Alignments tunneled beneath *only a single property* located at 301 South Linden Drive within Tract 7710.[31] (Mot. 29;

[31] In the Federal Defendants' Local Rule 56-2 Statement of Genuine Disputes of Material Fact ("FTA's Genuine Disputes") ¶¶ 75, 77, ECF No. 98-3, the FTA attempts to dispute that the Camden and Linden Alignment would tunnel under only 301 South Linden Drive. However, the map produced by the Agencies (but excluded from the FSEIS) confirms that 301 South Linden Drive is the sole property impacted by the Camden Alignment. (AR118508.) And while the Linden Alignment skims the backyard of one additional neighboring property—305 South Linden Drive—it does not run beneath the qualifying historic structure. (*Id.*)

Additionally, the Agencies both make evidentiary objections to Exhibit 19 to the Recine Declaration, ECF No. 89-22, on the grounds that it is extra-record evidence. (*See* FTA's Resp. to Pl.'s UF ¶ 75; Local Defendants' Request for Evidentiary Ruling on Specified Objections, ECF No. 97-8.) These arguments fail for the reasons set forth in the School District's Opposition to Evidence Brief. In sum, Exhibit 19 is a demonstrative map to aid the Court with the Agencies' map that is included in the Record but not the FSEIS (i.e., AR118508). (See Pl.'s UF ¶¶ 75.) Exhibit 19 shows the physical locations of the Camden and Linden Alignments with respect to the actual boundary line of Tract 7710. This information is contained in the map at AR118508 as well, but Exhibit 19 presents the actual boundary line of the eligible historic district clearly for the Court to see, in a manner the Agencies should have included in the FSEIS. Therefore, Exhibit 19 is not meant to supplant or replace any maps that the Agencies relied in conducting their supplemental environmental review, but rather to supplement and explain this complex and technical matter.

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Pl.'s UF ¶¶ 74-79; AR114888; AR118508-09; 107418-20; AR114838; AR198715.) Moreover, this property did not contribute to Tract 7710's historical significance *because the property had been "demolished" years earlier* and reconstructed in a modern style. (Pl.'s UF ¶ 77; AR114888; AR118508-09.) Indeed, the Agencies also appear to have intentionally excluded the map overlaying the Linden and Camden Alignments on Tract 7710 from the FSEIS and Appendix L, and they fail to disclose that the Camden and Linden Alignments impact only a single non-contributing property within the district. (Pl.'s UF ¶ 77; AR107418-20; AR114838); (*see* AR075722) (Agencies must disclose relevant facts and shortcomings). The Agencies do not even bother to refute these facts, instead focusing on convincing the Court that their Section 4(f) analysis of historic resources was never necessary, so the Court should simply ignore it. (*See infra* at § II.B.3.)

Armed with knowledge that 301 South Linden Drive and other properties within Tract 7710 were non-contributing, the Agencies should have complied with the Policy Paper and consulted with SHPO. The Agencies did not do this, however, because the result would place the Project Alignment and the Camden and Linden Alignments on equal footing with respect to Tract 7710, thereby undermining the Agencies' preference for the Project Alignment. Stated differently, had the Agencies consulted with the SHPO to find that 301 South Linden Drive was non-contributing, none of these alignments would be found to tunnel under historically contributing properties of Tract 7710, and therefore none would directly use any such property "for purposes of Section 4(f)." (AR059676.) The fact that the Agencies concluded that the Camden and Linden Alignments would "use" more Section 4(f) resources of Tract 7710 in this circumstance, and without proper consultation with the SHPO, is arbitrary and capricious. (*See* Pl.'s UF ¶¶ 73, 79.)

Finally, contrary to the Agencies' assertion, they did not consider Tract 7710 to be a single historical resource (i.e., "as a whole") merely for *preliminary*

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"planning and screening purposes." Indeed, this purportedly preliminary determination is in the *final* Section 4(f) analysis of the FSEIS as a factor weighing *against* the Camden and Linden Alignments. (Pl.'s UF ¶ 79; AR107418-20; AR114826; *see* Metro Br. 25-27; FTA Br. 47-48.) For example, in Table 5-19, summarizing the Agencies' "least overall harm" analysis, the Agencies use red font to indicate that the Camden and Linden Alignments would have "greater impact or worse performance than the Project" Alignment because they require "Subsurface Easements below Section 4(f) Historic Properties," such as the "Tract 7710 Residential Grouping." (AR107419; Pl.'s UF ¶¶ 78-79.) The Agencies then conclude—without qualification—that the Camden and Linden Alignments "would tunnel under a greater number of historic properties than the Project [Alignment], including the Tract 7710 Residential Grouping." (AR107420; Pl.'s UF ¶ 79.) This inconsistency demonstrates that the Agencies cannot fall back on their "planning and screening purposes" excuse to save their "least overall harm" analysis relating to Tract 7710.[32]

ii. The Agencies Incorrectly Focus on the Square Footage of Tunneling to Assess "Least Overall Harm" to the High School's Section 4(f) Recreational Resources.

The Camden and Linden Alignments would cause less harm to the High School's recreational resources because they travel under open recreational fields while the Project Alignment travels under Building C, a planned recreational gymnasium. (Mot. 36; Pl.'s UF ¶¶ 110, 116-18.) The Project Alignment would preclude construction of aspects of Building C, including new underground parking

[32] The FTA also argues in passing that because it must consider Tract 7710 a singular historical resource, "a 'use' of that resource [by the Camden and Linden Alignments] through tunneling would require consultation with the California SHPO, and could require adjustments to the tunnel route based on that consultation." (FTA 47-48.) To the extent this is another delay-based argument, it fails for all the reasons discussed above. (*See supra* § II.A.2.e.)

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for increased community access to the campus, thereby adversely affecting the activities, attributes or features that qualify Building C for Section 4(f) protection. (Mot. 36; Pl.'s UF ¶¶ 96-109, 118.)

The Agencies' only response comes from Metro, which argues that the Camden and Linden Alignments would tunnel under more square feet of recreational resources than the Project. (Metro Br. 25; *see* Pl.'s UF ¶ 116.) But the fact that the Project Alignment tunnels under fewer square feet than the Camden and Linden Alignments entirely misses the point. (*See* Mot. 36.) Rather, "the location of the affected acres in relation to the remainder" of the Section 4(f) resources is "a more important determination, from the standpoint of harm . . . than determining the number of affected acres." *D.C. Fed'n of Civic Assocs. v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971). Metro does not distinguish or address this authority. More importantly, the FSEIS does not comply with its mandate to analyze the relative importance of the recreational area that the Project Alignment would tunnel under in relation to the High School campus as a whole. *See* 23 C.F.R. § 774.3(c)(1)(iii). Had the Agencies done so, they would have concluded that tunneling under Building C causes substantial and permanent, irremediable harm to this recreational resource because it precludes construction of the planned underground parking area, which is necessary for community access. (Mot. 17; Pl.'s UF ¶ 118; AR104600-03; AR104625.)

The Agencies' arbitrary attempts to subdivide Building C must also be rejected. The FSEIS contends that Section 4(f) does not apply to the entirety of Building C because "[f]uture development rights, including the development of subsurface parking for a property with multiple uses, are not a Section 4(f)-protected feature." (AR107336.) This ignores a crucial fact: the purpose of the underground parking is to increase community access to recreational facilities, including Building C, which will be a center for recreational activity. (Pl.'s UF ¶¶ 2-3; AR072217

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(purpose of underground parking at Building C is to increase parking for "community recreation and high school events" and provide access to Building C which is expected to be a "major center of activity").) The portion of the Section 4(f) Policy Paper on which the FSEIS purports to rely is inapposite. This section discusses multiple-use public land holdings. Examples of such land holdings include national forests, state forests and Bureau of Land Management lands which are "often vast in size, and by definition . . . comprised of multiple areas that serve different purposes." (AR059672.) This section is not applicable here, in the case of a single building, and where the purpose of the parking is to increase community access to recreational facilities. The entirety of Building C therefore must be considered a Section 4(f) resource.

Moreover, the underground parking structure must be completed before other critical phases of the High School's Master Plan can be executed (Mot. 17; Pl.'s UF ¶ 109; AR104600-03; AR104623)), and permitting for construction of the parking structure (and Building C as a whole) is now on hold with California regulators, following Metro's intentional interference in the permit approval process. (Pl.'s UF ¶¶ 102-04, 109.) Finally, the Camden and Linden Alignments, which traverse under only open fields, would have the added benefit of securing the High School's historic resources, by ensuring that Building B1 is not negatively impacted by tunneling beneath it. The Agencies' focus on square footage in analyzing least overall harm defies commons sense—demonstrating, yet again, that the FSEIS is arbitrary and capricious.

iii. The FSEIS Fails to Properly Consider the School District's View in Recognizing the Significance of Buildings B1 and C to the High School.

In conducting their "least overall harm" analysis, the Agencies did not properly consider the School District's view of the relative significance of historic

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and recreational resources on the High School's campus, including Buildings B1, B2 and C. (*See* Mot. 36-37; Pl.'s UF ¶¶ 119-21.) The Agencies' only response again comes from Metro, which makes several flawed arguments.

Metro first argues that it was not required to consider the School District's preferences because the SHPO, not the School District, is the "official with jurisdiction" over historic resources in Section 4(f). (Metro Br. 33.) This contention is undermined by the FSEIS itself, which enumerates the School District as "a consulting party under Section 106." (AR107408; Pl.'s UF ¶ 119; Mot. 36.) The FTA reiterates this conclusion in its October 2017 letter to the SHPO, stating that it "has granted" the School District's request "to be [a] Section 106 consulting part[y]" and that the Agencies thereafter "engaged in discussions" with the School District. (AR114772.) Those discussions and follow-up comment letters clarified that the School District preferred that the subway alignments tunnel underneath open fields rather than beneath buildings (including, particularly, Section 4(f) protected building B1) because, among other reasons, if abandoned oil wells are encountered they can be easily removed from above open land. (*See* Pl.'s UF ¶ 126; AR104615 (School District raising concerns regarding methane accumulations in oil wells and risk of puncture from tunnel boring machine); AR114643 (School District demonstrating Metro has no viable plan for removing oil wells when a building is on the surface); AR114591 (Metro admitting it has no plan for removing an oil well from under a building, stating instead that its "construction team has more than a year to look at th[e] issue"); *see also* Pl.'s UF ¶ 126; AR107414 (FSEIS acknowledging that "[l]ocating and removal of abandoned oil wells is most efficient from the surface.").)

