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BEVERLY HILLS UNIFIED SCHOOL DISTRICT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BEVERLY HILLS UNIFIED SCHOOL DISTRICT,

Plaintiff,

v.

FEDERAL TRANSIT ADMINISTRATION, *et al.*,

Defendants.

Case No. 2:18-cv-0716 GW(SSx)

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Honorable George H. Wu
Courtroom 9D

Action filed: January 26, 2018
Hearing Date: April 29, 2019 at 8:30 a.m.

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Plaintiff Beverly Hills Unified School District (the "School District") respectfully submits this memorandum of law in support of its motion for summary judgment.[1]

PRELIMINARY STATEMENT

On February 1, 2016, this Court issued a 217-page tentative ruling (the "Tentative Ruling") concluding that Federal Transit Administration ("FTA") violated the National Environmental Policy Act ("NEPA") and Section 4(f) in approving the "Project Alignment" of the Purple Line Extension between a station on Wilshire Boulevard in Beverly Hills to Century City in Los Angeles (the "Project"). *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSX), 2016 WL 4650428 (C.D. Cal. Feb. 1, 2016). Those violations included: (1) failing to analyze the health impacts of construction (despite the fact that substantial construction work was moved to a staging area directly adjacent to portable classrooms used to educate the entire student population of Beverly Hills High School (the "High School")); (2) failing to analyze health and explosive risks posed by methane migration despite the fact that the planned tunnels will run directly beneath historic High School buildings, which are also vulnerable to subsidence; (3) presenting questionable conclusions about seismic safety as "above reproach"; (4) refusing to prepare a supplemental EIS after generating and receiving significant new seismic information; and (5) acting ***arbitrarily and capriciously*** in determining that tunneling under the school is not a "use" under Section 4(f), thus sidestepping the analysis of whether "prudent and feasible alternatives" exist and ensuring that "all possible planning" to minimize harm arising from such use.

In its ruling, this Court also explained that it was a "***very close question***" whether the Agencies predetermined the location of the station before engaging in

[1] Also submitted herewith are the School District's Statement of Uncontroverted Facts ("UF") and the Declaration of Jennifer S. Recine ("Recine Decl.").

their environmental analysis and that the analysis underlying the decision to move the station from Santa Monica Boulevard to Constellation Boulevard "appear[ed] to have been slanted in one direction," but the Court found that based on the then-existing record, the Agencies' conduct did not meet the standard for predetermination *at that time*. *Id.* at *87-88.

In response to the Tentative Ruling, the FTA and Los Angeles County Metropolitan Transportation Authority ("Metro," and with the FTA, the "Agencies"), together, beseeched this Court not to implement the presumptive remedy – vacatur of the Record of Decision ("ROD") – for its eminently correct conclusion that FTA had acted arbitrarily and capriciously in selecting the Project Alignment without analyzing alternatives under Section 4(f) and otherwise violating NEPA in at least four respects. The Agencies repeatedly reassured the Court that they could – and would – engage in the supplemental environmental analysis demanded by the Tentative Ruling fairly and objectively – and without reliance on cost or bureaucratic momentum – notwithstanding the fact that during that analysis the Agencies would execute a Full Funding Grant Agreement ("FFGA") with each other for more than $1 billion dollars and Metro would enter into a design/build contract ("Design/Build Contract") with Tutor Perini – based on the Project Alignment. Indeed, the Agencies argued these agreements ***could be changed*** to accommodate a different alignment and promised that they would not rely on costs or administrative difficulties associated with changing the alignment as a basis not to seriously consider alternatives.

In reliance on the Agencies' representations, this Court did not vacate the ROD. But, it instructed that "should Metro follow down that path [of obtaining the FFGA and executing 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." The Court cautioned the FTA to ensure that Metro took "no action" that would "[l]imit the choice of reasonable alternatives." The Court

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

Unfortunately, but perhaps unsurprisingly, the Agencies did not live up to their word. Their final supplemental environmental analysis ("FSEIS") relies on ***outright pretext*** as reasons to reject alterative alignments provided by the School District in response to the Project Alignment – delay to the Project and purported impact on historic properties. The School District's alternative alignments comport with Metro's construction requirements, do not compromise the functionality of the subway, cost less to build in absolute terms, and burden fewer historic and recreational resources, and thus are the best choice under any rational analysis. Yet, the Agencies declined to seriously consider them because these alternatives would delay the Project, as the Agencies had decided not to consider them during the initial environmental review (precisely the violation of section 4(f) this Court identified in its Tentative Ruling), and thereby increase costs, when taking into account the fact that the Agencies have been expending monies towards its construction over past two years, as they steamed ahead in the absence of vacatur. The Agencies gave the Project Alignment an "automatic advantage" over the other alignments because it has already been through a flawed environmental review process and adopting it will hasten delivery of the Project's "purpose and need." Without that advantage, the Agencies' internal documents concede that there is no disadvantage to the School District's preferred alternative alignments. The Agencies also misrepresented that the School District's proposed alignments caused "greater impact" to historic properties – falsely claiming they impact a Beverly Hills historic district despite knowing that they do not.

Worse yet, the Agencies engaged in absolutely no analysis concerning – and provided no reasonable basis for rejecting – a suitable alternative staging location for construction of the Project Alignment. In their draft supplemental

environmental impact statement ("DSEIS"), the Agencies publicly announced for the first time the staging area would be located directly at the High School's fence line – substantially closer to the High School than disclosed in their original environmental review. As the Agencies were well aware, just across the fence line sits vulnerable portable classrooms, where substantially all of the High School's academic activities will take place until the first quarter of 2020, as the Project is constructed. Toxic emissions and airborne particulates generated by construction at Staging Areas 2 and 3 will pose substantial health risks to students, faculty, staff, and members of the public using the High School's classrooms and recreational facilities. Noise and vibration from those staging areas also will adversely impact the High School's recreational facilities and threaten to undermine the learning environment at the High School's vulnerable portable classrooms. Despite this harm, the record reflects a single communication with the owner of the alternative staging area, which fails to confirm that construction of a development planned at that site would prevent its use as a staging area. Instead, before the Agencies even published the DSEIS, Metro had already used federal funds to acquire the properties for Staging Areas 2 and 3.

Lurking behind the automatic advantage the Agencies gave the Project Alignment over concededly viable alternatives and their abject failure to even superficially analyze the viability of Staging Area 1 is the work done and money expended in favor of the Agencies' "preferred alternative" starting immediately upon issuing the ROD in August 2012 and culminating in the execution of the FFGA and Design/Build Contract shortly after the Tentative Ruling. Ninth Circuit law forbids Agencies from entering into binding commitments of precisely this type and magnitude before deciding how a project impacts the environment.

As NEPA jurisprudence plainly holds, agencies must "look before they leap," otherwise one must assume that the temptation to arrive at predetermined result has, in fact, slanted the analysis. And, here, it undoubtedly has. The only

real basis articulated by the Agencies in the record for declining to adopt an alternative alignment – which would preserve community historic features and recreational facilities – is the delay that arises directly from the Agencies' own failure to engage in a proper environmental analysis in the first instance and their determination to continue working towards the Planned Alignment while the supplemental environmental review was underway. Had the Agencies simply conducted a public review of alternatives to the Constellation Station in the first place, the Project Alignment would have no advantages at all.

The Agencies have continued to push the Project Alignment forward in every conceivable way, yet they will ask this Court – with a straight face – to find that they engaged in an objective supplemental analysis of the environmental impact of the Project on the High School, even as they committed billions of dollars to their chosen route and staging area. Their position strains credulity. If the Court follows the direction of the Ninth Circuit and "evaluate[s] 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," it will necessarily conclude that they did. Because, consistent with the honest words of Phillip Washington, Metro's CEO, by the summer of 2017, when the DSEIS was published, Metro could not consider any alternative alignments or staging areas because of commitments the Agencies had already made.

FACTUAL BACKGROUND

Beverly Hills High School is the only public secondary school in the City of Beverly Hills (the "City"). Through a cooperative use agreement with the City, the High School provides educational and recreational services for the broader Beverly Hills community. The School District is in the midst of a project to modernize the High School to meet current and long-term educational and community needs (the "Master Plan"), including through underground development. (UF ¶¶ 1-4.) The next step in the Master Plan is construction of Building C, a planned gymnasium

with underground parking for the purpose of increasing community access to the High School's recreational facilities. (*Id.*; UF ¶¶ 3, 96-97.)

The Westside Purple Line Extension is a public transportation project to extend Metro's existing Purple Line subway to the West Los Angeles Veteran Affairs Hospital. (AR107027.) The approved route for Section 2 would tunnel at shallow depths beneath the High School, including under historic buildings and Building C. (AR107341-42.) Construction will generate harmful levels of toxins, noise, and vibration, and will occur for seven years at staging areas abutting the High School's athletic fields, which currently house portable classrooms used by hundreds of students. (AR107122; AR107164; UF ¶ 5.)

A. The Prior Environmental Review and Litigation

In 2012, the Agencies prepared and issued a Final Environmental Impact Statement ("FEIS") for the Project. (AR040458; UF ¶¶ 6-8.) In the FEIS, they approved a subway tunnel running from a station at Constellation Boulevard along an alignment running directly beneath the heart of the High School's campus. (*See* AR040510-11; AR041158.) The Agencies also proposed to locate the construction staging area for the Project at an empty lot at 1950 Avenue of the Stars ("Staging Area 1") directly adjacent to the planned station entrance, more than 1,100 feet away from the High School's athletic fields and portable classrooms. (AR075777.) Despite the incorporation of land beneath the High School's historic and current and planned recreational resources, the Agencies wrongly determined that the Project did not "use" the Section 4(f) resources. (AR041322.)

On November 16, 2012, the School District filed a complaint for declaratory and injunctive relief challenging the Agencies' flawed environmental analysis, including the Agencies' determination that the Project Alignment did not "use" the High School's historic and recreational resources. In February 2016, the Court issued a tentative ruling determining that the FTA committed multiple violations of NEPA and Section 4(f) in approving the Project Alignment. (AR075563-778.)

Among other things, the Court determined that the FTA erred in concluding that tunneling under the High School did not "use" the High School's historic and recreational resources, and by failing to perform a "follow-on Section 4(f) analysis" of prudent and feasible alternatives and all possible planning to minimize impacts of the Project. (AR075773-77; UF ¶¶ 9-10.)

