UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-9861-GW(SSx)	Date	February 1, 2016
Title	*Beverly Hills Unified School District v. Federal Transit Administration, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None Present	None Present	

PROCEEDINGS: **(IN CHAMBERS): TENTATIVE RULINGS ON: (1) PLAINTIFF BEVERLY HILLS UNIFIED SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT [111]; (2) PLAINTIFF THE CITY OF BEVERLY HILLS MOTION FOR SUMMARY JUDGMENT [105]; AND (3) DEFENDANTS FEDERAL TRANSIT ADMINISTRATION, THERESE W. MCMILLAN, LESLIE T. ROGERS, AND ANTHONY FOXX'S CROSS-MOTION FOR SUMMARY JUDGMENT [115]**

Because of the length of the attached proposed Tentative Ruling (and concomitant complexity of the issues and size of the administrative record), the Court provides a copy of the Ruling two days in advance of the hearing date.

In addition to any arguments that the parties might direct to the recitation of facts and analysis of the issues in the Tentative Ruling, the Court would ask the parties to be prepared, at the hearing to address (by way of reference to specific page numbers in the Tentative Ruling) both of the following: 1) any instance in the factual background section of the Ruling where the Court has gotten a material fact WRONG, either with respect to the substance of that fact or the context in which it is presented in the background section; and 2) any instance in the Court's description of the parties' various arguments on the various claims where the Court has obviously misunderstood (or otherwise mischaracterized in the Tentative Ruling) any of those arguments. As to first item, this invitation does NOT serve as an opportunity to simply reargue the disputes laid out in the parties' synthesized joint statement, to present factual counterpoints, or to argue what should be inferred/concluded from various facts. As to the second item, this is not an opportunity to raise new arguments or to raise arguments that the Court has already determined in the Ruling (unless argument demonstrates otherwise) to be untimely.

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Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin., et al., Case No. CV-12-9861-GW (SSx) (consolidated with CV-13-1144-GW (SSx), CV-13-8609-GW (SSx), and CV-13-8621-GW (SSx)) – Tentative Rulings on: (1) Plaintiff Beverly Hills Unified School District's Motion for Summary Judgment; (2) Plaintiff The City of Beverly Hills Motion for Summary Judgment; and (3) Defendants Federal Transit Administration, Therese W. McMillan, Leslie T. Rogers, and Anthony Foxx's Cross-Motion for Summary Judgment

I. Background

Presently before the Court are three motions for summary judgment in these four consolidated cases initiated by the Beverly Hills Unified School District ("BHUSD") and The City of Beverly Hills ("the City") (collectively "Plaintiffs") against defendants Federal Transit Administration, Peter M. Rogoff (in his official capacity as Administrator of the FTA[1]), Leslie T. Rogers (in his official capacity as Regional Administrator, FTA Region IX), and Anthony Foxx (in his official capacity as Secretary, United States Department of Transportation) (collectively "FTA"). The operative complaints in the cases allege claims under the National Environmental Policy Act ("NEPA") − 42 U.S.C. § 4321 et seq., section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)") – formerly 49 U.S.C. § 1653(f), presently 49 U.S.C. § 303(c), and the National Historic Preservation Act ("NHPA") – 16 U.S.C. § 470 et seq. The City's operative complaint also alleges a Clean Air Act ("CAA") claim, 42 U.S.C. § 7401 et seq.

A. Preliminary Note

In setting forth the following factual background, the Court acknowledges and appreciates that "[i]n general, a court reviewing agency action under the APA must limit its review to the administrative record." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014). As such, the decision to have the parties prepare their "Joint, Synthesized Statement of Undisputed Facts and Genuine Disputes," Docket No. 123,[2] as would be customary in a typical summary judgment-setting, may seem out of place. Here, although the Court refers to that joint statement in setting out its

[1] Therese W. McMillan has substituted in an as defendant for Peter M. Rogoff, pursuant to Federal Rule of Civil Procedure 25(d). *See* Docket No. 130.

[2] All docket numbers cited herein are to the docket in case number 12-9861-GW (SSx), unless specifically noted otherwise.

discussion of the facts, it has used it as a *window into* the administrative record in the case rather than as the controlling document that it might otherwise be in this procedural setting. *See, e.g.*, *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1046 n.13 (9th Cir. 2011) (reflecting district court's use of "statement of genuine issues" document, but relying upon the "correct numbers" shown by the administrative record, even though court "would not [ordinarily] permit a party to dispute factual issues conceded in a statement of genuine issues," because "[i]t makes no sense…to affirm a NEPA violation and set aside a travel plan that serves the public interest on account of a misunderstanding about the administrative record"). The Court's factual recitation is the product of a (lengthy) attempt to identify those facts that the parties do not dispute while acknowledging disputes over particular issues (with the Court's Analysis section addressing disputes further). Even where, in the parties' joint statement, one or more of the parties has identified what they consider to be a "dispute" about a certain fact, upon a close review of that fact the Court has frequently been able to identify at least part of the fact (if not *all* of it) that is not, in truth, disputed, at least so far as addressed by the parties in that joint statement.

In addition, there are two types of evidentiary resources beyond the administrative record that the Court has considered here. First, the joint statement references, as evidence, a number of admissions in the parties' pleadings – for instance, admissions by the FTA in its Answers to the various complaints. Second, the joint statement references extra-record evidence put forward to establish the City's standing, as the FTA has challenged it in its summary judgment motion. The Court has concluded that it may properly examine both types of evidence. *See, e.g.*, *Seifert v. Winter*, 555 F.Supp.2d 3, 5 (D.D.C. 2008); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004).