Nevertheless, Metro argues that the Court should disregard the School District's preference that the Project Alignment not tunnel under Building B1 because the School District purportedly cites no evidence proving it ever expressed such a preference. (Metro Br. 33.) Not so. Leaving aside the fact that Metro

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conferred with the School District in person, where representatives explained their preference and its basis, the July 24, 2017 letter from the School District's counsel expresses a strong preference against tunneling under Building B1 because it is a vulnerable historic structure that could be severely harmed by the Project Alignment. (Mot. 36; Pl.'s UF ¶ 119; AR104603-04).) And as stated above, the School District also expressed its strong preference that tunneling occur only under open fields due to the risk of an explosion from encountering abandoned oil wells and methane under the surface. (Pl.'s UF ¶ 126; AR104615.) Indeed, the FSEIS, in proposing a potential for removing unmapped abandoned oil wells from within the TBM machine—a technique that is only necessary if they are encountered under a building such as Building B1—acknowledges that doing so increases the likelihood of methane migration. (AR107292 ("it is possible" that removing a steel casing from an oil well from within the tunnel will result in "a release of combustible gas" and could be "released . . . to the ground surface").) Thus, Metro effectively admits that the Agencies did not even consider the School District's views on Building B1. As set forth in the Motion, this failure is sufficient to render their "least overall harm" analysis arbitrary and capricious as a matter of law. (Mot. 36-37.)

In addition, Metro argues that it considered the School District's preference for the Project Alignment not to tunnel under Building C, but ultimately "weighed the factors differently" within its discretion. (Metro Br. 33-34.) This argument also misses the mark. Although the Agencies may have weighed the factors differently, that does not absolve them of their duty to weigh the factors properly. *See, e.g.*, *City of S. Pasadena*, 56 F. Supp. 2d at 1121. In this instance, that means considering the School District's views on the significance of Building C and the true reasons why the School District preferred that the Project Alignment not tunnel underneath it. The FSEIS states the School District merely cared about its ability to proceed with its Master Plan. (AR107410.) But the record shows that the School District was

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specifically concerned about Building C (a protected Section 4(f) resource) being a center for future community recreational activities, which includes its ability to build underground parking to accommodate enhanced community use of the campus in general. (Mot. 37; Pl.'s UF ¶ 120; AR087509; AR104600-03.) The Agencies' disregard for the School District's preferences, as described, proves that the FSEIS's "least overall harm" analysis was deficient as a matter of law.

iv. The Agencies Concede That the Camden and Linden Alignments Meet the Project's Purpose and Need.

As set forth in the Motion, the FSEIS concedes that the Camden and Linden Alignments meet the Project's purpose and need because they are similar to the Project Alignment in ridership, travel time and curve radius. (Mot. 37 (citing AR114827); Pl.'s UF ¶ 122.) Accordingly, it is arbitrary and capricious for the Agencies to use these factors against the Camden and Linden Alignments in a "least overall harm" analysis. (Mot. 37.) The Agencies simply manipulated how differences between the Project Alignment and its alternatives are presented in the FSEIS to make the Project Alignment appear more attractive. (Mot. 30; Pl.'s UF ¶¶ 80-83.) As one example, the FTA instructed Metro to "aggregate" minor differences in travel time to create "a more compelling argument" for the Project Alignment. (Mot. 30 (quoting AR142307; AR142310); Pl.'s UF ¶ 80.). This is direct evidence of the Agencies' predetermination.

The Agencies respond to the arguments related to travel time and manipulation, but they ignore the Motion's evidence that ridership and curve radius would not materially differ between alignments. They concede, therefore, that those factors should not weigh against the Camden or Linden Alignments. As to travel time, the Agencies argue that it was not arbitrary and capricious to consider this factor in the "least overall harm" analysis because the School District acknowledges that the Camden and Linden Alignments would have slightly longer travel times on

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an individual-rider basis, and those times supposedly become significant when aggregated across total ridership. (Metro Br. 30; FTA Br. 49.) To state this proposition, however, is to refute it. Indeed, the draft SEIS describes differences in travel times of up to 30 seconds as insignificant, yet the Agencies use 2- and 15-second differences against the Camden and Linden Alignments. (Pl.'s UF ¶ 80; AR142307; AR142310; AR107418-19.) The Agencies offer no reasonable justification for aggregating these insignificant delays across total ridership, and their decision to do so simply demonstrates their bias in favor of the predetermined alignment.

Metro attempts to spin the FTA's damaging admissions in the draft SEIS by saying that the FTA was simply trying to put the numbers in context. (Metro Br. 31-32.) The FTA's statements, however, speak for themselves, and the draft SEIS says nothing about putting figures into context. Rather, knowing that the travel time differences were insignificant and therefore unhelpful to the Project Alignment, the FTA deliberately manipulated the presentation of the numbers to create "a more compelling *argument*" as a way around their obligations to fairly weigh least overall harm. (AR142307 (emphasis added); Pl.'s UF ¶ 80.) Given all the evidence proving the Agencies' predetermination, Metro's after-the-fact explanation about the FTA's intentions in the draft SEIS rings hollow.[33] (Pl.'s UF ¶ 80; AR142310; AR114827; AR199043.)

[33] In addition, Metro's argument does nothing to explain how including both the daily delay *per capita* as well as the delay *in seconds* does not double count the same factor against the Camden and Linden Alignments. (Mot. 30.)

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v. The Agencies Fail to Rebut Evidence That the Camden and Linden Alignments Would Cause Less Harm to Non-Section 4(f) Properties Than the Project Alignment.

The Motion demonstrates that the Camden and Linden Alignments would have less adverse impact on properties or resources not protected by Section 4(f) than would the Project Alignment because the Camden and Linden Alignments: (1) require fewer commercial easements (and the cost of the Camden Alignment would be less than the Project Alignment); (2) shorten the materials transport corridor; and (3) pose less of a safety risk from abandoned oil wells and subsurface methane. (Mot. 37-39; Pl.'s UF ¶¶ 123-26.) The Agencies' response does nothing to refute these points, none of which were properly taken into account in the FSEIS.

The Camden and Linden Alignments would have less of an impact on non-Section 4(f) resources because these alignments would tunnel under fewer commercial properties than the Project Alignment and the costs of acquiring subsurface easements for the Camden Alignment would be less than the Project Alignment. (Mot. 37-38; Pl.'s UF ¶¶ 123; AR114827; AR114820.) The Agencies do not respond to these arguments at all.

The Camden and Linden Alignments also have less impact on non-Section 4(f) resources than the Project Alignment because they would relocate the tunnel access shaft to a portion of 2010 Century Park East, which would shorten the materials transport corridor. (Mot. 38; Pl.'s UF ¶ 124.) This change would not increase impact to the AT&T property at 2010 Century Park East, as the FSEIS suggests, because the Project Alignment already requires a temporary construction easement for that property and its parking structure was already slated for demolition to build a materials transport corridor. (Mot. 38; Pl.'s UF ¶ 124; AR107414; SUP015156-57; Recine Decl. Ex. 24.)

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The Agencies do not address the School District's arguments concerning the shortened materials transport corridor or the temporary construction easement for the AT&T property, thereby conceding that both issues support the Camden and Linden Alignments in the "least overall harm" analysis. Metro does respond, however, to the parking structure argument, with two unavailing points. First, Metro claims that the Court should disregard the School District's evidence that the Project also resulted in demolition of the parking structure because it is "post-SEIS, extra-record evidence." (Metro Br. 28 n.14.) Metro is wrong. Although the Motion cited to Exhibit 24 of the Recine Declaration, it also cited to SUP015156-57, which is properly before this Court and is pre-SEIS evidence establishing that "[t]he owner has agreed to demolition of the parking structure." In any event, as set forth in the Opposition to Evidence Brief, filed concurrently, Exhibit 24 is properly before this Court as a supplement to the administrative record regarding complex and technical matters.

Next, Metro argues that it counted the tunnel access shaft factor in favor of the Project Alignment because the Project Alignment sought to demolish the parking structure only *with* AT&T's permission, whereas the Camden and Linden Alignments "categorically require demolition of the parking lot to make way for the access shaft." (Metro Br. 28 n.14.) This does not tell the full story. AT&T "agreed to demolition of the parking structure" because the structure was "not structurally and seismically adequate to support" the Agency's proposed materials transport corridor. (SUP015157; Pl.'s UF ¶ 124.) Thus, even though the Project Alignment does not directly tunnel underneath the AT&T parking structure, this pre-SEIS document shows that the result is the same under all three alignments: the AT&T parking structure was going to be (and has been) demolished. Therefore, it is

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arbitrary and capricious for the FSEIS to have counted the tunnel access shaft factor against the Camden and Linden Alignments in this manner.[34]

The Camden and Linden Alignments also would have less of an impact on non-Section 4(f) resources than would the Project Alignment because they pose less of a safety risk from abandoned and unmapped oil wells under the High School, according to data in the FSEIS itself. (Mot. 38-39; Pl.'s UF ¶¶ 125-26.) This is based on the fact that the Project Alignment is only 35 feet away from the closest known oil well on the High School's campus (Rodeo 107)—not 230 feet as the Agencies incorrectly asserts—while the Camden and Linden Alignments are both 60 feet from their closest known oil wells. (Mot. 38-39; Pl.'s UF ¶ 125; AR107529; AR107290; AR107414.) Moreover, because the Camden and Linden Alignments only tunnel under open recreational fields, as opposed to under buildings, they reduce the safety risks associated with encountering *unmapped* oil wells, since abandoned wells can only be removed safely and efficiently from the surface where no buildings are present. (*Id.* at 39; Pl.'s UF ¶ 126; AR107290; AR107292 (risk of combustible gas release if steel casing is removed from within the tunnel).) Importantly, the Agencies do not contest or address this latter argument at all. That is because the FSEIS concedes, as it must, that "[l]ocating and removal of abandoned oil wells is most efficient from the surface." (AR107414; Pl.'s UF ¶ 126.)

Instead, the Agencies assert that the Motion—and their own FSEIS—got the distances wrong, and that the Project Alignment is farther than 35 feet from the closest known oil well. (Metro Br. 28-29.) The Agencies make several flawed arguments in support. First, Metro argues that a visual inspection of Figure 5-47 of the FSEIS shows that the Project Alignment is farther from the Rodeo 107 oil well

[34] Moreover, SUP015157 is dated in September 2017, which means the Agencies knew the parking structure would be demolished before publishing the FSEIS—yet they failed to disclose this despite simultaneously using the existence of the structure against the Camden and Linden Alignments.

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than the Camden and Linden Alignments, and therefore the 35- and 60-foot figures, respectively, are incorrect. (Metro Br. 28-29 (citing AR107415).) Metro, however, has no factual support for this assertion and, indeed, it is contradicted by the FSEIS itself. Chapter 5 of the FSEIS expressly cautions that, "[b]ased on experience with *other projects* in the Century City area, *mapped accuracy* of known oil wells is within *approximately 200 feet*." (AR107414 (emphases added).) It also states that the Camden Alignment would be "*between about 60 and 120 feet* of a mapped well (Rodeo 107)" and the Linden Alignment "*would be between 20 and 60 feet* of the mapped location of Rodeo 114 (Table 5-16)." (*Id.* (emphases added).) Yet, despite these inexact figures and assessments of "other projects," the Agencies confidently rely on the distances listed in Table 5-16 and conclude that the Project Alignment is more than 35 feet from Rodeo 107. (AR107414.) In so doing, they fail to acknowledge the actual geotechnical studies within their own FSEIS. Chapter 4 explains that the 35-foot figure was "precisely" derived using aerial photographs and magnetometer surveys, not *a casual glance at a map accurate only to 200 feet*:

> The locations of abandoned oil wells, including the six identified abandoned oil wells on the BHHS property, have been evaluated based upon State Department of Oil, Gas and Geothermal Resources (DOGGR) records, historic aerial photographs (e.g., Figure 4-36), and geophysical (magnetometer) surveys to identify more precisely the location of metal casings. Based upon this information, the closest known abandoned oil well at the BHHS site is believed to be approximately 35 feet from the proposed alignment.