B. The Court-Ordered Supplemental Environmental Review

In subsequent proceedings to determine the appropriate remedy for the FTA's NEPA and Section 4(f) violations, the Agencies sought to avoid vacatur of the ROD. (UF ¶¶ 11-18, 21-22.) The FTA claimed that vacatur would result in a significant delay to the Project and prevent the Agencies from proceeding with the Section 2 FFGA, which would commit $1.187 billion in federal funds to the Project Alignment, and Design/Build Contract, a $1.3765 billion contract to construct the Project Alignment. (Recine Decl., Exs. 1, 2.) At a deposition, Phillip Washington, Metro's CEO, acknowledged that once the FFGA and Design/Build Contract were in place, those contracts would affect how the Agencies would evaluate alternative alignments because a change in alignment would be a "cardinal change" to the Project as described in the FFGA and would require a "change order of high magnitude" to the Design/Build Contract. (Recine Decl., Ex. 3.)

The Court cautioned that "should Metro follow down the path [of executing the FFGA and Design/Build Contract] in the absence of a vacatur, Plaintiffs' argument for predetermination get[s] much stronger." (Recine Decl., Ex. 4 at 4.) The Court also noted the FTA's obligations under 40 C.F.R. § 1506.1(b), which imposes a duty on the FTA to ensure that Metro take "no action" that would "[l]imit the choice of reasonable alternatives." (*Id.* at 6.) To avoid a determination that the contracts would predetermine the outcome of the supplemental analysis, the FTA repeatedly represented to the Court that the contracts could be changed and that it would not rely on costs of changing the alignment in its supplemental

environmental analysis. (Recine Decl., Exs. 5-11.) The FTA and Metro made similar representations to the Ninth Circuit, acknowledging that "the district court expressly prohibited Metro or FTA from later arguing that it would be too costly to change the project alignment." (Recine Decl., Exs. 12-14.)

On August 12, 2016, the Court adopted its Tentative Ruling as final and remanded the FTA's decision with instructions to prepare a supplemental environmental impact statement. *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSX), 2016 WL 4445770, at *5 (C.D. Cal. Aug. 12, 2016). The District Court directed FTA to perform the following supplemental analyses: (1) identify direct and constructive uses of the High School campus from subway construction and operation on, beneath or near the campus, and if construction or operation causes a "use," evaluate "prudent and feasible alternatives" and "all possible planning" to minimize harm under Section 4(f); (2) discuss the completeness of the available seismic risk information related to Section 2; (3) discuss post-draft environmental impact statement seismic and ridership studies available to FTA and related to Section 2; (4) analyze potential public health impacts of NOx emissions during construction of the station and tunneling for Section 2, and assess the feasibility and efficacy of mitigation measures and alternatives; (5) analyze potential public health impacts of dust and diesel particulate matter emissions and assess the feasibility and efficacy of mitigation measures; and (6) analyze potential risks of soil gas migration from tunneling or other construction activities and disclose any information required by 40 C.F.R. §§ 1502.22, 1502.9, and *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), and assess the feasibility and efficacy of mitigation measures and alternatives. (*Id.* at *3-5.)

Relying on the Agencies' representations, the Court did not vacate the ROD or prohibit the FTA and Metro from the "initial and/or preparatory step[]" of executing the Section 2 FFGA and Design/Build Contract. *Id.* at *8-10. (Recine

Ex. 15.) The Court warned, however, that "[h]aving represented to the Court that those agreements may be changed, the FTA (and/or Metro) will not be heard at a later date to claim that they may not, or that doing so would be too costly as a basis for asserting that the alignment cannot be changed." (*Id.* at 4.) The Court cautioned that it would "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." (*Id.*) Similarly, the Ninth Circuit invited this Court, when it reviews the FSEIS, 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. v. Fed. Transit Admin.*, 694 Fed. App'x 622, 624 (9th Cir. 2017).

In the midst of remedy proceedings, the School District learned that Metro planned to relocate construction staging for the Project from the empty lot at 1950 Avenue of the Stars – the staging area selected in the FEIS – to staging areas located at 1940 and 1950 Century Park East ("Staging Area 2") and 2040 Century Park East ("Staging Area 3"). (Recine Decl., Ex. 16.) Staging Area 2 abuts the portable classrooms temporarily housed on the High School's athletic fields. This means that Metro will conduct substantial construction activity a mere 10 feet away from the High School's portable classrooms and fields, which, as the Court noted, was "materially closer than previously thought and disclosed," and would expand the Section 4(f) constructive use analysis. (*See* Recine Decl., Ex.4 at 6.). The change was made to accommodate a real estate developer's purported planned development of 1950 Avenue of the Stars.

C. The Agencies' Commitments In Favor of the Project Alignment

Throughout the supplemental review process, the Agencies made enormous contractual, financial, and resource commitments in favor of the Project Alignment and Staging Areas. (UF ¶¶ 23-32.) The Agencies did not limit themselves to

"initial" or "preparatory" steps such as executing the FFGA and Design/Build Contract, but instead disbursed, spent, and otherwise obligated more than a billion dollars of resources to the Project Alignment.

On December 15, 2016, the FTA and Metro executed the FFGA, obligating $1.187 billion in federal funds to the Project Alignment, despite that any modification of the FFGA that changes the alignment would be a "cardinal change" requiring enormous time and resources. (SUP000704; UF ¶ 23.) That same day, the FTA awarded Metro the first FFGA disbursement of $100 million for the Project Alignment. (SUP000777.) The FTA disbursed $34,481,540 to advanced utility relocation and demolition/site clearing work; $49,107,149 to the purchase of real estate and relocation of existing businesses; and $16,411,291 to final design, engineering management services contracts, agency costs, and construction management support services contracts. (SUP000777; SUP000786-90.)

Also on December 15, the FTA awarded the first disbursement of $43 million in federal funds under the Congestion Mitigation and Air Quality Improvement Program. (SUP000753.) The FTA disbursed $18,058,275 for real estate acquisitions and relocations and $24,942,725 for professional services related to preliminary engineering. (SUP000758-59.) The FTA disbursed funds specifically for Metro's acquisition of real estate notwithstanding the FTA's policy that the "acquisition of property would prejudice the consideration of alternatives." (Recine Decl., Ex. 17.) At the time of these disbursements, the supplemental environmental review had barely begun.

On December 20, 2016, the Agencies executed the Transportation Infrastructure Finance and Innovation Act ("TIFIA") loan agreement, which obligated $307 million in federal funds in loan to Metro. (SUP000803.)

With federal funds in place – but well before the supplemental review was complete – on January 26, 2017, Metro awarded the $1.3765 billion Section 2

Design/Build Contract to Tutor Perini/O&G, even though a change in alignment would require "a change order of high magnitude." (SUP001201; UF ¶ 27.) On April 26, 2017, Metro issued to Tutor Perini/O&G a notice to proceed with construction of Section 2 stations and tunnels, even though the Agencies had yet to issue the DSEIS. (AR104469.) Metro issued the Notice of Proceed knowing that if the Project Alignment was not adopted, construction of the Project would be delayed for 12 to 18 months, and a stop work order to Tutor Perini/O&G would be an "owner caused delay" under the contract terms. (AR104469; *see also* Recine Decl., Ex. 2 ¶ 9.) This meant that Metro would be financially responsible for all costs of delays and increases in the contract price – including daily overhead and delay rates, material storage and construction equipment rental costs, and escalated costs of construction – placing Metro on the hook for $72 to $108 million. (*Id*.)

Using federal funds, Metro began acquiring property rights for the Project Staging Areas, treating these Staging Areas as a foregone conclusion even though the Agencies had yet to complete their analysis of feasible and prudent alternatives. (AR104469.). Staging Area 2 consisted of two commercial properties located at 1940 and 1950 Century Park East, and Staging Area 3 consisted of a parking lot at 2040 Century Park East. By the beginning of July 2017, Metro was well into the process of acquiring property rights for these properties. Metro had certified and appraised, made offers, and commenced eminent domain proceedings for 1940 and 1950 Century Park East. (SUP014204-05; SUP015650-51.) It then took possession of 1940 Century Park East and gained a right of entry for 1950 Century Park East. (SUP014737.) Metro had certified 2040 Century Park East for acquisition. (SUP000288-296.) The Agencies have refused to include information on the costs of acquiring these the property rights in the administrative record.

The Agencies also began the 25 relocations required for the Project. Twenty-one of these relocations were for tenants at the two commercial buildings at Staging Area 2. (SUP015021.) By the beginning of July, Metro had completed

10 relocations at Staging Area 2, and was engaged in relocating the remaining commercial tenants. (*Id.*; SUP014736-37.) The Agencies refused to include information on the costs of these relocations in the administrative record.

As of June 2017 – months prior to the completion of the supplemental environmental review – Metro's expenditures on the Project totaled more than $292 million, nearly $116 million of which were funds disbursed by the FTA. (SUP014410; SUP014414.) Real estate work accounted for $124,970,000 of Metro's expenditures, 30 percent of its real estate budget. (*Id.*) (SUP014410.) Metro had committed an additional $41,869,000 million through the acceptance of offers for purchase of real estate, for a total of $166,839,000 in real estate commitments. (*Id.*) By the time the DSEIS was issued, Metro had irrevocably committed nearly 40 percent of its real estate budget, much of which was for the acquisition of property rights and relocations for the Staging Areas, alternatives to which the Agencies had yet to analyze. (SUP014410; SUP014426.)

D. The Agencies Issue a Flawed DSEIS

On June 2, 2017, the FTA and Metro issued the DSEIS. (AR088055-448; (UF ¶¶ 33-36.) The DSEIS reaffirmed the Agencies' selection of the Project Alignment, which requires the construction and operation of subway tunnels directly beneath the High School campus. (AR088135-138; AR088355.) The DSEIS also publicly announced the relocation of the Project's construction staging areas from the previously-selected Staging Area 1 to Staging Areas 2 and 3, directly adjacent to the High School's portable classrooms. (AR088138-39; AR088146-51.) The DSEIS did not disclose the Agencies' financial, contractual, and bureaucratic commitments to the Project Alignment and Staging Areas.

E. The School District Responds to the DSEIS

During the public comment period, the School District provided substantial comments to the DSEIS that put the Agencies on notice of flaws and inadequacies in its methodologies, analyses, and conclusions. (UF ¶¶ 37-42.)

On July 24, 2017, the School District submitted a detailed comment letter to the Agencies supported by the analyses of experts in the fields of structural, transportation, and geotechnical engineering, atmospheric and air quality science, and educational facilities administration, regulation, and management. (AR104596-5386.) In its letter, the School District, which had previously voiced its concerns at a public hearing conducted on June 22, 2017, informed the Agencies that the DSEIS did not objectively, fairly, or adequately evaluate the harm the Project poses to the High School, its students' health or learning environment, its historical and recreational buildings and facilities, its planned educational and recreational facilities, or the harm to the broader community. (*Id.*)

The School District alerted the Agencies to myriad flaws in the DSEIS. Contrary to the Agencies' assertions, the Project's impacts were not *de minimis*. (AR104596-616.) The Project Alignment, among other things, poses substantial risk of damage to the campus's historic Building B1 and would prevent its planned expansion and the construction of recreational Building C. (AR104598-604; AR104621-29; AR104630-49; AR104650-53; AR104654-819; AR104820-22.) The Project Staging Areas also will generate harmful levels of airborne toxins, noise, and vibrations. (AR104604-06; AR104611-14; AR104617-20; AR104823-55.) The School District pointed out that the DSEIS improperly rejected both less harmful and feasible and prudent alternatives. (AR104606-08; AR105207-19.)

At the June 22, 2017 hearing and in its comment letter, the School District proposed several minor alignment shifts that would cause less harm than the Project Alignment. Dubbed the "Linden Alignment" and "Camden Alignment" (together, the "Proposed Alternative Alignments"), these proposed alignments minimize harm to the High School campus and its Section 4(f) resources while posing no corresponding harm to the Project. (AR100674-79; AR105207-19.) The Proposed Alternative Alignments would still travel beneath the High School campus, but would avoid tunneling beneath historic and planned recreational

buildings and permit the School District to realize the completion of its Master Plan to the benefit of the entire Beverly Hills community. (*See* AR105207-19.) Each of the Proposed Alternative Alignments permit the Project to maintain a Constellation Boulevard station location. (*Id.*) Each alternative also is generally in line with the costs and travel time associated with the Project Alignment. (*Id.*)

F. The Agencies' Predetermination Is Revealed

In response to the School District's Proposed Alternative Alignments, Phillip Washington, Metro's CEO, stated – consistent with his prior deposition testimony – that Metro's contractual commitments and the prohibitive costs of changing the alignments eliminated the Agencies' ability to consider alternatives to the Project Alignment and Staging Areas. (AR104468-69; UF ¶¶ 43-44.) Mr. Washington asserted in a July 6, 2017 letter to School District consultant Hon. Ruby Svorinich, Jr. that Metro could not consider the Proposed Alternative Alignments because: (1) Metro had issued a "Notice to Proceed with construction of the Section 2 stations and tunnels [ ] to the design build contractor on April 26, 2017, [and] [a] delay to this contract would . . . cost Metro conservatively $6 million per month ($72 to $108 million for 12 to 18 months)"; (2) the Proposed Alternative Alignments "go under different private properties" than the Project Alignment and "would require new environmental analysis . . . delay[ing] the project 12 to 18 months"; and (3) "the proposed alignments are not directly above the tunneling shaft currently planned at the AAA property (1950 Century Park East)" which "Metro has acquired," in addition to "the adjacent site (1950 Century Park East) to the north, as well as the 2040 Century Park East site . . . to support tunnel operations." (*Id.*) He also rejected Staging Area 1 as "unavailable." (*Id.*)

Mr. Washington's letter thus revealed Metro's reliance on prohibitive costs of delays to the Design/Build Contract and property acquisitions in violation of the Agencies' promises to this Court and the Ninth Circuit. It also revealed for the first time that Metro had already acquired all three parcels of real estate required

for Staging Areas 2 and 3, and that these acquisitions prevented the Agencies from considering the alternative alignments and staging areas.

The next day, Metro board member Sheila Kuehl confirmed that Metro could not alter the alignment because it had lined up the properties along its selected route and a change would delay the project. (AR105370-71.)

G. The Agencies' Continued Commitments to the Project Alignment

Notwithstanding the School District's comment letter, the Agencies continued to commit resources to the Project Alignment and Staging Areas. (UF ¶¶ 45-51.) On September 17, 2017, before the Agencies completed their supplemental analysis, the FTA awarded Metro its second FFGA disbursement of $100 million, permitting Metro to use the federal funds for real estate acquisitions and final design work, again despite the FTA's policy that such commitments prejudice the consideration of alternatives. (SUP015167.) The FTA disbursed $46,331,316 to advanced utility relocation and design build contract general requirements, $31,469,502 for real estate acquisitions, and $22,199,182 to final design and engineering management services contracts, agency costs, and construction management support services and contracts. (*Id.*)

On September 25, 2017, the FTA disbursed $103,488,344.97 in federal funds to Metro under the TIFIA loan agreement. (SUP015147.) The FTA disbursed $4,916,250 to guideway and track elements, $40,365,500 for sitework and special conditions, $51,767,200 for real estate acquisitions, and $6,439,394.97 for final design. (SUP015150-51.) A month later, the FTA disbursed $42,511,655.03 to Metro under the TIFIA loan agreement. (SUP015287.) Specifically, the FTA disbursed $7,101,250 to guideway and track elements, $30,509,250 to sitework and special conditions, and $4,901,155.03 for final design. (SUP015290-91.) These loan disbursements, totaling $146 million, were made before the completion of the court-ordered supplemental environmental analysis.

By October 2017, Metro had taken possession of both 1940 and 1950 Century Park East. (SUP015295-97.) Metro was in talks with JMB, the owner of the 2040 Century Park East (a parking lot), who was willing to provide a "Right of Entry" whenever the property was needed. (SUP015297-98.)

By November 2017, Metro had completed and provided compensation for 22 of the 25 relocations necessary for the Project Alignment and Staging Areas. (SUP015344.) The relocations included all commercial tenants at Staging Area 2. (SUP015419-21.) The Agencies refused to include in the administrative record (the "Record") information on the costs of these relocations.

The limited information in the Record regarding Metro's commitments through November 2017 makes clear that Metro had, prior to completing the FSEIS, made significant commitments of capital in support of the Project. By November 2017, Metro had committed $1.406 billion of the $1.663 billion in federal funds it was due to receive (84.5 percent) in favor of the Project. (*Id.*) According to Metro, its commitments include actual contracts awarded, executed change orders, offers accepted for purchase of real estate, and "other Metro actions which have been spent or result in the obligation of specific expenditures at a future time." (SUP015355.) Approximately $230,081,000 of this $1.406 billion commitment was for real estate – meaning that before the Agencies completed the FSEIS, Metro had, through the acceptance of offers for real estate, committed more than half of its real estate budget. (SUP015336.)

Metro's commitments include $409 million in expenditures. While the supplemental review process was ongoing, the FTA disbursed $389 million to Metro, which amounts to more than 23 percent of the $1.663 billion in funds the FTA had committed to the Project. (SUP015340.) Metro spent $253 million of these funds. (SUP015340.) Through November 2017, Metro had spent nearly $131 million of the more than $150 million disbursed by the FTA for real estate acquisitions and relocations – nearly one third of its entire real estate budget for the

Project. (SUP000756; SUP000780-81; SUP015336; SUP015167; SUP015150-51.) Metro also had spent nearly $32.3 million of the approximately $87 million that the FTA disbursed for final design work. (SUP000010.)

H. The Agencies' Predetermination Infects the FSEIS

On November 22, 2017, the Agencies issued the Supplemental ROD and FSEIS reaffirming their selection of the Project Alignment and Staging Areas. (UF ¶ 52; AR107025-456; AR114963-5036) The FSEIS repeated the DSEIS's flawed findings that the Project Alignment and Staging Areas pose no threat to the High School and improperly rejected or ignored prudent and feasible and less harmful alternatives.

1. The Subway Tunnel Alignment

a. The Harm Posed by the Project Alignment

The Project Alignment poses a number of harms to the High School. It would harm both Section 4(f) historic and recreational facilities and undermine the ability of the School District to complete its Master Plan for the rehabilitation and modernization of the High School's campus. The Master Plan calls for the construction of a new gymnasium facility, Building C, which is to serve the recreational needs of both students and the greater community. (UF ¶¶ 96-98)

Building C has been designed to include vital underground parking in the center of campus for the purpose of providing the community with access to the High School's recreational facilities. (AR104625.) It must be completed before other phases of the Master Plan can be executed. After the completion of Building C, the School District will be able to demolish the existing gymnasium and build an expanded code-compliant track and field, which will also serve the needs of both students and the community. (AR104600; AR104623.) In a subsequent phase of the Master Plan, an outdoor Olympic-sized swimming pool will be added, again for community use. (AR072219; AR072439.)

The close proximity of Metro's planned tunnels to Building C raises

numerous technical and regulatory concerns that threaten the ability of the School District to construct Building C, as Metro has conceded by interfering with the School District's approval process for Building C. (AR104600; UF ¶¶ 96-104.) Given that there are no other viable building sites on the campus, the loss of Building C will have a cascading effect that will undermine the School District's ability to meet the future educational and recreational needs of its community. (AR104602; AR104625; UF ¶ 108.)

The Project Alignment also poses a risk of harm to the High School's Building B1, a Section 4(f)-protected historic property. This harm arises from the fact that the Project Alignment is to run directly underneath Building B1. Given the fact that the footings of Building B1, constructed in 1926, are lightly reinforced, the anticipated amount of ground settlement poses a significant risk that the soil under Building B1 will not continuously support its wall footings. (AR104820-21; UF ¶ 115.) This would result in the bottom of the footing cracking, and the cracking likely would spread to the exterior of the building. (*Id.*)

b. The Rejection of Feasible and Prudent Alternatives

The analytical flaws and misrepresentations in the FSEIS make clear that the Agencies' irrevocable commitments have improperly infected their environmental analysis in favor of its predetermined selection of the Project Alignment and Staging Areas. (UF ¶¶ 116-128.) Indeed, barely two months after the release of the FSEIS, a Metro spokesperson confirmed that "changing the alignment is no longer a viable option at this stage of the project." (Recine Decl., Ex. 18.)