(AR107290; Pl.'s UF ¶ 125.) Further, Appendix B to the FSEIS confirms that the oil well 35 feet from the Project Alignment is in fact Rodeo 107. (AR107529 ("The closest abandoned well on the BHHS property to the proposed subway alignment (Chevron USA Inc. Rodeo 107) is shown to be located approximately 35 feet to the

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south of the proposed southern tunnel on the DOGGR field maps."); Pl.'s UF ¶ 125.) Therefore, based on the actual evidence set forth in Chapter 4, Metro's baseless look-at-the-map argument fails.

FTA, on the other hand, makes a different argument. It attempts to undermine the School District's reliance on the 35-foot figure by saying that it "appears" to reference the oil well known as Wolfskill 23, and therefore is superfluous because that oil well will be removed under any alignment. (FTA Br. 48.) As the Motion clearly states, however, the oil well 35 feet away from the Project Alignment is Rodeo 107, not Wolfskill 23. (*See* Mot. 38 (discussing "Rodeo 107").) The FTA is therefore mistaken.

Finally, Metro states that the School District cannot rely on the 35-foot figure in the geotechnical report because the School District is alleging that the 230-foot figure in Table 5-16 of the FSEIS is incorrect. (Metro 29 n.15.) As a result, Metro argues, the School District was required to first raise this issue administratively so the Agencies could respond and correct the record. (*Id.*) This argument does not withstand scrutiny. First, the case relied upon by Metro only holds that the "Administrative Procedure Act requires that plaintiffs exhaust available administrative remedies before bringing their grievances [or claims] to federal court." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002). But the School District is merely relying on information within Chapter 4 of the FSEIS itself. Metro's administrative exhaustion argument therefore inapposite. Second, the draft SEIS did not include as a factor for least overall harm the distances between known oil wells and the Project, Camden or Linden Alignments (*see* AR088399-422), and the FSEIS and SROD were issued on the same date. (AR107026; AR114964.) Therefore, the School District never had an opportunity to administratively challenge the FSEIS on this issue before the SROD, even if the School District had a basis for doing so. Regardless, Chapter 4 of the FSEIS uses the

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same 35-foot figure. Thus, from the School District's perspective, there was simply nothing to correct.

vi. Difference in Cost Between the Alignments Is Not a Relevant "Least Overall Harm" Factor in This Case.

Cost cannot be a factor against the Camden and Linden Alignments in the "least overall harm" analysis because the Agencies concede there is no "[s]ubstantial differences in cost" between those alternatives and the Project Alignment and because the Agencies promised, as a condition of having the ROD remain in place on remand, and being permitted to proceed with the FFGA, that they would not use cost a basis for rejecting alternatives. (Mot. 39; Metro Br. 32-33 (citing AR107416-20) (admitting costs differences are insubstantial).) Yet, the Agencies improperly factored in $4.4 million in costs for the Camden and Linden Alignments based on the "Additional Geotech Investigations, SEIS, CEQA & Contract Docs" for any alternative alignment. (Mot. 27.; Pl.'s UF ¶ 127; AR114811-20; AR114827.)

The only response on this issue comes from Metro, which primarily relies on the Agencies' theory that they can analyze "use" instead of "harm" in the "least overall harm" analysis—a theory without legal merit. Regardless, as stated, if a "least overall harm" factor demonstrates no real difference among alternatives, then that factor cannot be used for or against any alternative. This is especially true here where § 774.3(c)(1)(vii) permits weighing cost differences among alternatives *only* if the differences are "substantial." Yet, as the discussion of Table 5-19 below shows, the Agencies wholly ignored this regulatory admonition and weighed insubstantial cost differences anyway. This is arbitrary and capricious and evidence of pretext.

Metro also argues that the Agencies did not "improperly calculate[] the cost of each alternative alignment based on delay" in Appendix L. (Metro Br. 32). But the Agencies did factor in the $72 to $108 million cost of delay by characterizing it as a "delay in meeting purpose and need." (*See supra* § II.A.2.e.) Even setting aside the

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costs of delay to the Design/Build Contract, Metro does not dispute that it included the $4.4 million figure in the cost-estimate worksheet of Appendix L, which evidences the Agencies' reliance upon bureaucratic inertia, nor does it dispute that including such costs was improper. Rather, it asks this Court to trust that it "did *not* base its determination on any change in the Design/Build Contract or costs Metro would incur due to the schedule delays if changes were made to the Project." (Metro Br. 32) This argument, however, is belied by Table 5-19's summary of the Agencies' "least overall harm" analysis. (AR107418-19.) This Table shows not only that the Agencies factored costs into their analysis (in the column titled "Capital Cost Relative to the Project (YOE)"), but that they included the improper $4.4 million figure and used red font to show that the increased cost associated with the Linden Alignment amounted to "greater impact or worse performance than the Project." Thus, the Agencies expressly (and improperly) considered costs to change the alignment in their "least overall harm" analysis.

For all the reasons discussed above, the Agencies acted arbitrarily and capriciously in considering, weighing, and applying Section 4(f) to the Project, Camden, and Linden Alignments.

3. The FSEIS Arbitrarily and Capriciously Concludes That the Project Alignment Would Not "Use" the High School's Protected Historic Resources.

The Agencies concede that the Project Alignment would directly or permanently "use" the High School's Section 4(f)-protected historic properties by tunneling underneath them. (FTA Br. 41, 43-44 (citing AR107342-43).) Nevertheless, the Agencies improperly conclude that the Project Alignment's "use" would be "*de minimis*" because the tunneling supposedly would not adversely affect those historic properties. (*Id.*) On this basis, the Agencies erroneously find that they were not required to conduct any further Section 4(f) analyses, including the follow-

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on, two-step process of evaluating feasible or prudent alternatives and all possible planning to minimize harm. (FTA Br. 43 (citing 23 C.F.R § 774.3); *see generally* AR107311-107424 (no two-step analysis conducted for the Project Alignment's effect on historic properties); *but see* AR107316 ("If a project would use a Section 4(f) resource and the use is not *de minimis*, that project can only be approved by" conducting the two-step analysis.).

First, the Agencies' "*de minimis* use" analysis and conclusion is flawed as a matter of law. (*See* Mot. 17-18.) Among other things, the Agencies failed to account for the foundation and exterior cracking (*i.e.*, harm) that the Project Alignment would cause to vulnerable and historic Building B1. (*Id.*; Pl.'s UF ¶ 115; AR104820-21.) By sidestepping this threshold "use" analysis and failing to analyze feasible and prudent alternatives, the Agencies have failed to satisfy Section 4(f).

In response, the Agencies both rely on the FSEIS, which makes three flawed arguments. (Metro Br. 24; FTA Br. 41, 43-44.) First, the FSEIS argues, without support, that the noise, vibration or ground resettlement from the tunneling activity at 70 feet below the surface is not substantial enough to cause harm to Building B1. (AR107342.) This assertion does not withstand serious scrutiny. Building B1's footings were constructed in 1926 and are only lightly reinforced. (Mot. 18; Pl.'s UF ¶ 115; AR104820-21.) Because the Project Alignment would tunnel directly beneath Building B1, the High School's Structural Engineer of Record ("SEOR") concluded there is significant risk that its footings will not be supported by the soil given the anticipated ground settlement resulting from the Project Alignment. (Mot. 18; Pl.'s UF ¶ 115; AR104820-21.) Ground settlement, which the FSEIS understates, could lead to cracking in the footings that could, in turn, spread to the exterior of the building. (Mot. 18; Pl.'s UF ¶¶ 111-15; AR104820-21; *see also* Pl.'s UF ¶¶ 110-14 (citing AR034403; AR104654-819).) In light of this evidence, it is simply not

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credible for the Agencies to conclude in the FSEIS that the Project Alignment would not adversely affect the High School's historic facilities.

The FTA's only response to this evidence is that the School District's other experts concluded differently in a preliminary report, finding "that tunneling at the proposed Project depth will not produce excessive differential settlements, and the impacts on the campus' historic buildings will be negligible." (FTA Br. 44 (citing AR113946-114112).) As an initial matter, "negligible" is a technical term that means that hairline cracks in the face of Building B1 are "likely" to occur. (AR034407; AR104675.) If there are existing cracks in Building B1, these cracks can be "negatively impacted." (*Id.*) Thus, even at the FSEIS's understated 0.5 inch surface settlement, cracking is likely to occur. (*Id.*)

Moreover, the experts found that the effects of subsurface tunneling is rife with uncertainty. Indeed, the FSIES itself admits that "cracking could occur" if "excessive tensile forces result from ground settlement." (AR113899.) As the experts note, "higher surface settlements than anticipated" are likely at the High School because the contractor may not be "fully acclimated to the in-situ conditions or the required face pressures to apply during [tunnel boring machine] drive." (AR113967.) Finally, the report concludes that the tunnel boring machine "could cause some hairline cracks to be developed" in Building B1, but it cannot be certain because it did not analyze "existing conditions" of the High School's historic buildings, and therefore "the [soil] settlements could negatively impact any cracks that may be present within the structures." (AR113973.) In other words, the experts expressly acknowledged the harm that "could" occur to Building B1 and expressly noted that their analysis was incomplete because they did not even study the actual building itself. Given these inherent and admitted uncertainties—as well as the Agencies' admission that "cracking could occur" and their failure to rebut any of the SEOR's conclusions with their own expert analysis—the Agencies had no factual

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basis on which to conclude that the Project Alignment would not adversely affect Building B1.

Second, the FSEIS concludes that tunneling for the Project Alignment would not harm the High School's historic structures because it would not increase the risk of subsurface gas or increase the likelihood of an explosion during construction or operation of the Project. (AR107342.) But as discussed below in the section on the Agencies' NEPA deficiencies (*see infra* § II.C.3), the FSEIS's analysis of subsurface gas is fatally flawed as well. In short, the FSEIS understates the potential number of abandoned wells and the risks of harm from a punctured well, and the Agencies have collected wholly insufficient information regarding the amount and location of methane on the High School campus.

The FTA defends its "*de minimis* impact" determination by relying on the concurrence it received from the California State Historic Preservation Officer ("SHPO"), pursuant to 23 C.F.R. § 774.5(b)(1). (AR107342; see FTA Br. 43 (relying on SHPO concurrence).) In October 2017, the FTA sent a letter notifying the SHPO of certain refinements the Agencies made to the Project and requesting the SHPO's concurrence with its determination under section 106 of the National Historic Preservation Act that the Project Alignment would have only a *de minimis* impact on the High School's historic properties. (AR114766; AR114773.) The October 2017 letter also states "that the proposed minor changes would not result in any additional adverse effects to historic properties," which is "the same" as when the SHPO previously concurred in December 2011. (*Id.*) In November 2017, the SHPO responded by concurring with the FTA's finding. (AR114796-98.)

The SHPO's concurrence, however, cannot save the Agencies' flawed "use" analysis. The FTA's October 2017 letter contains virtually no discussion of the refinements to the Project Alignment and does not disclose what potentially harmful impacts the Project Alignment might have on the High School. Rather, the FTA

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relies entirely on the SHPO's prior December 2011 concurrence as a method for bootstrapping concurrence here. (AR039295-97.) Yet the SHPO's concurrence letters in 2011 and 2017 both fail to show that the SHPO conducted any independent analysis of the FTA's evidence or conclusions. Instead, both letters merely summarize the FTA's letters and conclude without explanation that the SHPO concurs that the Project Alignment will not adversely affect the High School's Section 4(f) historic properties. (AR039296; AR114773). This is not the consultation and concurrence by the SHPO that § 774.5(b)(1) contemplates—instead, it is a meaningless rubberstamp.

The Agencies cannot salvage their arbitrary and capricious conclusion that the Project Alignment will only have a *de minimis* impact on the High School's historic properties. And thus, they wrongly conclude they were not required to conduct the follow-on, two-step analysis under Section 4(f) of evaluating feasible and prudent alternatives to the Project Alignment and all possible planning to minimize harm. This too is arbitrary and capricious as a matter of law and fatal to the FSEIS. (*See* AR075776) ("[I]n consequently failing to undertake the follow-on Section 4(f) analysis with respect to the impact on the High School—including its existing facilities and its Master Plan—of tunneling, the FTA acted arbitrarily and capriciously.").

4. The FSEIS Arbitrarily and Capriciously Concludes That Staging Areas 2 and 3 Would Not Constructively Use the High School's Protected Section 4(f) Resources.

The FSEIS concludes that activities set to occur on construction Staging Areas 2 and 3 directly adjacent to the High School would not constructively use the school's protected Section 4(f) historical or recreational resources. (AR107344; AR107349; Metro Br. 19-22; FTA Br. 44, 49.) As a result, the Agencies conclude that they had no further Section 4(f) obligations, including conducting the follow-on,

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two-step analysis of evaluating feasible and prudent alternatives and all possible planning to minimize harm (although the Agencies assert they took the latter step anyway). (Metro Br. 22; FTA Br. 49; Mot. 27.; Pl.'s UF ¶ 139; *see* AR107350-56 (no feasible and prudent analysis conducted for staging areas).)

The Agencies, however, failed to properly consider a number of substantial negative impacts on the High School's protected resources from Staging Areas 2 and 3. Had the Agencies conducted the Section 4(f) analysis properly, they would have concluded that Staging Areas 2 and 3 *do* constructively use the High School's protected resources and that, as a result, the Agencies were required to analyze feasible and prudent alternatives to Staging Areas 2 and 3—including Staging Area 1. (Pl.'s UF ¶¶ 129-37.) The Agencies' admitted failure to do so renders this part of their Section 4(f) analysis arbitrary and capricious as well, and further evidences their predetermination. (Mot. 31-32.)

a. A Proper Section 4(f) Analysis Shows That Staging Areas 2 and 3 Constructively Use the High School's Protected Resources and That Staging Area 1 Is a Feasible and Prudent Alternative.

Construction activities set to take place on Staging Areas 2 and 3 constitute a constructive use under Section 4(f) because they impact the High School "so severe[ly] that the protected activities, features, or attributes that qualify the [High School] for protection under Section 4(f) are substantially impaired," such that those "protected activities, features, or attributes . . . are substantially diminished." 23 C.F.R. § 774.15(a). Specifically, Staging Areas 2 and 3 are directly adjacent to the High School's current temporary classrooms and future half soccer field, being as little as 10 feet away; Staging Area 2 will contain an 80-foot wide "temporary access shaft" for stockpiling and removing "tunnel muck" for 2-3 years; and the Agencies acknowledge much of this activity will take place during the day. (Mot. 19-20, 39-

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40; Pl.'s UF ¶¶ 131, 134.) Additionally, Staging Area 3 will involve long-term construction activity, material storage and the use of heavy equipment via a "Materials Transport Corridor" between Staging Areas 2 and 3 that is parallel to the High School's fence line. (Mot. 20; Pl.'s UF ¶¶ 132-33; AR107269; AR107125; AR107054.)

Construction activity at Staging Areas 2 and 3 is scheduled to last "approximately" seven years; tunneling activity at the access shaft, "approximately" two to three years; and noise and dust effects, seven years. (*Id.* (quoting AR107053); Pl.'s UF ¶ 134; AR107063; AR107124; AR107232.) Moreover, the effects from construction activity at Staging Areas 2 and 3 will be at their most intense in September 2020 (Pl.'s UF ¶ 130; AR107259; AR107348), which is exactly when the High School plans for the portable classroom area to become a half soccer field (Pl.'s UF ¶ 130; AR107347-48), and where students and others using that recreational resource will be on a daily basis, unprotected by buildings or filters. (Pl.'s UF ¶ 143; AR104611.) Construction activity at Staging Areas 2 and 3 will lead to toxic emissions and airborne particulates, posing substantial health risks to students, faculty, staff and members of the public using the High School's classrooms and recreational facilities just a few feet away. (Mot. 20, 40; Pl.'s UF ¶¶ 135-36.) Noise and vibration will also adversely impact the High School's recreational facilities and threaten to undermine the learning environment at the High School's vulnerable portable classrooms. (Mot. 20, 40; Pl.'s UF ¶ 137.)

These construction effects together will severely impact the School District's Section 4(f) resources. For example, toxic emissions and construction noise at Staging Area 2 will prevent students and others from using the recreational athletic fields. (Mot. 40; Pl.'s UF ¶ 136; AR104833-34.) These effects also will impact the School District's ability to renovate its Section 4(f) historical properties while safely educating its students, because students are currently in portable classrooms to allow

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for that renovation, and the portable classrooms experience the greatest impact from Staging Areas 2 and 3. (*Id.*)[35]

Had the Agencies given proper consideration to these facts, they would have concluded that Staging Areas 2 and 3 constructively use the High School's protected Section 4(f) historical and recreational resources, and further, that they were required to analyze feasible and prudent alternatives. (*See* Mot. 31-32; Pl.'s UF ¶ 138.) By admitting they reached neither conclusion, the Agencies prove that their Section 4(f) analysis is arbitrary and capricious as a matter of law.

Moreover, had the Agencies conducted a proper "feasible and prudent" analysis they would have concluded that Staging Area 1 satisfies this test, as it very clearly inflicts far less harm on the High School's Section 4(f) properties than Staging Areas 2 and 3. In particular, the Agencies would have found that Staging Area 1: (1) better serves the Project's purpose and need by being located far closer to the access tunnel and not needing a materials transport corridor; (2) would mitigate noise and harmful airborne toxins by being located 1,100 feet from the School's athletic fields and portable classrooms; (3) would be less expensive in terms of tenant relocations and demolishing structures because the lot is empty; and (4) would permit the High School to better meet the School District's Master Plan (including seismic retrofitting and asbestos removal in historic buildings) by not directly exposing harmful airborne toxins and noise to students and others who are on athletic fields or in portable classrooms. (Mot. 40-41; Pl.'s UF ¶¶ 138-42.) As stated, the Agencies admit they failed to weigh or consider these factors or conduct this analysis of Staging Area 1. This is arbitrary and capricious, evidences predetermination and violates Section 4(f).

[35] Given this discussion in the Motion about flaws in the Agencies' constructive use analysis of the staging areas, FTA's aside that the School District does "not directly challenge this finding, and have no basis to do so" (FTA Br. 44) is plainly incorrect.

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b. The Agencies Fail to Prove They Properly Analyzed Constructive Use for Staging Areas 2 and 3.

The Agencies do not dispute the severe impacts on the High School's Section 4(f) historical and recreational resources described above. Rather, they argue that their purported mitigation efforts will prevent construction activities at Staging Areas 2 and 3 from constructively using the High School's protected resources, and as a result, they have no further Section 4(f) obligations regarding staging areas. (Metro Br. 20-21; FTA Br. 41.) This argument relies largely on the FSEIS's conclusions that mitigation efforts will reduce construction air pollution to meet federal and state requirements and reduce construction noise levels to meet City of Beverly Hills limits. (Metro Br. 20-22; *see* FTA Br. 41-42.)

The Agencies' proposed mitigation efforts are inadequate and stand no reasonable chance of satisfying relevant environmental restrictions during all phases of construction. (Mot. 46; Pl.'s UF ¶¶ 153-55.) For example, the Agencies propose to install "MERV 16-rated" filters in the HVAC systems of the portable classrooms. (Pl.'s UF ¶ 153; FTA Br. 32-33 (citing AR107264).) While this will provide some protection indoors, the Motion demonstrates that these filters will do nothing to mitigate the cancer risk to people who are outside, such as students walking between or around the portable classrooms. (Mot. 46.) Likewise, these filters would not prevent particulate emissions from entering any classroom (portable or permanent) when doors or windows are open. (Mot. 46; Pl.'s UF ¶ 153.) The filters also fail to protect people using the recreational fields, and the Agencies have not proposed to install filters in any of the High School's buildings beyond the portable classrooms. (Mot. 46; Pl.'s UF ¶ 153.) The Agencies have no response to these points.

The Agencies also argue that their "constructive use" analysis of the High School's historic resources withstands scrutiny because the SHPO concurred with their determination in November 2017. Relevant here (and partially discussed

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above), the FTA's October 2017 letter informed the SHPO that it switched the Project's staging area from Staging Area 1 (originally chosen in the 2012 FEIS) to Staging Areas 2 and 3 and requested the SHPO's concurrence with the FTA's Section 106 determination that these new staging areas would not constructively use the High School's historic resources. (AR114766; AR114773; *see* AR114766-95; *see also* 23 C.F.R. § 774.15(d)(3).) The SHPO concurred in a November 2017 letter. (AR114798.)

For reasons similar to those discussed above, however, the SHPO's concurrence cannot be relied upon in this case for several reasons.

First, the October 2017 letter does not describe any of the actual environmental consequences that would result from construction activities on Staging Areas 2 and 3, such as noise, vibration or air pollution (discussed above). Instead, the Letter states only that the "Project would not result in adverse effects to the BHHS property, related to the tunneling or noise and vibration during construction or operation." (AR114767.) There is no further detail or analysis.[36]

Second, the October 2017 letter downplays the distance between Staging Areas 2 and 3 and the High School, noting only that they will be located "within 150 feet from the parcel's shared property line with" the High School. (AR114771.) In reality, Staging Areas 2 and 3 will be *only 10 feet* from the High School's portable classrooms and athletic fields where nearly every student will be at some time during the typical school day. (Mot. 31 (citing AR104824-27); Pl.'s UF ¶¶ 21, 143; AR104611; Recine Decl. Ex. 4 at 6.) As discussed, this will expose the students to levels of noise, vibration and air pollutants harmful to their health and learning environment. The FTA's minimization of the distance between Staging Areas 2 and

[36] The FTA attempts to skirt this issue by citing non-specifically to 65 pages of Section 4.4 of the draft SEIS for an "evaluation of effect."