Because their commitments rendered the cost of change prohibitive, the Agencies manipulated their Section 4(f) analysis to favor the Project Alignment. For example, the Agencies claimed that the Linden and Camden Alignments tunnel beneath a greater number of historic properties than the Project Alignment. (AR107418-20.) The FSEIS identifies the additional properties as the "Tract 7710 Residential Grouping," a historic district consisting of "amply-sized, two-story

homes that are typically rectangular or L-shaped (with courtyard) in plan," with "Spanish Colonial Revival styling" as "its unifying feature." (AR114837.) The FSEIS did not include an overlay of the Linden and Camden alignments on the historic district. (*Compare* AR114838 *with* AR118508-09.)

In reality, the Linden and Camden Alignments run beneath only a single property – 301 South Linden Drive – within the boundaries of the historic district. (AR118508-09.) However, the historic structure at 301 South Linden Drive was demolished in 1998, and is therefore not a Section 4(f)-protected property. (AR114888, AR118508-09.) The Agencies knew this because the 2004 Beverly Hills Historic Resources Survey Report, the document on which they relied, listed 301 South Linden Drive as "demolished." (AR114888.) A map produced by the Agencies that overlays the Camden and Linden Alignments on the historic district clearly shows that the Camden and Linden Alignments impact only one residence in the historic district, and clearly labels that residence as "demolished." (AR118508-09.) Nevertheless, the Agencies excluded the map from the FSEIS and falsely claimed in the FSEIS that the Linden and Camden Alignments impacted more historic properties. (AR107418-20.)

2. The Project Staging Areas

a. The Harm Posed by the Project Staging Areas

The FSEIS sets forth the Agencies' final selection of construction staging areas directly adjacent to the High School. (AR107230; UF ¶¶ 129-137.) Within Staging Area 2, which abuts the High School's current portable classrooms and future half soccer field, Metro plans to construct an 80-feet wide "temporary access shaft." (AR107053.) This shaft will be used to provide access to the tunnel for workers and materials and for removal of excavated material. (AR107113.) "[F]or approximately two to three years," Staging Area 2 will be used for "stockpiling and off-hauling . . . tunnel muck." (AR107124.) While the Agencies claim diesel trucks will haul stockpiled excavated material "primarily during nighttime hours,"

they acknowledge that substantial construction activity will take place during daytime hours involving heavy equipment and the stockpiling of excavated material. (AR107053; AR107268-69)

Staging Area 3, across from the High School's current athletic fields, will be used during the duration of construction "for tunnel support equipment, material storage, and contractor offices" and will also involve long-term construction activity and the use of heavy equipment. (AR107269; UF ¶ 132.)

Since Staging Areas 2 and 3 are not directly adjacent to each other, Metro also proposes to construct a "Materials Transport Corridor" directly adjacent to the school. (AR107125.) This corridor, which parallels the High School's fence line, will be used to move materials and heavy equipment between Staging Areas 2 and 3. (AR107054; AR107125; UF ¶ 133.)

Construction activity at the Project Staging Areas is scheduled to take place for "approximately" seven years. (AR107053; UF ¶ 134) Tunneling activity at the tunnel access shaft is to last for "approximately" two to three years. (AR107124.) The Agencies expect noise and dust effects to occur for seven years (AR107232) – adversely impacting thousands students, as well as community members using the High School's recreational facilities.

b. The Rejection of Feasible and Prudent Alternatives

As discussed below (*infra* at §§ II, III), because of their proximity to the High School, Staging Areas 2 and 3 will generate airborne toxins and construction noise that will pose significant harm to the High School. In contrast, Staging Area 1, which was the Agencies' original choice for construction staging, poses less harm due to its greater distance from the school. (AR075777.) Without analyzing the availability of the site through acquisition or a temporary construction easement, the FSEIS dismisses Staging Area 1 as "unavailable" due to planned future development, and it fails to consider it as a feasible and prudent alternative

or take a "hard look" at the environmental impacts of that alternative. (AR088084; UF ¶¶ 138-142.)

APPLICABLE STANDARDS

NEPA and Section 4(f) determinations are reviewed under the Administrative Procedure Act ("APA"). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). Under the APA, an agency decision shall be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it fails to follow the necessary procedural requirements. *See* 5 U.S.C. § 706(2). In determining whether an agency's decision is arbitrary and capricious, the Court must conduct a "thorough, probing, in-depth review" of whether the agency's decision was reasonable, based on a consideration of the relevant factors, and not a clear error of judgment. *Overton Park*, 401 U.S. at 415. Courts will reverse a decision if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Auto. Co.*, 463 U.S. 29, 43 (1983); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176-1177 (9th Cir. 2011).

ARGUMENT

I. THE AGENCIES' PREDETERMINATION

NEPA mandates procedural compliance "as a means of safeguarding against environmental harms." *Davis v. Mineta*, 302 F.3d 1104, 1114 (10th Cir. 2002). The required environmental analysis is NEPA's "action-forcing" device that requires agencies to take a "hard look" at environmental consequences of a project. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000). The proper time to complete NEPA and Section 4(f) obligations is *before* the agency commits to a project design, not after, so that the analysis "can serve practically as an important

contribution to the decision-making process and will not be used to rationalize or justify decisions already made." *Id.* at 1142; 40 C.F.R. § 1502.5.

The purpose of predetermination jurisprudence is to prevent a prior commitment from slanting an agency's environmental analysis. *Metcalf*, 214 F.3d at 1144-45. Thus, before completing the SEIS, the FTA was prohibited from taking any action that would "limit the choice of reasonable alternatives." 23 C.F.R. § 771.130(d),(f)(3); 40 C.F.R. § 1506.1(a)(2). Such prohibition extends to "commit[ting] resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f). As the federal lead agency, the FTA has the affirmative duty to prevent any action by Metro, its joint lead agency and project sponsor, that would "limit the choice of reasonable alternatives" before the SEIS is completed. 40 C.F.R. § 1506.1(b).

The relevant inquiry is whether the agency, prior to completing the requisite environmental analysis, has made a firm commitment that "swings the balance decidedly in favor" of one outcome. *Metcalf*, 214 F.3d at 1145. NEPA regulations recognize that certain activities, such as final design, property acquisition, and construction, bias the consideration of alternatives, and prohibit these activities before the environmental analysis is completed. 23 C.F.R. § 771.113(a). Courts have found predetermination where an agency has made binding contracts in favor of one outcome, *Metcalf*, 214 F.3d at 1145, concrete efforts furthering one outcome, *id.*, definite statements in favor of one outcome, *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004), substantial financial commitments to one outcome, *see WildWest Institute v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008), or otherwise limited or prejudiced the choice of alternatives.

Here, the Agencies made irreversible commitments in favor of the Project, preventing a proper analysis of its environmental impacts. They committed over a billion dollars through the execution of contracts. They also allocated, disbursed, and spent hundreds of millions of dollars towards the acquisition of property rights,

relocations, and final design work useful only for the Project Alignment and Staging Areas. Their consideration of these commitments and other improper factors – such as the cost of delays to the Project in the event an alternative is selected – pervaded and undermined the SEIS process.

A. The Agencies' Commitments

By entering into billion dollar contracts with concrete deadlines, the Agencies improperly predetermined the outcome of their environmental analysis. Months before the SEIS was completed, the FTA executed contracts obligating $1.663 billion for the Project, comprised of $1.187 billion in FFGA funds, $307 million in TIFIA loan funds, and $169 million in CMAQ funds. (SUP015340; UF ¶¶ 26, 49) Metro, in turn, awarded the $1.3765 billion Section 2 Design/Build Contract for Project's construction. (SUP001201; UF ¶ 27) While the Court did not prohibit the Agencies from the "initial and/or preparatory" step of executing these contracts, the Agencies' actions here far exceed initial preparation and reflect their commitment of hundreds of millions of dollars in furtherance of only one outcome.

The Ninth Circuit has repeatedly recognized that substantial financial investment on preparations useful for only one alternative constitutes predetermination because they limit the choice of reasonable alternatives. *WildWest Inst.*, 547 F.3d at 1169 (citing 40 C.F.R. § 1506.1(a)); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) ("[a]fter major investment of both time and money," it is likely that "more environmental harm will be tolerated" by an agency rather than undergo major expenses to make alterations to a project); *see also Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971).

Here, the size of the Agencies' disbursements and expenditures in favor of their preferred alignment and staging areas rendered the Agencies' analysis of alternatives an exercise of form over substance. Before the SEIS was completed, the FTA had disbursed $389 million in federal funds to Metro. *See supra* § G.

Metro had spent more than 15 percent of the $1.663 billion in federal funds obligated to the Project, and had firmly committed 84.5 percent of those funds. *Id.*

A large portion of the FTA's disbursements and Metro's expenditures were for the acquisition of property rights. In disbursing these funds and authorizing acquisition activities, the FTA violated NEPA regulations and its own policy prohibiting property acquisitions before an environmental analysis is complete. 23 C.F.R. § 771.113(a); (Recine Decl., Ex. 17). FTA guidelines explain that "[t]he reason for this prohibition is that ***the acquisition of property would prejudice the consideration of alternatives***." (Recine Decl., Ex. 17). Prohibited activities include "appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnation" – all of which the FTA authorized Metro to undertake here. *See* 23 C.F.R. §§ 771.113(a), 710.305. Yet, ignoring its own policy, the FTA disbursed more than $150 million for real estate acquisitions and relocations. *See supra* § G.

As a result, before the Agencies completed the FSEIS, Metro had committed more than $230 million to real estate acquisitions – more than half of its real estate budget. *Id.* Most of these expenditures and commitments were useful for only the Agencies' preferred alternative. In particular, the FTA authorized Metro to spend or otherwise commit large sums of money to acquire 1940 and 1950 Century Park East and relocate all 21 businesses located there. *See supra* § G. Due to the Agencies' refusal to include this information in the Record, the exact amount of Metro's commitments for the Staging Areas is unknown but is believed to be approximately $230 million.[2]

[2] The FTA represented at a November 5, 2018 hearing on the Record that the Court can discern the amount spent on the staging areas from the documents provided in the Supplementation Record because these are "the only properties that have thus far or prior to the [supplemental] ROD [been] purchased by Metro with

These financial commitments, and the additional costs required if the Project is changed, are so substantial that they foreclose reasonable alternatives and predetermine the outcome of the environmental analysis as a matter of law. For example, the selection of an alternative staging area, such as the vacant lot at Staging Area 1, would require additional expenditures to acquire property rights. The Agencies would have to write off up to ***$230 million*** already spent or contractually committed to acquire property rights and relocate tenants for Staging Areas 2 and 3. (SUP015336; UF ¶ 51.) Likewise, the admittedly prohibitive cost of $72 to $108 million delay under the Design/Build Contract – plus additional costs to redo final design, amend the FFGA, and other work – to change the Project Alignment prevent meaningful analysis of alternatives. *See Save the Yaak*, 840 F.2d at 718; *Mineta*, 302 F.3d at 1115 ("harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure").