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3 and the most vulnerable part of the High School demonstrates the Agencies' flawed consultation and predetermination.

Third, the SHPO's November 2017 concurrence letter provides no indication that the SHPO conducted any independent analysis. Instead, it spends several pages summarizing the October 2017 letter and concludes, without any reasoning, that SHPO "agree[s] that the previous finding of adverse effect for the undertaking remains appropriate . . . and that the changes described above will not result in additional adverse effects." (AR114798.) Given the selective information provided by the FTA, the SHPO's rubberstamp concurrence comes as no surprise. Accordingly, not only was the Agencies' Section 4(f) constructive use analysis arbitrary and capricious, but it could not be cured by the SHPO's concurrence, as the Agencies intend in the FSEIS. (Metro Br. 21 (citing AR107421); FTA Br. 41 (citing AR107342).) In any event, the Agencies are also required to consult with the School District, which is a consulting party for historic resources and the official with jurisdiction over the recreational resources on the High School campus. 23 C.F.R. § 774.15(d)(3), (f)(6). The School District did not concur with the FTA's determination that there would be no constructive use.

As a result, the Agencies were required to analyze feasible and prudent alternatives to Staging Areas 2 and 3, including Staging Area 1. Their admitted failure to do so is arbitrary and capricious as a matter of law, and fatal to their entire Section 4(f) analysis of construction staging areas.

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5. The Agencies Fail to Rebut Evidence That They Did Not Comply With Their Section 4(f) Obligations for the Construction Staging Areas.

a. The Agencies' Purported "All Possible Planning" Efforts Cannot Save Their Flawed Section 4(f) Analysis.

The Agencies make several meritless arguments in an attempt to rebut the foregoing. First, they argue that they were "under no duty to analyze alternatives to" Staging Areas 2 and 3 (such as Staging Area 1), because they do not constructively use the High School's Section 4(f) resources, and regardless, "the Project includes all possible planning to minimize harm." (Metro Br. 23; *see id.* at 22-23; FTA Br. 41, 44, 49-50.) This misses the point. As stated, the Agencies' entire Section 4(f) analysis fails as a matter of law because they botched their constructive use determination and failed to analyze feasible and prudent alternatives to Staging Areas 2 and 3. In any event, the Agencies have not conducted all possible planning to mitigate the health, air quality, noise and vibration impacts from the placement of the Staging Areas immediately next to the High School's recreational fields. The most effective mitigation is to move construction staging farther away to the empty lot at Staging Area 1, to allow these emissions to dissipate before reaching the school. Many of the purported mitigation measures the FSEIS proposes do not protect children and members of the community who will be outdoors using the recreational fields, including the half-soccer field, and who will not receive any protection afforded by MERV-16 filters, and at evening recreational events, when diesel trucks will haul the excavated muck from Staging Area 2. (*See* Metro Br. 22-23 (describing purported all possible planning efforts); FTA Br. 49-50 (same).)

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b. The Agencies' Focus on the Cost of Staging Area 1 Cannot Save Their Flawed Section 4(f) Analysis.

Metro argues that, had the Agencies conducted analyses of feasible and prudent alternatives and/or least overall harm (which, again, they did not), they would have concluded that Staging Area 1 did not satisfy these tests because acquiring 1950 Avenue of the Stars was "extremely expensive." (Metro Br. 23.) However, the mere cost of this property on its own is irrelevant. The Motion's point, which Metro ignores, is that any proper analysis of alternatives or least overall harm would assess all aspects of cost or compare them to other alternatives. (Mot. 41.) As the Motion shows and the Agencies concede, the FSEIS does not assess the cost of acquiring a temporary construction easement for Staging Area 1 (or even a part of it) or the cost to relocate tenants or demolish structures (which would be zero, since Staging Area 1 is an empty lot), or even acknowledge Metro's authority to utilize eminent domain in this instance. (*Id.*; *see* 23 C.F.R. § 774.3(c)(1)(vii), § 774.17 (requires assessing substantial costs); Pl.'s UF ¶¶ 84-95, 141.) Accordingly, even if the Agencies had analyzed alternatives or the least overall harm of staging areas, their single-minded focus on the acquisition cost of Staging Area 1 alone would still be arbitrary and capricious.

Regardless, the premise on which Metro's argument rests—that Staging Area 1 was "extremely expensive"—is unsupported. Metro cites a 2015 Los Angeles Times article stating that the commercial developer of 1950 Avenue of the Stars (where Staging Area 1 would be located) had abandoned development of the site. (Metro Br. 23 (citing AR113689-90).) But the article expressly does *not* state a price for the property. (AR113689 ("No price has been set [for the] 5.5-acre property").) Nor does it address the price of less than a full acquisition of the property, *such as a temporary construction easement for part of the site*. Thus, even if the Agencies had conducted analyses of alternatives and/or least overall harm, their would-be reliance

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on the cited article to support their rejection of Staging Area 1 based on cost is arbitrary and capricious. In any event, citation to a newspaper article cannot substitute for the actual and rigorous cost analysis required by Section 4(f), which the Agencies concede they did not conduct (as evidenced by the lack of citation to anything in the FSEIS).

c. The Agencies Fail to Defend the FSEIS's Conclusion That the Century City Center Is Under Construction.

The FSEIS concludes that Staging Area 1 is "not [ ] available" because it will be under development in 2018 (AR107110; Mot. 31) due to the Century City Center project at 1950 Avenue of the Stars. (Mot. 9.) The Motion establishes that even if the Agencies had conducted an analysis of feasible and prudent alternatives for staging areas, the evidence would not support their rejection of 1950 Avenue of the Stars as being unavailable for Staging Area 1 due to development of the Century City Center project. (*Id.* at 31-34; *see* Pl.'s UF ¶¶ 138-42.) Rather, the evidence establishes that the majority, if not all, of the property is available for construction staging. (UF ¶¶ 86, 92-93; AR118517-18; Recine Decl. Ex. 22.) Despite this, the Agencies did nothing to confirm the purported construction schedule for the Century City Center project. (*Id.* at 32.)

In response, Metro points to certain documents that it says proves the Century City Center project is underway at 1950 Avenue of the Stars, making that property unavailable for use as Staging Area 1. (*See* Metro Br. 17-18, 23 (citing AR060932, AR072235-36; AR112930; AR118517).) However, these documents only show that the Century City Center is *planned* to be developed and that certain administrative and preparatory steps have been taken—but they say nothing about whether the 5.5 acre lot is unavailable even for temporary or partial easements during the Project construction. In fact, they make clear that the developer has yet to obtain all necessary approvals, and do not indicate when such approvals will be granted (if

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ever) or when construction will begin thereafter (if ever). For instance, AR60932 is just a page from the 2013 Subsequent Draft Environmental Impact Report for the Century City Center that was submitted to the City of Los Angeles because the developer had dramatically changed plans for the project and required new approvals. Similarly, AR072235-36 is a citation to the School District's 2015 EIR (regarding its Master Plan) discussing the cumulative impacts of various "potential" projects in the vicinity of the High School. (AR072234.) These pages also specifically describe the "Status" of the Century City Center as awaiting approval. (AR072235.) And, as Metro admits, AR118517 and AR112930 simply reflect that certain permit applications were submitted to the City of Los Angeles.

Regardless of whatever stage of preliminary approval the Century City Center is under, it is not "currently under construction" as Metro contends (Metro Br. 18 n.10), and it certainly was not under construction when the DSEIS and FSEIS were drafted and adopted. The Motion shows that the Century City Center developer applied for permits for only one of two proposed towers occupying just 25 percent of the 5.5 acre site, and that as of January 2, 2019, the City of Los Angeles Department of Building and Safety ("LADBS") had not approved or issued building permits for the Century City Center, which remains under "plan check." (Mot. 32 (quoting Recine Decl. Ex. 21); Pl.'s UF ¶ 86.) Metro does not and cannot dispute these facts. As a result, it concedes that 75 percent of 1950 Avenue of the Stars is available for temporary construction easements and for use as Staging Area 1. (Pl.'s UF ¶ 139 (approximately 3 acres required in total for construction staging and tunneling activities); AR107355 (same).)

Metro also argues that Exhibit 21 to the Recine Declaration is "extra-record evidence" that the Court should disregard, but if it does not, then Metro requests that the Court also consider *its* extra-record evidence: an online article that Metro says proves the Century City Center project is "currently under construction." (Metro Br.

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18 n.10 (citing Wright Decl. Ex. B/2).)[37] Exhibit 21, however, is not extra-record evidence. The FSEIS expressly states that "a building permit was submitted in 2017 for a 41-story apartment tower at 1950 Avenue of the Stars." (AR107053.) This determination necessarily relies upon Exhibit 21, which is an LADBS webpage containing permit application information for a 41-story apartment tower at 1950 Avenue of the Stars. Other evidence in the Record likewise establishes that the Agencies actually relied on the LADBS webpage. The City of Los Angeles sent a link to this webpage to Metro in an October 2017 email exchange and informed Metro that the development was still under "plan check." (AR118517-18; Mot. 33-34; *see also* Pl.'s UF ¶ 86.) *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (administrative is "'all documents and materials directly or *indirectly* considered by agency decision-makers'") (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981)). Metro's reliance upon the link is evidenced by its response—"Perfect! Thank you so much . . . "—and the inclusion of the information within the link in the pages of the FSEIS. (AR115817-18.) Thus, the Motion properly cited to Exhibit 21, the contents of which Metro does not dispute. As a result, the Court should reject Metro's extra-record evidence which, by contrast, is not part of the Administrative Record and was not relied upon by the Agencies.[38]

In any event, even if Metro's extra-record evidence is considered, it carries very limited probative weight. It is an article from a website (https://urbanize.la) of unknown credibility, and therefore is not something governmental departments like the Agencies should rely upon in a proper Section 4(f) analysis. But even if its contents are taken as true, they do not support Metro's view that the Century City Center is "currently under construction." The article, dated January 30, 2019,

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[37] Metro's brief, on page 18, footnote 10, calls this exhibit "Ex. B," but the Wright Declaration calls it "Exhibit 2."

[38] Metro did not assert any evidentiary objections to Exhibit 21 in the Local Defendants' Request for Evidentiary Ruling on Specified Objections, ECF No. 97-8.

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expressly states that a "full complement of building permits has yet to be issued for the project." (Wright Decl. Ex. B/2 at 4.) It also confirms that the developer is only seeking to build one of the two originally proposed towers (*id.* at 3), thereby confirming that 75 percent of 1950 Avenue of the Stars is still available for use as Staging Area 1. (Pl.'s UF ¶ 86; Recine Decl. Ex. 21.) The article states that "work at the project site" so far "includes soil excavation and the demolition of the foundations of buildings that previously stood on the property" (Wright Decl. Ex. B/2 at 4.)—in other words, preliminary construction activities (for only a part of the property) that could accommodate a temporary easement for the Project. Finally, the article describes the ever-changing nature of the development planned at 1950 Avenue of the Stars—from entitlement in 2004, to being "put on ice due to the global recession," to a planned office tower, to abandonment of the project in 2015, and finally reversion to its earlier plan but while only pursuing one residential tower—demonstrating that the Agencies acted arbitrarily and capriciously in failing to research whether the property was actually unavailable. (*Id.*)

Finally, the Agencies fail to rebut the Motion's evidence that they never attempted to confirm the Century City Center project construction schedule *before issuing the DSEIS*, which they knew was uncertain and may not overlap with the Project. (Mot. 32; Pl.'s UF ¶¶ 86-91.) Rather, Metro quibbles with the Motion's "insinuation that Metro's *only* contact with the developer [of Century City Center] was in a single letter," which Metro now asserts "is incorrect." (Metro 17 n.8.) However, it is *Metro*, not the School District, that represented to this Court that the July 31, 2017 letter is the only communication Metro had with the developer regarding the availability of 1950 Avenue of the Stars as a staging area for the Project. (Recine Decl. Ex. 22.) Metro cannot be permitted to deny the existence of additional communications in discovery (as it has) only to rely on their purported

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(but uncited) existence in its brief. To the extent additional communications exist, this Court should compel Metro to immediately produce them to the School District.

d. The Agencies Fail to Support Their Rejection of Staging Area 4 for the Location of the Tunnel Access Shaft.

The Agencies' decision rejecting "Staging Area 4" as a location for the tunnel access shaft (in favor of Staging Area 2) was arbitrary and capricious as well. (Mot. 41-42.) That is because, in the Agencies' failure to conduct any analysis of feasible and prudent alternatives under Section 4(f), they improperly weighed traffic congestion in other locations (resulting from motorists taking alternate routes farther away from the construction zone and BHHS) over the health of High School students and faculty. (*Id.*; Pl.'s UF ¶ 142.) Metro argues in response that the FTA reasonably concluded "locating the access shaft in Area 4 would cause more impacts than locating it in Area 2" because locating it in Staging Area 2 would "delay completion of the Constellation Station," increase traffic congestion (again, this is actually congestion elsewhere in the vicinity, not at the construction site) and point harmful air pollutants and noise toward "other receptors," i.e., to somewhere other than the construction site or the High School. (Metro Br. 18-19.)

Obviously, the relevant factor in the Agencies' Section 4(f) analysis *should have been* the health and well-being of the High School's students and faculty. (Mot. 44.) Indeed, Metro's brief tellingly omits that the "other receptors" it says would be harmed if Staging Area 4 were used are a photography center and three large, commercial office buildings. (AR107117.) This is arbitrary and capricious as a matter of law, and further evidence of the Agencies' predetermination.

For all the reasons discussed above, the Agencies acted arbitrarily and capriciously in considering, weighing and applying Section 4(f).

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C. The Agencies Violated NEPA by Failing to Take a "Hard Look" at Toxic Emissions and Particulates, Construction Noise, Abandoned Oil Wells and Methane and Seismic Issues.

As set forth in the Motion, 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). Agencies must take a "hard look" at the environmental consequences of their actions and reasonable alternatives to them. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011). Critically, "a 'hard look' should involve a discussion of adverse impacts *that does not improperly minimize negative side effects*." *N. Alaska Env'l Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (emphasis added) (quoting *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1241 (9th Cir. 2005). Adhering to the NEPA process is so vital that "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." *Mineta*, 302 F.3d at 1115. A court may not "rubber stamp" an agency decision, but must make a "searching and careful" inquiry into whether the decision adhered to the statute's demands. *See Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 858-59 (9th Cir. 2005) (citations and quotation marks omitted).

Here, as discussed in the Motion and below, the Agencies have failed to take the required "hard look" in each of several important respects—including, in particular, by repeatedly attempting to minimize the negative potential side effects of the Project. For each of these reasons, the FSEIS must be rejected.

1. The Agencies Fail to Take a "Hard Look" at Toxic Emissions and Particulates.

As set forth in the Motion, construction activity at the Project Staging Areas will take place immediately adjacent to the High School and directly across from the

High School's temporary classrooms. The temporary classrooms house 500-600 students at a time and are used by all of the High School's students at some point during the school day. (Pl.'s UF ¶ 143.) Construction—which is scheduled to last for years—will occur while classes are in session and while students, faculty, staff and members of the public are using the High School's facilities. (Pl.'s UF ¶ 144; AR104611; AR107348.) The planned construction activity will generate high levels of toxic emissions and particulates, which will be blown into the area of the High School's classrooms, administrative buildings, athletic fields and grounds. (Pl.'s UF ¶ 144; AR104824-26.) These airborne toxins can cause or contribute to health problems, ranging from short-term effects such as coughing, dizziness, nausea and headaches, to long-term effects, such as cancer, chronic asthma and other respiratory illnesses. (Pl.'s UF ¶ 144; AR104611; AR104825.)

For the reasons stated in the Motion, the Agencies have violated NEPA's "hard look" requirement by insufficiently analyzing and accounting for potential adverse health effects to students caused by toxic emissions and particulates originating from the Project Staging Areas and the materials transport corridor. (See AR104604-05; AR104611-13; AR104823-55; Pl.'s UF ¶¶ 143-155.) The Agencies repeatedly assert that construction will not have any adverse impact on human health or the High School. (*See*, *e.g.*, FTA Resp. to Pl.'s UF ¶ 144.) However, their conclusions are based on a flawed analysis that did not follow appropriate SCAQMD and EPA Guidelines nor proper review standards to protect BHHS. (Pl.'s Resp. to FTA UF ¶ 11; Pl.'s Resp. to Metro UF ¶ 150.)

While many of the claims asserted by the Agencies in defense of the FSEIS are in dispute (*see* Pl.'s Resp. to FTA UF ¶¶ 11-26, 28, 30-31, 34, 36-37, 42; Pl.'s Resp. to Metro UF ¶¶ 150, 154-155, 157-160, 162-167, 169-173, 175-177, 200-201, 203, 207, 214, 216, 222, 224, 226, 227, 23-236, 238-242, 244-246, 255, 267, 271,

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276-278, 284-285, 294-303), the following fundamental flaws cannot reasonably be challenged:

First, in conducting their analysis of health risks posed by emissions and airborne particulates generated by construction activity, the Agencies used a far higher exposure threshold than the one cited by the School District. (Pl.'s Resp. to FTA UF ¶¶ 16, 18; Pl.'s Resp. to Metro UF ¶ 170-171.) The agencies acknowledge that children, such as the High School students, are more sensitive to toxins. (FTA Resp. to Pl.'s UF ¶ 146; Metro Resp. to Pl.'s UF ¶ 146.) The Agencies' use of a 10-in-one-million threshold for cancer risk is not appropriate for developing minors, such as the High School's young students; to protect children, a 1-in-one-million threshold for cancer risk is more protective and appropriate. (Pl.'s UF ¶ 146; AR104829-30.)

The Agencies purport to "dispute" the fact that they applied a 10-in-one-million cancer risk exposure threshold rather than consider and adopt the more protective and appropriate 1-in-one million standard. (FTA Resp. to Pl.'s UF ¶ 146; Metro Resp. to Pl.'s UF ¶ 146.) However, none of the purported facts cited by the agencies even address the 1-in-one million standard cited by the School District. The Agencies' responses are simple misdirection.

Second, the Agencies should have calculated the maximum cancer risk at the High School's property line nearest to the source of emissions, which is consistent with local and state guidance. (Pl.'s Resp. to FTA UF ¶¶ 13, 15; Pl.'s Resp. to Metro UF ¶ 157; AR104829-30; AR104384.)

The Agencies respond by asserting that their analysis "met the requirements for the Children's Protection Act and OEHHA guidelines." (FTA Resp. to Pl.'s UF ¶ 147; Metro Resp. to Pl.'s UF ¶ 147.) But the Agencies cite nothing that would support their decision to calculate the *maximum* cancer risk somewhere other than at the point that will receive the *maximum* amount of emissions. As such, the

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agencies performed an inadequate risk assessment. (AR104834.) The maximum risk should have been calculated at the nearest property line to the emissions, consistent with California state and local laws and guidance that protects school children, including Health & Safety Code Sec. 42301.6 (AB 3205) and the South Coast AQMD Risk Assessment Procedures for Rules 1401, 1401.1 & 212. (AR104834.)

Third, while the High School rests upon an abandoned oil field, the health risk assessment provided in the FSEIS does not quantify the additional impact from toxic substances in the soil and the potential releases of methane and toxic gases during subsurface activities. These could add cumulatively to the health impacts posed by toxic emissions from construction equipment. (Pl.'s UF ¶ 151; AR104834-35; AR107249-64.)

The Agencies respond, in part, that they considered the risks presented by methane. (FTA Resp. to Pl.'s UF ¶ 151; Metro Resp. to Pl.'s UF ¶ 151.) As discussed below, however, the FSEIS's conclusion about methane risk is fundamentally flawed, and their confidence in the lack of methane on the High School campus is contrary to their own data, which shows *explosive* levels of methane both on and immediately adjacent to the High School. (*See infra* § II.C.3.)

Fourth, the Agencies' failure to examine the air quality impacts of construction staging at Staging Area 1 further demonstrates their failure to take the required "hard look." Due to the distance of Staging Area 1 from the High School, harmful emissions and particulates generated by construction would substantially dissipate before reaching the school grounds, reducing the risks of adverse health impacts on the High School's "sensitive receptors." (Pl.'s UF ¶ 155; AR104840-41.) This should have been a strong factor against the Agencies' determination to site the staging areas immediately adjacent to the High School's temporary classrooms, yet the Agencies did not even consider it.

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The Agencies purport to "dispute" the fact that they did not examine the air quality impacts at Staging Area 1, but their responses are no more than attempts to justify *why* they did not examine the air quality impacts, including because they determined they were not legally obligated to conduct a Section 4(f) analysis of the site and had already decided not to use Staging Area 1. (FTA Resp. to Pl.'s UF ¶ 155; Metro Resp. to Pl.'s UF ¶¶ 155, 139.) This is no response at all. The fact is that the location of Staging Area 1 would cause harmful emissions and particulates to dissipate before reaching the campus, reducing the risks of adverse health impacts as compared to the other staging areas, and this factor should have been considered.

2. The Agencies Fail to Take a "Hard Look" at Construction Noise.

The FSEIS also fails to take the mandated "hard look" at the harm that noise and vibration from construction activity will have upon the education of the High School's students. (Pl.'s UF ¶¶ 156-169.) Indeed, construction noise is already harming students' education—since construction began, unacceptably high noise levels stopped instruction on at least one occasion. (Recine Decl. Ex. 29; Pl.'s UF ¶¶ 156, 165.)

As set forth in the Motion, noise levels at the portable classrooms generated by construction will far exceed accepted levels for schools and adversely impact students' ability to learn. (Pl.'s UF ¶ 158; AR104617-18.) The American National Standards Institute ("ANSI") sets forth a noise threshold of 35 decibels ("dBA") for classrooms. (Pl.'s UF ¶ 158; AR104617; Recine Decl. Ex. 25.) However, the Agencies expect that construction noise levels at the High School's portable classrooms will be 69 dBA. (Pl.'s UF ¶ 160; AR107270.)