B. <u>The Agencies' Commitments Infected Their Analysis</u>

The Agencies' financial, contractual, and resource commitments infected their supplemental environmental analysis. "This prejudgment diminishes the deference owed to the federal defendants in [this Court's] review of their decision" to select the Project Alignment and Staging Areas. *See Mineta*, 302 F.3d at 1112.

1. The Agencies Manipulated Their Alignment Analysis

The prohibitive costs of changing the alignment caused the Agencies to slant the Section 4(f) alternative analysis in favor the Project Alignment. In analyzing alternatives for "least overall harm," the Agencies improperly considered schedule delays and costs of realigning the Project, misrepresented the impact of the Camden and Linden Alignments on historic properties, and distorted factors to bolster the Project's performance.

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federal dollars," and the Court can discern the "combined cost" of the Staging Areas from the Record. (Recine Decl., Ex. 23 at 17:19-18:4.) The School District thus assumes that most, if not all, of the $131 million spent and $230 million committed to real estate were on Staging Areas 2 and 3.

a. The Agencies' Improper Consideration of Delay

The Agencies understood that, due to their improper commitments, if the Project Alignment was not adopted, construction of the Project would be delayed for 12 to 18 months, and Metro's costs would increase between $72 and $108 million. (*See* AR104468-69; UF ¶ 56-72.) The FSEIS and Appendix L demonstrate that the Agencies considered these schedule delays and costs in analyzing alternatives. The FSEIS characterizes this "delay" as "delay in project construction," "delay in the realization of Project benefits" and "delay in meeting purpose and need," explaining that "[i]f a different alternative was selected for implementation, then it would require additional analysis under CEQA and NEPA and additional engineering and design efforts." (AR107392; AR107413.)

An early draft of the FSEIS reflected that the Agencies believed the alternatives considered for least overall harm were "similar to the Project in meeting the purpose and need" (AR169516), and that "the differences in overall harm between the alternatives are minimal and do not indicate an alternative that would clearly have the least harm." (AR168998-99). Setting aside that a proper Section 4(f) analysis demonstrates that in fact the Camden and Linden Alignments pose the least overall harm (*see infra* § II.A), the Agencies improperly incorporated consideration of schedule delays as a pretext to manufacture differences among the alternatives and reject each alternative to the Project Alignment.

In later drafts, the Agencies deleted language stating that the differences between the harm caused by the alternatives were "small" or "minimal." (*Compare* AR168998-99 *with* AR169550-51.) Instead, subsequent drafts of the FSEIS stated that the FTA was "taking into account the adverse impact to the public that would result from the delay in Project benefits" to change the alignment. (AR169551, AR169516; AR169542-43; AR107392; AR107413) The Agencies penalized every alternative for a "delay in meeting [the Project's]

purpose and need" since each alternative would require the Agencies to conduct further environmental analysis and additional engineering and design work. (AR107390-92; AR107413) The Agencies also improperly added an additional $4.4 million to the cost of each alternative alignment for additional geotechnical investigations, SEIS, CEQA, and contract documents required for changing the alignment. (AR114811-20.)

The Agencies knew that they should not be considering schedule delays. In the DSEIS, the Agencies did not consider any "delay in meeting purpose and need" in the least overall harm analysis. (*Compare* AR088401 *with* AR168970; UF ¶ 60..) Early drafts of the FSEIS state – in response to public comments that Metro improperly rejected the Camden and Linden Alignments – that "the impacts to the design-build contract and ***potential schedule delays were not considerations in the decision-making process***." (AR169588; *see also* AR181485.) After making schedule delays the primary justification for rejecting alternatives, the FTA revised the draft FSEIS to state that it did not consider "***costs Metro would incur due to the schedule delays***." (*Compare* AR181485 with AR184743.) Although the FTA knew that Metro was influenced by the costs of delays, the FTA enabled Metro to rely on delays to the schedule by characterizing such consideration as "delay of public benefits from the Project" "due to additional environmental analysis and design needed" for any change to the Project Alignment. (AR184743.)

The Agencies' consideration of schedule delays as a factor in their decision-making is predetermination, and it violates the Court's instruction that they cannot rely on the inertia caused by their work towards the Project. The Agencies rely on the "delay to public benefit" as a pretext to reject alternative alignments. (*See* AR114827.) Yet, any delay in the construction timetable has been caused by the Agencies themselves through their failure to conduct a Section 4(f) alternative analysis in the original FEIS – a failure the Court found to be arbitrary and capricious. *Tentative Ruling*, 2016 WL 4650428, at *124. After being ordered to

undertake a proper evaluation by the Court, the Agencies have now improperly deferred a complete analysis of alternatives considered for least overall harm, contending that "[a]ll alternatives, aside from the Project, would delay meeting the Project's purpose and need" because they would require additional analysis under NEPA. (AR107081.) This rewards the Agencies' initial selection, which was reached improperly, and their continued singular focus on the Project Alignment. It is precisely this type of "[in]flexibility in selecting alternative[s]" due to "a major expense in making alterations in a completed [plan]" that predetermination jurisprudence seeks to prevent. *Lathan*, 455 F.2d at 1121; *Save the Yaak*, 840 F.2d at 718 ("After major investment of both time and money, it is likely that more environmental harm will be tolerated.") Moreover, courts accord little weight to an agency's reliance on harm due to costs of delays to a Project where, as here, the costs are self-inflicted because the agency has "jumped the gun" on the environmental issues. *Mineta*, 302 F.3d at 1116.

b. Improper Consideration of Tract 7710

In addition, the FSEIS puts a thumb on the scale in favor of the Project Alignment by misrepresenting that the Camden and Linden alignments had "greater impact" than the Project Alignment because each "would tunnel under a greater number of historic properties than the Project, including the Tract 7710 Residential Grouping." (AR107418-20; UF ¶¶ 73-79.) According to the FSEIS, Tract 7710 is an NRHP-eligible historic district consisting of "amply-sized, two-story homes that are typically rectangular or L-shaped (with courtyard) in plan," with "Spanish Colonial Revival styling" as "its unifying feature." (AR114837.) The FSEIS did not include an overlay of the Linden and Camden alignments on the historic district, although the Agencies created such a map. (*Compare* AR114838 *with* AR118508-09.) The map shows that the Linden and Camden Alignments run beneath only a single property – 301 South Linden Drive – within the historic district. (AR118508-09; *see also* Recine Decl., Ex. 19.) 301 South Linden Drive,

however, was demolished in 1998 and rebuilt in a modern design, and thus does not qualify as Section 4(f)-protected property either individually or as a contributor to the historic district. (AR114888; AR118508-09.) FTA policy 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)." Section 4(f) Policy Paper (2012) (AR059676).

The Agencies knew that the Linden and Camden Alignments did not impact any qualifying properties. First, the 2004 Beverly Hills Historic Resources Survey Report, on which the Agencies relied, listed 301 South Linden as "demolished." (AR114888.) Second, when drafting the FSEIS, the Agencies examined a map that clearly depicts that the Camden and Linden Alignments tunnel beneath only one residence in the historic district, and that property, 301 South Linden, bears an "x" for "demolished." (AR118508-09.) The Agencies excluded this map from the FSEIS and Appendix L. (*See* AR114838.) Finally, the Agencies' knowledge is demonstrated by their revisions to the draft FSEIS to avoid describing the precise impact of the Camden and Linden Alignments on properties within the historic district. An early draft of the FSEIS stated that the Camden and Linden alternatives would each "***require subsurface easements from multiple properties identified as contributing to a NRHP-eligible residential historic district***." (AR169538 (emphasis added).) Upon realizing that the Camden and Linden Alignments did not require subsurface easements from properties ***contributing*** to the historic district, the Agencies carefully rephrased the language to state that the Camden and Linden Alignments would "require subsurface easements from ***one or more properties within [the Tract 7710] grouping***." (AR198715.) The Agencies then counted the purported impact on Tract 7710 as "greater impact of worse performance than the Project," which had the effect of improperly skewing the analysis in favor the Project Alignment. (AR107419-20.)

c. Manipulation of Other Least Overall Harm Factors

The Agencies intentionally misrepresented other factors relevant to the Section 4(f) analysis so as to skew that analysis in favor of the Project Alignment. (UF ¶¶ 80-83.) They manipulated the manner in which travel time was presented to favor the Project Alignment. Recognizing that a 30-second increase in travel time between the Project Alignment and its alternatives was not "a substantial difference" (AR142307; AR142310), the FTA instructed Metro to "aggregate[] [the difference] over a number of travelers" to create "a more compelling argument" for the Project Alignment. (AR142307.) This enabled the Agencies to portray an insignificant seconds-long difference between the Camden, Linden, and Project Alignments as a difference of 30-person hours per day for Camden and 240-person hours per day for Linden. (AR107418-19.) The FTA also instructed Metro to present the "daily delay per capita . . . in addition to the delay in seconds" (AR142310), thus enabling the Agencies to reward the Project Alignment twice for purportedly better performance on a single factor (AR114827; AR199043).

The Agencies also manipulated the impact of the Camden and Linden Alignments on historic property by inflating the square footage of impact. The FSEIS acknowledges that only certain buildings – namely Buildings B and F – are "contributing resources to the [High School] historic property" and subject to Section 4(f) protection. (AR107324.) The Section 4(f) analysis thus purported to consider only Buildings B and F as Section 4(f) properties. (AR107324-25.) Both the Camden and Linden Alignments avoid Buildings B and F, while the Project Alignment tunnels beneath vulnerable Building B1. To manufacture greater impact for the Camden and Linden Alignments, the Agencies included the square footage of property that, by the Agencies' own definition, is not contributing Section 4(f) property. A map depicting the Agencies' calculation of square footage demonstrates that the Agencies included the square footage of tunneling under ***any*** part of the campus, even open fields and buildings slated for removal. (AR114826,

AR118641-43.) The Agencies double-counted the purported greater impact by including the length/area under the High School as a separate factor in the analysis, again rewarding the Project Alignment twice for purportedly better performance on a single factor. (AR114826; AR199042.)