The Agencies acknowledge that noise levels at the temporary classroom buildings closest to the construction staging area will exceed the City's noise limits

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both during the day and at night. (FTA Br. 33; Metro Br. 39.)[39] Nevertheless, the FSEIS summarily concludes that because "[t]he Contractor will be responsible for providing additional noise control measures and/or limiting the equipment and construction activities to reduce the construction noise at these sites to comply with the noise level limits . . . , there would be no adverse effect" at these sites. (AR107271-72.) In other words, the FSEIS ignores its own predicted data and simply assumes that the noise levels will not in fact be exceeded. That is wishful thinking, not a "hard look," and it improperly minimizes the negative effects of the Project Alignment. *See N. Alaska Env'l Ctr.*, 457 F.3d at 979.

The FTA takes issue with the School District's observation that noise levels inside the portable classrooms will exceed the ANSI standard, but its response is entirely inadequate. (FTA Br. 34.) The FTA argues that the noise level in the *permanent* classrooms will be lower, but the only comment it has regarding the portable classrooms is that the level of noise in the classrooms "is dependent upon the sound insulation of those structures and their location." (FTA Br. 34.) Of course, that is precisely the point: the Agencies should not have approved a plan that put a staging area immediately adjacent to the High School's lightly constructed temporary classrooms.

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[39] Notably, however, the Agencies do not agree on how much and also significantly understate the impact stated in the FSEIS. FTA asserts that the noise limits will be exceeded "by one decibel during the day, and two decibels at night" (FTA Br. 33 (citing AR 112643-44)), while Metro asserts that the noise limit will be exceeded "by 8 decibels (dB) during the day, and 2 dB at night." (Metro Br. 39 (citing AR112643-44).) The FSEIS itself, however, states that even after the installation of sound barriers, "[a]s shown in Table 4-22, the construction noise level at Site O, BHHS temporary classroom buildings closest to the Area 2 construction site, is predicted to exceed the noise limit by 8 dB for daytime and 7 dB for nighttime hours," i.e., 69 dbA during the day and 68 dBA at night, as stated by the School District in the Motion. (AR107271; *see also* AR107270 (Table 4-22); AR112928 (acknowledging "predicted . . . daytime noise exceedance of the City of Beverly Hills daytime noise limits by up to 8 dB at the temporary classroom locations with implementation of the proposed mitigation").

Metro likewise cites the permanent classrooms (which are irrelevant to sound levels in the portable classrooms) and asserts that the ANSI sound levels could be met if the School District were to "upgrade" the classrooms to meet the ANSI standard. (Metro Br. 39-40.) This is simply circular reasoning: if the portable classrooms were upgraded to meet the ANSI standard, then they would meet the ANSI standard. Metro also argues that the ANSI standards should not be applied because the ANSI standards were designed to establish an acceptable noise threshold for classrooms rather than to regulate construction impacts. (Metro Br. 39 (citing AR112929).) Again, however, this is not an argument at all, much less indicative of the requisite "hard look."

The Agencies also fail to propose any classroom-based noise mitigation measures to lessen the impact of construction noise upon the portable classrooms. Here, the Agencies cannot have it both ways. They cannot argue, as Metro does, that the ANSI sound levels could be met for the portable classrooms if the School District were to "upgrade" the classrooms to meet the ANSI standard (Metro Br. 39-40) and then completely fail to address how this might be done, either by the Agencies or by the School District.

The Agencies respond by arguing that "NEPA does not require an agency to formulate and adopt a complete mitigation plan." (FTA Br. 34; Metro Br. 40 (both citing *N. Alaska Env'l Ctr.*, 457 F.3d at 979 Nevertheless, an environmental analysis must contain "a reasonably complete discussion of possible mitigation measures." *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). "The mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Id.* (quoting *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997). "In other words, an EIS must include '[m]eans to mitigate adverse environmental impacts.'" *Id.* (quoting 40 C.F.R. § 1502.16(h)). Here, the Agencies have suggested that classroom-based

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noise mitigation measures should be sufficient to reduce the sound levels in the portable classrooms to a tolerable and ANSI-compliant level compatible with the High School's learning environment. However, the Agencies have completely failed to discuss such measures, much less in sufficient detail to ensure that the Project's environmental consequences have been fairly evaluated in this regard.

Likewise, the Agencies also fail to propose any noise- or vibration-mitigation measures for Building C. As set forth in the Motion, noise and vibration impacts from trains traveling below Building C will exceed the FTA's own standard for schools. (AR112694-95.) However, the Agencies have not committed to measures sufficient to mitigate the impacts of noise and vibration to levels appropriate for education. (*See* AR104617-18; Pl.'s UF ¶ 167.) Indeed, the Agencies do not even respond to this omission in their briefs.

Given the harm posed by noise and vibration from construction at Staging Area 2, Staging Area 1 is a prudent and feasible alternative that should have been considered and selected. Its location approximately 1,100 feet from the school would greatly reduce the impact of noise on classrooms. Also, a change from the Project Alignment to the Camden or Linden Alignments, which do not run under Building C, will eliminate the impacts of noise and vibration on that building, as discussed above.

The FTA responds by contending that it "considered alternative staging area locations and concluded that alternative locations 'would require additional property acquisition to meet the 3-acre requirement, add substantial cost to the Project from right-of-way acquisition, and displace commercial and/or residential properties, some of which may be historic properties.'" (FTA Resp. to Pl.'s UF ¶ 169.) This argument, however, is simply non-responsive. Utilizing Staging Area 1 would not require additional property acquisition because Staging Area 1 is itself in excess of five acres, there is no evidence that it would be more expensive than any alternative

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staging areas, and no "commercial and/or residential properties" would be displaced *because Staging Area 1 is a vacant lot*. (Pl.'s UF ¶ 141; AR107110.)

3. The Agencies Fail to Take a "Hard Look" at Abandoned Oil Wells and Methane.

As set forth in the Motion, the Agencies have failed to undertake the mandated "hard look" with respect to the likelihood of encountering abandoned oil wells and methane on the High School's campus. While several aspects of the analysis remain in contention (as identified above), the following cannot reasonably be disputed:

First, the Agencies have failed to undertake the mandated "hard look" with respect to the alternative Camden and Linden Alignments. The Camden and Linden Alignments, which run under fields and buildings slated for demolition, mitigate abandoned-oil-well risks because any methane released from an oil well punctured below a field would quickly dissipate, whereas methane released from an oil well under a building may become trapped within that building. (Pl.'s UF ¶ 171.) Moreover, if gas is present in an unmapped well, the Camden and Linden Alignments are clearly superior due to the ease of surface access. If gas is present, then there are no viable subsurface options available; access from the surface will be required. Stopping the gas flow will most likely require a workover rig to access the well from the surface and clean the well out to a depth below the gas zone that is the source of gas and cementing the well from that depth. Under the best of circumstances this will cause significant disruption to the normal use of the area, and if the well is under a structure, it could require removing enough of the structure to provide access to the rig. (AR105235-105236; Pl.'s Resp. to FTA ¶ UF 31; Pl.'s Resp. to Metro UF ¶ 238.)

The Agencies acknowledge that "[l]ocating and removal of abandoned oil wells is most efficient from the surface." (FTA Resp. to Pl.'s UF ¶ 171; Metro Resp. to Pl.'s UF 171.) Nevertheless, the Agencies purport to "dispute" the mitigating

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effect of the Camden and Linden Alignments by contending that these alignments are supposedly closer in proximity to mapped oil wells and thus more likely to encounter an abandoned oil well. (FTA Resp. to Pl.'s UF ¶ 171; Metro Resp. to Pl.'s UF ¶ 171.) As discussed above, however, the Agencies' confidence that the Camden and Linden Alignments are closer to a known oil well than the Project Alignment is unsupported. Indeed, the evidence in the FSEIS demonstrates exactly the opposite. (*See supra* § II.B.2.v.)

The FTA also purports to dispute the mitigating effect of the Camden and Linden Alignments by contending that "[t]he record does not support the idea that tunneling under a building would increase the likelihood of encountering an abandoned oil well" (FTA Resp. to Pl.'s UF ¶ 171), but no one—certainly not the School District—has ever made such an argument. The School District's point is simply that if an oil well is encountered underneath a building, the risk from methane increases and removal of the oil well becomes more complicated and dangerous than if an oil well is encountered under an open field. (AR105235-105236; Pl.'s Resp. to FTA ¶ UF 31; Pl.'s Resp. to Metro UF ¶ 238.) The FTA's gross mischaracterization of the School District's argument—and the FTA's discounting of what is an obvious point—evidences their failure to take a "hard look" at this issue.

Second, and critically, the Agencies have collected insufficient information regarding the amount and location of methane on the High School campus. (Pl.'s UF 172.) The California Department of Toxic Substances has declared the High School campus to be a "methane zone." (Pl.'s UF 172.) Nevertheless, the FTA and Metro have only taken soil gas samples *from a single borehole at the proposed tunnel depth* on the campus. (Pl.'s UF ¶ 172; Pl.'s Resp. to FTA UF ¶ 24; Pl.'s Resp. to Metro UF ¶ 201.)

The Agencies respond by pointing to a number of other gas monitoring wells installed at various points along the Section 2 alignment (*see* FTA Resp. to Pl.'s UF

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¶ 172; Metro Resp. to Pl.'s UF ¶ 172), but the Agencies cannot plausibly dispute that soil gas samples were collected on the High School campus from *only a single borehole at the proposed tunnel depth*, since this is plainly documented in the FSEIS. (AR107209; AR107210.) Moreover, methane concentrations at that borehole increased as depth increased, demonstrating the need to conduct additional sampling at the actual tunnel depth. (AR107209.)

The Agencies' failure to take seriously the risk of methane on campus is even more egregious given the fact that explosive amounts of methane were found both on the campus itself as well as immediately adjacent to the campus. The FSEIS reports that methane was found on the Project Alignment at up to 51,000 parts per million on the High School campus itself and 986,000 parts per million immediately west of the campus at the proposed Constellation station site. (AR107215; Pl.'s Resp. to FTA UF ¶ 24; Pl.'s Resp. to Metro UF ¶¶ 200, 203.) The FSEIS discounts the 51,000 parts per million reading by asserting that it was "not repeatable." But in fact there were *two* samples taken at this location, one at a depth of fifteen feet with a sample of 51,000 parts per million and one at a depth of five feet with a sample of 22,000 parts per million. (AR107210; Pl.'s Resp. to Metro UF ¶ 203.) In addition, elsewhere on the campus, methane was sampled at 69,000 parts per million at a depth of fourteen feet and 89,000 at a depth of nine feet. (AR107209; Pl.'s Resp. to Metro UF ¶ 203.) Of course, these were shallow samples. The FSEIS does not report on any other samples taken at or near tunnel depth on campus, but samples taken at or near tunnel depth *adjacent* to the campus were nearly off the charts, with samples of 281,000, 333,000, 904,000, 908,000 and 899,000 parts per million on Century Park East (the street between the west side of the campus and the Constellation station) *and up to 986,000 parts per million at the Constellation station site itself*. (AR107209; Pl.'s Resp. to Metro UF ¶ 203.) The FSEIS's repeated

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spinning and downplaying of this data does not pass scrutiny and is further evidence of the Agencies' failure to take the requisite "hard look."

Third, the FSEIS mischaracterizes the nature of the ground under the campus and the ability of methane to travel vertically through it. (AR105291-92; Pl.'s UF ¶ 172; Pl.'s Resp. to FTA UF ¶ 22; Pl.'s Resp. to Metro UF ¶ 207.) Apparently realizing that their position with respect to methane migration through soil is untenable, the Agencies simply ignore this fundamentally flawed aspect of their analysis. Instead, the Agencies argue that methane migration is unimportant *because there supposedly is no methane along the Project Alignment to begin with*, even though there is no basis for this assertion. As discussed above, the Agencies' claim that significant volumes of methane *do not exist along the alignment* (*see, e.g.*, FTA Resp. to Pl.'s UF 172; Metro Resp. to Pl.'s UF ¶ 172) is flatly contradicted by their own data. Methane was found at the one borehole on the Project Alignment on the High School campus that was sampled at anywhere near tunnel depth (AR107209, sample C-119B). Moreover, the Agencies' own data shows that explosive levels of methane were found at tunnel depth on the Project Alignment at the Constellation station site (AR107209, sample M-408), that explosive levels of methane were found on the Project Alignment at tunnel depth immediately adjacent to the campus (AR107209, sample M-407) and that elevated levels of methane, increasing with depth, were found at various locations on the High School campus (e.g., AR107210, samples A6-SG10, A6-SG6, A6-HP4). (AR107209; AR107215; AR107210; Pl.'s Resp. to FTA UF ¶ 24; Pl.'s Resp. to Metro UF ¶ 203.)

Fourth, the Agencies' analysis also fails to consider and address the manner in which tunneling will create new pathways for methane to travel, once again resulting in an understatement of the risk posed by methane migration. (AR105292-93; Pl.'s UF ¶ 172; Pl.'s Resp. to FTA UF ¶ 25; Pl.'s Resp. to Metro UF ¶ 209.) The Agencies purport to dispute this understatement of risk from methane migration, but

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their only response is that "soil gas along the alignment at the BHHS site *has not been found* to contain elevated gas pressures; therefore, the risk of hazardous gas migrating at the site is negligible." (FTA Resp. to Pl.'s UF ¶ 172 (emphasis added).) As discussed above, however, with the exception of a single borehole, the Agencies *did not even look* for elevated gas pressures at tunnel depth along the Project Alignment at the High School.

Finally, the Agencies have not proposed an adequate methane mitigation system for the campus, which would reduce the risk of potential methane migration introduced by tunneling. (Pl.'s UF ¶ 172.) Here, the Agencies' response is once again entirely inadequate. According to the Agencies, mitigation measures are unnecessary for parts of the Section 2 alignment that do not have elevated subsurface gas concentrations and, in any event, "[g]as that enters the atmosphere dilutes rapidly." (FTA Resp. to Pl.'s UF ¶ 172; Metro Resp. to Pl.'s UF ¶ 172.) But that is no argument at all. As discussed above, the Agencies have *no basis* for asserting that there are no elevated subsurface gas concentrations under the section of the Project Alignment that travels underneath the High School. Moreover, their observation that gas entering the open atmosphere dilutes rapidly supports the School District's alternative alignments, since those alignments are over open fields rather than buildings.

4. The Agencies Fail to Take a "Hard Look" at Seismic Issues.

As set forth in the Motion, the FSEIS's seismic analysis is fundamentally flawed. Had the Agencies conducted a proper analysis, they would have determined that the Santa Monica Boulevard alignment is feasible and prudent and would avoid harm to the High School. (*See* Mot. 49 (citing AR104610, AR105220-27).) Nothing in the Agencies' briefs changes this conclusion.

First, the FSEIS plainly fails to take a hard look at fault investigations undertaken since the release of the FEIS, which have found no active faults on Santa

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Monica Boulevard. As stated in the Motion, although the FSEIS purports to update the seismic analysis from the March 2012 FEIS to account for new studies, the evaluation remains flawed and geared toward avoiding the conclusion that there is no fault present on Santa Monica Boulevard. (Pl.'s UF ¶¶ 173-176.) Investigations conducted by multiple experts since 2011 have failed to find active faults along Santa Monica Boulevard. (Pl.'s UF ¶ 174.)

Metro acknowledges that "other property owners in the Project's vicinity have prepared a number of independent geotechnical fault investigation reports." (Metro UF ¶ 255.) Metro further asserts that it "reviewed" and "used" these reports. (*Id.*) But Metro fails even to mention the critical fact that not a single one of these reports found, and all refuted, the existence of an active fault where Metro's consultants had previously mapped one or several through the investigated properties. (*See* Pl.'s Resp. to Metro UF ¶ 255; Reports cited in Metro UF ¶ 255 (SEIS Appendix B).) Indeed, Metro now admits that the supposed "faults" that served as the basis for elimination of the *alternative* Santa Monica Boulevard station (east of the initial site) were not faults at all; instead, the "apparent offsets were due to tilting of the beds and not faulting." (Metro UF ¶¶ 289-90.)

Second, despite the wealth of seismic studies that were submitted to the Agencies, the FSEIS wrongly concludes that there are active faults preventing the location of a station on Santa Monica Boulevard. (Pl.'s UF ¶ 174.) The Agencies never address the School District's point that there is simply no evidence of an active fault that is *actually on* Santa Monica Boulevard preventing the construction of the station. Indeed, instead of addressing the School District's actual argument about the flaws in the FSEIS, the FTA asserts that there are faults in the "area" of Santa Monica Boulevard (FTA Br. 37), in a "broad zone along Santa Monica Boulevard" (*id.*) or "in the vicinity of Santa Monica Boulevard" (FTA Resp. to Pl.'s UF ¶ 173). However, the locations identified by the FTA (*see* FTA Resp. to Pl.'s UF ¶ 173) are

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all well to the south of the proposed Santa Monica station; no studies have found any active faults on Santa Monica Blvd where the proposed station would actually be located. (Pl.'s Resp. to FTA UF ¶ 34; Pl.'s Resp. to Metro UF ¶ 255.)[40]

Metro counters that "[t]he presence of faulting in the area of Santa Monica Boulevard is unquestioned by all parties." (Metro Resp. to Pl.'s UF ¶ 173.) But the mere presence of faulting in the general area of Santa Monica Boulevard is simply not the issue. The presence of *active* faulting is the issue, and no *active* faults have yet been found, much less active faults that are actually along (rather than in the general vicinity of) Santa Monica Boulevard.

Third, as explained in the Motion, the Agencies plainly targeted the Santa Monica Station. The FTA does not dispute that absolutely no fault investigations similar in detail to those performed for a potential Santa Monica Boulevard station were performed for the Constellation or the Rodeo/Wilshire stations, nor for any other stations on the Purple Line. (Pl.'s UF ¶ 175.) Similarly, Metro responds only that "the Agencies undertook *appropriate* fault investigations for all locations along Section 2," but cites no facts whatsoever in support of this conclusion. (Metro Resp. to Pl.'s UF ¶ 175 (emphasis added).)

Fourth, the FSEIS uses an incorrect definition of an "active" fault, interprets the same geologic conditions at different locations differently and relies on poor quality, low-resolution photos of a 1972 excavation. (Pl.'s UF ¶¶ 175-176.) The FTA does not dispute that for every other project, the Agencies defined an "active" fault based on an 11,700-year benchmark established by state law and the California Geological Survey. (Pl.'s UF ¶ 175; *see also* Metro UF ¶ 266.) The FTA also does not dispute that, for the project, they decided to define an "active" fault as one having

[40] Additionally, in the only fault study cited by the Agencies (FT-5 at BHHS) where a fault was actually observed, Metro admits that the fault has been *inactive* for "about 60,000 years." (Metro Resp. to Pl.'s UF ¶ 174.) Thus, even if there were faults on Santa Monica Boulevard, there is no actual evidence of any *active* faults.

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ruptured in the last 35,000 years. (FTA Resp. to Pl.'s UF ¶ 175.) The FTA unaccountably attempts to justify this redefinition by noting that faults with activity during the past 200 years are considered more likely to have future activity than faults classified as Holocene age (last 11,000 years)—which is facially irrelevant and does not even speak to the issue—and by citing activity standards used for dams and nuclear power plants. (FTA Resp. to Pl.'s UF ¶ 175.) This is simple misdirection. If the standards for dams and nuclear power plants are appropriate, then why did the Agencies admittedly use an 11,700-year standard for every other project—or if they did not use the 11,700-year standard, then where is their documentation of the supposed 35,000-year standard?

Elsewhere, Metro concedes that they simply applied a different definition of what constitutes an "active" fault. Specifically, Metro states that, according to Metro Rail Design Criteria, faults are considered to be active "if they have experienced displacements during the past approximately 11,000 years (Holocene time)." (Metro UF ¶ 266.) Metro then admits that it considered other faults to be "active" even if the most recent rupture was more than 11,700 years before present, supposedly because this is "prudent." (Metro UF ¶ 267.) Tellingly, however, Metro cites no instance of where they have *published* this supposedly "prudent" more-than-11,700-years-before-present standard for determining active faults, nor does Metro cite any instance of using such a standard for any location other than the Santa Monica station.

The Agencies also fail adequately to address the undisputed fact that the FSEIS interprets the same or similar geologic conditions at different locations differently. (Pl.'s UF ¶ 175.) For example, it is undisputed that "abrupt thickening" of alluvial deposits is present at both the Wilshire/Rodeo and proposed Santa Monica stations (Pl.'s UF ¶ 175), but this is seen as somehow indicative of active faulting only at the proposed Santa Monica station. (Pl.'s UF ¶ 175.) The Agencies' only

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response is that they expect their plainly biased interpretation to be supported by unspecified future studies that have not yet been conducted, which is simply inadequate. (*See, e.g.*, FTA Resp. to Pl.'s UF ¶ 175.)

The Agencies also fail to justify the FSEIS's reliance on low-resolution photos of a 1972 excavation near the Constellation station to conclude that there is direct evidence that these excavations found no evidence of faulting. (Pl.'s UF ¶ 176.) The FTA suggests that these low-resolution photos "support" a finding of no faults, but the FTA does not dispute that no serious seismic professional would accept them as reliable data. (FTA Resp. to Pl.'s UF ¶ 176.) Metro, for its part, fails even to offer a response. (Metro Resp. to Pl.'s UF ¶ 176.) Once again, this is evidence of the Agencies' predetermination to proceed with the project without taking the requisite "hard look" at the proposed alternatives.

For each of the foregoing reasons, the FSEIS must be rejected.

III. CONCLUSION

For the foregoing reasons and for those set forth in the Motion, the School District respectfully requests that the Motion be granted, and that the Federal Defendants' and the Local Defendants' Cross-Motions be denied, in their entirety.

Dated: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019 a copy of the **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' AND LOCAL DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's EM/ECF System.

/s/ Jennifer S. Recine
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