Finally, the Agencies manipulated the manner in which differences between the Project Alignment and its alternatives are presented in the FSEIS. In the DSEIS and draft versions of the FSEIS, a table comparison of least overall harm alternatives included black text for "similar impact to the Project," red text for "greater impact or worse performance than the Project," and green text for "less impact or better performance than the Project." (AR088420; AR169745-46.) After adding the School District's Proposed Alternative Alignments, however, the Agencies removed the green text (AR184260-61), so that impacts that were previously presented in green text as "better performance" than the Project now were presented in black text as "impact similar to the Project" – thus misrepresenting the impacts of the School District's Proposed Alternative Alignments. (*Compare* AR170069-70 *with* AR107083-84.)

2. The Agencies' Expenditures on the Project Staging Areas

The Agencies' substantial financial commitments to acquire and relocate the Project Staging Areas prevented proper analysis of the vacant lot at Staging Area 1 as an alternative. (UF ¶¶ 84-95.) As discussed below, the Project Staging Areas, located 10 feet from the High School's recreational fields and temporary classrooms, will generate harmful emissions, particulates, noise, and vibration that will adversely affect the High School. (AR104824-27.) The Agencies were thus required under Section 4(f) to analyze feasible and prudent alternative staging areas, but they failed to do so. The FSEIS concludes, without analysis, that Staging Area 1 is "not [ ] available" because it will be under development in 2018. (AR107110.) Even if this were supported – and it is not – Metro has the authority to obtain a temporary construction easement at that site, just as it has used eminent

domain to acquire the land adjoining the High School, and the Agencies are required to analyze Staging Area 1 for feasibility and prudence. The Agencies' failure to do so demonstrates predetermination.

In reality, plans for the future development at 1950 Avenue of the Stars are far from definite, and construction is not imminent. In March 2018, Century City Realty ("CCR" or "JMB"), the developer of 1950 Avenue of the Stars, stated that JMB was still exploring its options for the site, and that although it was currently applying for permits for a proposed residential tower, it was retaining options to build an office building at the site because "markets can change." (Recine Decl., Ex. 20.) Moreover, JMB has applied for permits for only one of two proposed towers comprising ***25 percent of the 5.5 acre site***. (Recine Decl., Ex. 21; SUP000001-03.) To date, the City of Los Angeles Department of Building and Safety has not approved or issued building permits for the proposed tower, and the building remains under "plan check." (Recine Decl., Ex. 21.)

The Agencies have long been aware of the uncertainty surrounding Century City Center. A February 2017 draft of the DSEIS acknowledged that "the timing of construction for 1950 Avenue of the Stars is not available," and "construction overlap may not occur since the schedule and activities associated with construction of the Century City Center are currently unknown." (AR130859; AR130813.) Because the Agencies could not confirm that construction of Century City Center would proceed before construction of the Project, the draft determined that certain alignments that would require tunneling beneath the property were "not definitively infeasible." (AR130859.) The same would be true of Staging Area 1. Nevertheless, the Agencies did not attempt to confirm the construction schedule with CCR before issuing the DSEIS. As the Agencies have since admitted, their only written communication with CCR is a single letter from CCR to Metro dated July 31, 2018 – after the issuance of the DSEIS. (Recine Decl., Ex. 22.)

Lacking documentation to support their assertion that construction of

Century City Center would preclude the use of Staging Area 1, the Agencies committed funds to Staging Areas 2 and 3, foreclosing the selection of alternatives. As these commitments increased, progressive drafts of the DSEIS portrayed construction of Century City Center as increasingly imminent. To justify the rejection of Staging Area 1, as well as alternative alignments that would tunnel beneath 1950 Avenue of the Stars, an April 2017 draft of the DSEIS stated that the developer "has recently indicated that construction will begin before the scheduled construction of Century City Station," and "[o]nce the high-rise is under construction," alternative alignments tunneling beneath 1950 Avenue of the Stars "would not be feasible." (AR144404.) The final draft of the DSEIS included the same language. (AR088382-83.)

It was not until July 2017, after the Agencies issued the DSEIS, that the Agencies received documentation from CCR. (*See* AR106409.) Far from confirming imminent construction, the CCR letter noted that development of 1950 Avenue of the Stars had experienced delays since 2015. (*See id.*) Although CCR stated that it "expect[s] that the [p]roperty will be under development in 2018," CCR did not provide a construction schedule. (*Id.*) By this time, the Agencies were well into the expensive process of acquiring property rights for properties at the Staging Areas, had completed more than half the required relocations, and were engaged in relocating the remaining tenants. *See supra* § C. The Agencies persisted in claiming that Staging Area 1 was unavailable, even while removing references to the "unknown" construction schedule for Century City Center from the FSEIS. (*See* AR184570; AR184573.)

The Agencies were subsequently unable to confirm that construction for Century City Center was imminent. In October 2017, when Metro contacted the City of Los Angeles seeking "official documentation" that Century City Center "will start ground breaking," the City of Los Angeles instead informed Metro that the development was still under "plan check," and sent a link to a Department of

Buildings and Safety webpage that revealed that the site was only under a 25% partial plan check. (AR118517-18.) By this time, the Agencies had completed the remaining relocations at Staging Areas 2 and 3 and, having spent up to 50 percent of its real estate budget to acquire and relocate these properties, could not afford to select an alternative. *See supra* § G. Ultimately, the FSEIS relied on the vague assertions of the CCR letter, determining that the property would "not be available" as a staging area because it "will be under development in 2018, which is before the scheduled construction of the Century City Station[.]" (AR107110). Despite their knowledge that CCR had submitted permit applications for only 25% of the site, the Agencies did not seek further information from CCR or explain in the FSEIS whether the remaining 75 percent of the site (well over the 3 acres required) was available for construction staging.

II. THE FTA VIOLATED SECTION 4(F)

The FTA's decision to approve the Project Alignment and Project Staging Areas is arbitrary and capricious. Section 4(f) prohibits the FTA from approving a project using protected historic or recreational sites unless (1) there is no prudent and feasible alternative to using the Section 4(f) property; and (2) the project includes all possible planning to minimize harm to the Section 4(f) property. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008); 49 U.S.C. § 303(c). "This language is a plain and explicit bar to the use of federal funds for construction of [a project] through [Section 4(f) properties]—only the most unusual situations are exempted." *Citizens to Preserve Overton Park*, 401 U.S. at 411.

"[T]he requirements of section 4(f) are stringent." *Dole*, 740 F.2d at 1447. The FTA may approve the "use" of a Section 4(f) property only if "there [a]re truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes [reach] extraordinary magnitudes. *Overton Park*, 401 U.S. at 413. If Section 4(f) property must be used, the Agencies are required

"to utilize all possible planning to minimize harm" to recreational and historic sites, including by relocating the route through another portion of the Section 4(f) area as a means of minimizing harm. *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1116 (C.D. Cal. 1999).

A. The FTA's Rejection of the Camden and Linden Alignments

The Agencies improperly rejected the Camden and Linden Alignments, which minimize harm to the High School's Section 4(f) resources. (UF ¶¶ 116-128.) Having found that there were no prudent and feasible alternatives that avoided using property protected by Section 4(f) (*see* AR107387), the Agencies were required to use all possible planning to minimize harm and to "select[ ] the option which does the least harm." *City of S. Pasadena*, 56 F. Supp. 2d at 1116. Section 4(f) sets forth the factors to consider when conducting a "least overall harm" analysis: (i) the ability to mitigate adverse impacts to each Section 4(f) property; (ii) the relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection; (iii) the relative significance of each Section 4(f) property; (iv) the views of the official(s) with jurisdiction over each Section 4(f) property; (v) the degree to which each alternative meets the purpose and need for the project; (vi) after reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and (vii) substantial differences in costs among the alternatives. 23 C.F.R. § 774.3(c).

Due to their substantial commitments in favor of the Project Alignment, the Agencies failed to properly apply and evaluate the relevant factors. Under a proper analysis, the Camden and Linden Alignments cause less overall harm in light of the statute's preservation purposes, and one of them should have been selected.

First, the Camden and Linden Alignments each have less impact than the Project Alignment on historic properties than the Project Alignment. The Camden and Linden Alignments do not tunnel beneath historic buildings on the High

School's campus. In contrast, the Project Alignment tunnels beneath historic Building B1, the exterior of which is susceptible to cracking and could be damaged by tunnel construction. Also, contrary to the Agencies' claims, the Camden and Linden Alignments do not impact any Section 4(f)-protected properties in Tract 7710. *See supra* § I.B.1.b.

Second, the Camden and Linden Alignments would cause less harm to the High School's recreational resources, because they avoid tunneling under the planned gymnasium (Building C) – which will be a center for the community recreational activities. (AR107409.) Instead, these alignments travel under open recreational fields. (*Id.*) The FSEIS assumes that because the Project Alignment tunnels under less area of recreational resources than the Camden and Linden Alignments, the Project Alignment causes less harm. (AR107407-08.) Section 4(f), however, requires "a far more subtle calculation than merely totaling the number of acres." *D.C. Fed'n of Civic Associations v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971) (the location of impact "may be a more important determination, from the standpoint of harm . . . than determining the number of affected acres"). Building C is planned to have four underground levels of parking for the purpose of increasing community access to the school's recreational facilities. The Project Alignment would harm the recreational use of this property by precluding construction of the parking area. (AR104600-03.) Thus, the School District, as the official with jurisdiction over the recreational resources, prefers that the Project Alignment tunnel beneath the open fields rather than Building C. (*Id.*)

Third, the FSEIS concedes that the Agencies are required to consider the School District's view regarding the relative significance of historic and recreational resources on the High School's campus. (AR107408.) The School District identified both Building B1 and Building B2 as buildings of greater historic significance. (AR107408; AR104603-04.) Yet, without explanation, the FSEIS accords greater historic significance to Building B2 (under which the

Project does not tunnel), but it fails to do so for Building B1 (under which the Project does tunnel). (AR107408.)

While the FSEIS acknowledges that the School District expressed its preference that the Project tunnel beneath its recreational fields rather than Building C, it wrongly states that this preference was based only on its ability to proceed with the Master Plan. (AR107410.) In fact, as the School District explained in its comment letter, Building C will be a center for future community recreational activities, and it will have four underground levels of parking for the purpose of increasing community access to the High School's recreational facilities. (AR087509; AR104600-03.) These recreational facilities would be best protected by not tunneling under Building C.

Fourth, the Agencies themselves have conceded that the Camden and Linden Alignments would meet the Project's purpose and need. All three alignments would have similar ridership. (AR114827.) While the Camden and Linden Alignments would increase travel time by 2 seconds and 15 seconds, respectively (AR114827), the Agencies have admitted that a difference of even 30 seconds is not substantial (AR142307;AR142310). While the curve radius favors the Project Alignment slightly, the Agencies have conceded that the Camden and Linden Alignments are each feasible with an 825 feet radius. (AR114829-30.) Additionally, as discussed above, consideration of "delay" to construction is improper and contravenes the purposes of NEPA and Section 4(f) by favoring the Agencies' selection on the basis of their failure to conduct a proper Section 4(f) analysis in the first place. *See supra* § I.B.1.a.

Fifth, the Camden and Linden Alignments each have less adverse impact on resources not protected by Section 4(f). The Agencies considered the number of easements from residential properties, the number of easements from commercial properties, the location of the access shaft, and the distance to known oil wells. (AR114827.) While the Linden and Camden Alignments would tunnel under

fewer commercial properties than the Project (4 and 5 fewer respectively), the Project would tunnel under fewer residential properties than the Linden and Camden Alignments (20 and 27 more respectively). (*Id.*) These differences are not of the magnitude required to justify rejection of the Linden and Camden Alignments. *See Louisiana Envtl. Soc'y, Inc. v. Coleman*, 537 F.2d 79 (5th Cir. 1976) (displacement of 120 dwellings was not of magnitude required to reject an alternative that minimizes harm). Moreover, the costs of acquiring subsurface easements for Camden is less than for the Project Alignment. (AR114820.)

Contrary to the Agencies' assertion, there is no "adverse impact" arising from the location of the access shaft for the Camden and Linden Alignments. The Agencies state that the Camden and Linden Alignments encroach on the AT&T property at 2010 Century Park East, and thus would "requir[e] demolition of a portion of that building's parking garage." (AR107414.) But the demolition of the parking structure does not cause a greater impact, as the Project Alignment ***already*** requires a temporary construction easement from 2010 Century Park East, and the parking structure was ***already*** slated for demolition to build the materials transport corridor. (SUP015156-57; *see also* Recine Decl., Ex. 24.) Thus, the relocation of the access shaft closer to Staging Area 3 favors the Camden and Linden alignments, as it would shorten the materials transport corridor.

The Camden and Linden Alignments also pose less safety risks from abandoned oil wells. The FSEIS's determination that the Project Alignment is 230 feet from a mapped oil well is unsupported. (AR107414.) A Metro report states that "[t]he 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 south of the proposed southern tunnel on the DOGGR field maps." (AR107529 (emphasis added).) Chapter 4 of the FSEIS states that the Project Alignment is 35 feet away from the closest known well on the High School's campus. (AR107290.) The Camden Alignment is 60 feet from Rodeo 107, and the

closest known oil well to the Linden Alignment is Rodeo 114 at 60 feet. (AR107414.) Thus, the Camden and Linden Alignments are each farther from a known oil well than the Project Alignment. The fact that the Camden and Linden Alignments tunnel under open fields, as opposed to under buildings, reduces the safety risk in the event the tunnel boring machine encounters an unmapped oil well. As the FSEIS concedes, "[l]ocating and removal of abandoned oil wells is most efficient from the surface." (AR107414.)

Finally, the Camden Alignment would cost $20 million less than the Project Alignment. (AR114820; AR114827.) The Linden Alignment would cost $10 million more than the Project Alignment (AR114818), but given the other ways in which the Linden Alignment causes less harm – such costs do not justify its rejection. *See Louisiana Environmental Soc., Inc. v. Coleman*, 537 F.2d 79 (5th Cir. 1976) (agency unreasonably rejected routes that crossed through different portion of Section 4(f)-protected lake where rejection was based on factors that cannot be found to be of an extraordinary magnitude); *Dole*, 740 F.2d at 1542 (increased cost of $42 million is not extraordinary).

Thus, the Camden and Linden Alignments would generate the least overall harm. The FTA's arbitrary and capricious rejection of those alignments, and its approval of the Project Alignment, violated Section 4(f). *Mineta*, 302 F.3d at 1121-22 (holding that consideration of alternatives was so insufficient as to render it "essentially meaningless"); *Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*, 772 F.2d 700, 717 (11th Cir. 1985) (setting aside decision where agency "did not make the requisite findings necessary for an informed comparison of the relative harms anticipated by the construction of the various routes").

B. <u>The FTA Improperly Rejected Staging Area 1</u>

The Project Staging Areas and materials transport corridor abut the High School's athletic fields, and as the Agencies admit, the Project would involve a direct "use" of the school's recreational facilities under Section 4(f). (AR107347;

UF ¶¶ 129-137.) Moreover, the relocation of students to temporary classrooms currently placed on the future half soccer field across from Staging Area 2 was necessitated by the School District's campus modernization, which included required renovations (such as seismic retrofitting and asbestos removal) to Section 4(f)-protected historic buildings. (*See* AR104599-610.) The impacts from construction at the Project Staging Areas upon the temporary classrooms thus impact the School District's ability to renovate Section 4(f) properties while safely educating students usually housed in those historic buildings.

As discussed below, airborne toxins (*infra* § III.A) and noise (*infra* § III.B) generated by construction at Staging Areas 2 and 3 pose significant harm to the High School's Section 4(f) properties and temporary classrooms. Since the Project Staging Areas will "use" the High School's 4(f) resources, the Agencies are prohibited from selecting them unless there are no feasible and prudent alternatives and they pose the least possible harm of the available alternatives. Had the Agencies performed a proper analysis, they would have concluded that using Staging Area 1 – a vacant lot close to the station box – would inflict far less harm on the High School's Section 4(f) properties than Staging Areas 2 and 3.

In rejecting Staging Area 1, the FSEIS fails to discuss the relevant Section 4(f) factors. (UF ¶¶ 138-142.) It does not analyze whether Staging Area 1 is feasible and would meet the Project's purpose. In fact, Staging Area 1 would better suit the Project than Staging Areas 2 and 3, as the Agencies acknowledged in the 2012 FEIS by selecting it as the preferred staging area. They explained, construction staging areas are usually "located at station sites to facilitate access to the tunnel." (AR040669.) Now, the Agencies have chosen to locate construction staging significantly farther from the station entrance. (*See* AR107111.) Unlike Staging Areas 2 and 3, Staging Area 1 would not require construction of a materials transport corridor because it is over 3 acres – the size typically required to support tunneling operations. (AR107122.)

The FSEIS fails to address whether Staging Area 1 would mitigate the construction impacts on the High School's Section 4(f) resources. As the Agencies have previously explained, locating construction staging at Staging Area 1 would mean that surface-disturbing construction activities would be located 1,100 feet away from the High School's athletic fields and portable classrooms. (AR075777.) This greater distance would permit noise and airborne toxins to dissipate before reaching the school grounds. (AR104840-41; AR107267.)

The FSEIS does not analyze the cost of acquiring a temporary construction easement for Staging Area 1 – which may delay, but not prevent, its commercial development. Section 4(f) requires costs of extraordinary magnitude to justify rejection of feasible and prudent or less harmful alternatives. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984). The FSEIS fails to even acknowledge that Metro has the authority through eminent domain to acquire a temporary construction easement for the site. Staging Area 1, unlike Staging Areas 2 and 3, would not require costs to relocate tenants or demolish structures, as it is a vacant lot. Yet, without any assessment of the costs of acquiring a temporary easement, the FSEIS makes the conclusory determination that the property is unavailable. (AR107110.) This determination is unreasonable, arbitrary, and capricious. *See Ass'n Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101, 1112 (N.D. Tex. 1985) ("The discussion of alternatives in this EIS does not contain any information that enables a decision maker to draw a reasoned conclusion about the comparative environmental risks of the proposed alternatives.").

The Agencies' rejection of "Staging Area 4," which is located at the center of Constellation Boulevard near its intersection with Century Park West, for the location of the tunnel access shaft further reflects the insufficiency of their Section 4(f) and NEPA analyses. The Agencies prefer to place the tunnel access shaft in Staging Area 2 next to the High School, because placing it in Staging Area 4, which is closer to the station itself, would divert traffic. (AR107113-17.) In the

Agencies' calculus, threats to the health of the High School's students, faculty, staff and community using its Section 4(f) resources, as well as to the education of thousands of students, are less of a concern than re-routing of traffic. This failure to properly weigh the harm posed by construction activities demonstrates the Agencies' failure to adequately consider feasible and prudent alternatives and to take the mandated "hard look."

III. THE AGENCIES VIOLATED NEPA

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). It compels agencies to 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). NEPA does not set out substantive environmental standards, but instead establishes "action-forcing" procedures to ensure that agencies meet their obligations. *See Metcalf*, 214 F.3d at 1141. In this way, "NEPA simply guarantees a particular procedure, rather than a substantive result." *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010) (citations and quotations omitted). Because NEPA is primarily a procedural statute, where agency action violates its process requirements, it must be set aside. *See Save the Yaak Comm.*, 840 F.2d at 717.

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 violation of NEPA will diminish any deference owed to the agency. *Id*. at 1112. Thus, 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 quotations

omitted). The Administrative Procedure Act governs judicial review of agency decisions made pursuant to NEPA and under that review, an agency's action, findings and conclusions shall be held "unlawful and set aside" if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. Toxic Emissions and Particulates Pose Significant Health Risks

Violating NEPA's "hard-look" requirement, the Agencies have insufficiently analyzed and accounted for potential adverse health effects caused by toxic emissions and particulates emitted from the Project Staging Areas and the materials transport corridor. (*See* AR104604-05; AR104611-13; AR104823-55; UF ¶¶ 143-155.) As discussed above, these staging areas will adjoin the High School's campus. Construction activity will take place directly across from temporary classrooms housing 500-600 students at a time and which are used by all of the High School's students at some point during the school day. (AR104611.) 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. (AR104611; AR107348.) This construction activity will generate unacceptably high levels of toxic emissions and particulates, such as diesel particulate matter ("DPM") and nitrogen dioxide ("NO_2"), which will be released from trucks and equipment, and particulate matter ("$PM_{2.5}$" and "PM_{10}"), which will be generated by excavation, the stock piling and hauling of excavated material, and other construction activity. (AR104825-26.) Toxic emissions and particulates from construction will be blown directly downwind into the area of the High School's classrooms, administrative buildings, athletic fields, and grounds. (*See* 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. (AR104611; AR104825.)

In conducting their analysis of health risks posed by emissions and airborne particulates generated by construction activity, the Agencies used inappropriate exposure thresholds. Children, such as the High School's students, are more sensitive to toxins than the general adult population and considered "sensitive receptors." (AR104605; AR104829-30; *see also* AR107255.) The FSEIS relies on exposure thresholds that do not adequately protect sensitive groups such as high school children (or pregnant staff) from the health effects from toxic emissions of DPM, $PM_{2.5}$ and NOx emissions. 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. (AR104829-30.) To protect children, a 1-in-one-million threshold for cancer risk is more health-protective. (AR104829-30.) Yet, the Agencies failed to adequately consider and adopt this standard and instead they used a 10-in-one million threshold to assess the cancer risk for developing minors. (*See* AR107261.) The Agencies also 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. (*See* AR104384.)

The Agencies also failed to adequately consider the health impacts of short-term and long-term exposure to particulate matter. To protect children from long-term health impacts from fine particulate matter ($PM_{2.5}$), a threshold of 1.2 micrograms (one-millionth of a gram) per cubic meter of air ("$\mu g/m^3$") for 24-hour average impacts, or 0.3 $\mu g/m^3$ for annual average impacts, is appropriate. (AR104827; AR104830.) These thresholds are consistent with Environmental Protection Agency guidelines. (*Id.*) The FSEIS's analysis of short-term, 24-hour average $PM_{2.5}$ impacts, 10.4 $\mu g/m^3$ (AR107260 (Table 4-17)), is flawed, because it relies on an exposure threshold too high for sensitive receptors. Given the potential high levels of $PM_{2.5}$ emissions expected to impact the High School campus on a daily basis, the federal significance threshold of 1.2 $\mu g/m^3$ for a 24-hour average is appropriate and should have been used. (AR104830; AR104838.)

The Agencies also neglected to analyze or set a limits for long-term, annual $PM_{2.5}$ exposure. (*See* AR107260.) The FSEIS fails to analyze the long-term $PM_{2.5}$ health impacts at the High School campus by comparing annual average $PM_{2.5}$ concentrations over several years to the federal significance threshold, 0.3 $\mu g/m^3$. (*See* AR112770.) Indeed, the Agencies also admit that harmful exceedances of PM_{10} will occur during the course of the Project, threatening the health of students and others using the High School's facilities. (AR107259.)

The FSEIS also contains technical flaws and omissions that caused them to underestimate the impacts of airborne emissions. The Agencies' air quality modeling (AR107258-59) does not follow local and EPA guidance on developing a proper emission source representation for stationary and mobile off-road and on-road construction equipment. (*See* AR104830-33; AR104836; AR104838-40.) Their approach, involving the dilution of modeled emissions sources spread over a large area, causes the Agencies to underreport levels of toxins from concentrated diesel exhaust plumes released from equipment stacks near ground level and from smaller areas of construction activity. (*Id*.) As a result, the Agencies grossly underestimate the negative health impacts of construction. (*See* AR104831.)

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. (*See* AR104834-35; *see also*, *generally*, AR107249-64.) These could add cumulatively to the health impacts posed by toxic emissions from construction equipment.

These failures demonstrate that the Agencies improperly dismissed the threat of harm posed by the Project Staging Areas as not significant. When the FSEIS's analysis is corrected, prior to any mitigation, the negative health impacts are very high. Using the appropriate 1-in-one-million threshold, the cancer risk to students exceeds the threshold by 69 times, the cancer risk to unborn children in

their third trimester exceeds the threshold by 27 times, and the cancer risk to adults exceeds the threshold by 16 times. (*See* AR104835-36.)

The FSEIS also fails to propose mitigation measures sufficient to reduce the health impacts of construction at the Project Staging Areas to acceptable levels. For example, despite the Agencies' proposals to remove a diesel crane and bulldozing from Staging Area 3 and limiting hauling of excavated material by diesel trucks to evening hours, the cancer risk for students would still be unacceptably high. (*See* AR104835.) The Agencies' calculation of the risk at 3.6 in 1 million is greater than three times an appropriate level for children. (AR104829; AR107262) Additionally, while the Agencies' proposal to install "MERV-16" filters in the HVAC systems of the portable classrooms (AR107264) will provide some protection, these filters will do nothing to mitigate the cancer risk to people using the athletic fields, and the Agencies have not proposed to install filters in any of the High School's buildings beyond the portable classrooms.

At a minimum, to reduce health risks, all trucks and equipment used at the site should comply with EPA Tier 4 and use California Air Resources Board level 3 diesel particulate filters, and no trucks or construction equipment should be used during school hours. (AR104824; AR104840-43; UF ¶ 154.) Yet, the Agencies plan to require only certain pieces of construction equipment to meet the EPA's stringent Tier 4 emissions standards. (AR112769.) Indeed, with respect to trucks used for hauling and deliveries, the Agencies simply require them to be model year 2012 or newer. (AR107256.) Indeed, while the Agencies propose to limit the hauling of excavated material by diesel trucks to evening hours (AR107053), due their failure to take other appropriate mitigation measures, this will ***increase*** the cancer risk for students and members of the public using the High School's facilities, particularly its athletic fields, during the evening. (UF ¶ 154.)

Finally, 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." (*See* AR104840-41.)

B. Construction Noise Will Adversely Impact Education

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. (UF ¶¶ 156-168.) Ensuring appropriate noise levels and listening conditions at a school is essential to preserve the learning environment. (AR104617-18.) As the Agencies recognize, "[t]he construction of the Project involves activities which generate high noise and vibration levels." (AR112628.) They acknowledge that while "noise impacts would be reduced through implementation of [the Agencies' recommended] mitigation measures, . . . adverse construction noise impacts could remain after mitigation in areas of concentrated construction activity, including . . . construction laydown areas." (AR107267.) 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; UF ¶¶ 156, 165.)

Noise levels at the portable classrooms generated by construction will far exceed accepted levels for schools and adversely impact students' ability to learn. (*See* AR104617-18.) The American National Standards Institute ("ANSI") sets forth a noise threshold of 35 decibels ("dBA") for classrooms. (AR104617; Recine Decl., Ex. 25.) Yet, the Agencies expect that construction noise levels at the High School's portable classrooms will be 69 dBA. (AR107270.) Indeed, since construction began, noise levels at the portable classrooms were recorded at even higher levels, at more than 94 dBA. (Recine Decl., Ex. 29; UF ¶¶ 156, 165.)

The Agencies have no plan to continuously monitor harmful noise and vibrations at the temporary classrooms during school hours. They plan only to

conduct weekly short duration noise measurements. (AR112661-62.) Full-time, continuous monitoring during school hours is required, as harm to learning can arise anytime high noise or vibration levels are present. The Agencies also fail to propose ***any*** classroom-based noise mitigation measures to lessen the impact of construction noise upon the portable classrooms.

Additionally, noise and vibration levels predicted in the FSEIS for planned Building C will limit its recreational and educational uses. (AR104618.) The Agencies predict unmitigated noise and vibration impacts from trains traveling below Building C to exceed the FTA's own standard for schools, which is too low for an effective learning environment. (AR112694-95.) Yet, the Agencies have not committed to measures sufficient to mitigate the impacts of noise and vibration to levels appropriate for education. (*See* AR104617-18; UF ¶ 165.)

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 will 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.

C. Abandoned Oil Wells and Methane Pose Significant Risks

The Agencies also have failed to undertake the mandated "hard look" with respect to the possibility of abandoned oil wells on the High School's campus, the likelihood that they contain methane within their casings, and the likelihood of puncture as the result of construction activity. (*See* AR107073-74; AR107202-16; (UF ¶¶ 170-172.) As a result, the FSEIS understates the potential number of abandoned wells and the risks of harm from a punctured well, which include methane accumulation within a building, which can lead to explosion, or a sudden uncontrolled gas release, which can pose health risks. (*See* AR104615; AR105228-88; AR105289-357.)

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. The Agencies acknowledge that "[l]ocating and removal of abandoned oil wells is most efficient from the surface." (AR107414.) If the top of a well is obstructed by a building, removal becomes difficult. (AR105236.)

To date, 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." (AR105290-91.) Yet, FTA and Metro have only taken soil gas samples from a single borehole at tunnel depth on the campus and that borehole demonstrated that methane concentrations increased as depth increased. (*Id*.) The FSEIS also mischaracterizes the nature of the ground under the campus and the ability of methane to travel vertically through it. (AR105291-92.) The Agencies' analysis also fails to consider and address the manner in which tunneling will create new pathways for methane to travel. (AR105292-93.) As a result, they understate the risk posed by methane migration. (*Id*.) They also have not proposed an adequate methane mitigation system for the campus. (AR105293-94.)

D. The FSEIS's Incomplete Seismic Analyses

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. (UF ¶¶ 173-176.) Had the Agencies conducted a proper analysis, they would have determined that the Santa Monica alignment is feasible and prudent and would avoid harm to the High School. (*See* AR104610; AR105220-27.)

The FSEIS fails to take a hard look at fault investigations undertaken since the release of the FEIS, which have failed to find active faults along Santa Monica

Boulevard. (AR105221-22.) 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. (AR105221-27.)

The FSEIS also relies on flawed data and fails to evaluate geologic evidence consistently. 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. (AR105224-25.) Only the Santa Monica station was targeted. The Agencies have defined an active fault for Section 2 as one having ruptured in the last 35,000 years, even though they have previously used an 11,700 year benchmark. (*See* AR107183-84; AR105223.) They also interpret the same or similar geologic conditions at different locations differently. The Agencies interpret thickening of older alluvial deposits under the High School and at the proposed Santa Monica station as indicative of active faulting, but are silent as to the same characteristics under the Wilshire/Rodeo station. (AR105224.) They interpret a series of faults through the High School campus to explain vertical differences in equivalent sedimentary layers dipping gently to the east. But at the Constellation station, the Agencies conclude there is no evidence of faulting despite a similar tilt. (AR105223.) The Agencies' reliance on poor quality, low-resolution photos of a 1972 excavation near the Constellation station does not support that the excavations found no evidence of faulting. (AR107200-01; AR105225-27.)

CONCLUSION

For the foregoing reasons, the School District respectfully requests that the Court grant its motion for summary judgment.

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