Finally, the Court has also reviewed – for purposes of its understanding of the situation, not for purposes of the factual record – certain other litigation, as identified by the FTA in filings subsequent to the close of briefing on these motions. *See* Docket Nos. 131-32. On October 22, 2015, the California Court of Appeal issued a decision in state court proceedings involving the same subway project at issue here, but with only the Los Angeles County Metropolitan Transportation Authority ("Metro") as a defendant, and founded upon issues of state law. *See Beverly Hills Unified Sch. Dist. v. L.A. Cnty.*

Metro. Transp. Auth., 241 Cal.App.4th 627 (2015). The same plaintiffs involved here sued Metro, filing petitions for writ of mandate challenging Metro's approval of the project. *See id.* at 632. They asserted that Metro had failed to comply with the California Environmental Quality Act ("CEQA") – Cal. Pub. Resources Code § 21000 et seq., the state law equivalent of NEPA. *See id.* The City also alleged that Metro violated its statutory obligations under California Public Utilities Code § 30639 *et seq.* by failing to provide a full and fair hearing for the City on May 17, 2012. *See id.* The trial court denied both petitions. *See id.* The California Court of Appeal affirmed. *See id.* at 633, 675.

The California Court of Appeal decision contains a relatively-detailed discussion of the background and ultimate agency decisions giving rise to this case. *See id.* at 633-57. In addition, it evidences that many of the same arguments raised here were presented in the state court litigation (though under the umbrella of a CEQA argument), at the trial and appellate levels. In particular, the Court of Appeal's opinion discussed the argument that Metro was required to "recirculate" the Environmental Impact Statement/ Environmental Impact Report ("EIS" or, in state court, the "EIS/EIR") because the new information in the final EIS ("FEIS") "reversed the draft EIS/EIR's analysis regarding the Century City station location, resulting in the elimination of the 'base' station (the Santa Monica station), leaving only the 'optional' alternative (the Constellation station)…and thus constituted 'significant new information' requiring recirculation." *Id.* at 660-63. Included in this argument is the assertion that analysis of the West Beverly Hills Lineament ("WBHL") had changed between the Draft Environmental Impact Statement/ Environmental Impact Report ("DEIS") and the FEIS, and that assertions regarding the viability of any station at all on Santa Monica Boulevard had changed. *See id.* at 661. Plaintiffs also directed arguments at changes in analysis concerning air quality impacts, including the assertion that Metro had improperly assessed only regional thresholds. *See id.* at 666-68.

In between the submission of the final briefs on these cross-motions and this hearing, the FTA alerted the Court not only to that California Court of Appeal decision, but also to a decision from this District involving a recent similar challenge to a joint FTA/Metro project in another part of Los Angeles. *See Crenshaw Subway Coalition v.*

Los Angeles Cnty. Metro. Transp. Auth., Case Nos. CV 11-9603 FMO (JCx), CV 12-1672 FMO (JCx), 2015 WL 6150847 (C.D. Cal. Sept. 23, 2015). That decision has no factual overlap with this case. But it did similarly involve a challenge under NEPA which was, among other things, resolved (largely) by way of a summary judgment hearing. *See id.* at *6, 8, 38 & n.3. The plaintiffs in that case also raised arguments that the agencies had not adequately analyzed alternatives, that there was predetermination, and that NEPA required a supplemental EIS ("SEIS"). *See id.* at *15, 18-19, 35-36 & nn.14-15.[3]

B. Factual Background

1. Overview of the Project

Part of a long-planned rapid transit system for the City of Los Angeles[4] calls for development of the West Side Subway Extension ("the Project"), which would extend the current "Purple Line" subway nine miles from the existing terminus near the Wilshire/ Western traffic intersection to a new western terminus at the West Los Angeles Veterans Affairs Hospital. *See* BHUSD's Response to Federal Defendants' Statement of Genuine Disputes of Material Facts ("BHUSDR") ¶¶ 1.2, 2, Docket No. 117-1 at page 3 of 204. The Project as ultimately conceived includes seven new stations spaced at approximately 1-mile intervals. *See id.* ¶ 3. For approximately 2.5 miles, the Project will pass beneath the City. *See* The City of Beverly Hills's Response to Federal Defendants' Statement of Genuine Disputes of Material Facts in Response to the [City of Beverly Hills's] Statement of Uncontroverted Facts and Conclusions of Law ("CR") ¶ 2.1, Docket No. 116-1 at page 3 of 181.

There will be two stations in the City beneath Wilshire Boulevard near La Cienega Boulevard and near Rodeo Drive, each of which may take up to seven years to construct. *See id.* ¶¶ 2.2, 98.1-98.2, 100.1-100.2. Two additional stations would be

[3] Yet another recent decision involving challenges to a Los Angeles-area subway project is the May 2014 decision in *Today's IV, Inc. v. Federal Transit Administration*, Nos. LA CV-13-00378 JAK (PLAx), LA CV-13-00396 JAK (PLAx), LA CV-13-00453 JAK (PLAx), 2014 WL 3827489 (C.D. Cal. May 29, 2014).

[4] Metro (and its predecessor, the Southern California Rapid Transit District) have long sought a westside subway line, at least as early as 1968. *See* The City of Beverly Hills's Response to Federal Defendants' Statement of Genuine Disputes of Material Facts in Response to the [City of Beverly Hills's] Statement of Uncontroverted Facts and Conclusions of Law ("CR") ¶¶ 5.1-5.2, Docket No. 116-1 at pages 4-5 of 181.

constructed *near* the City, one at Fairfax and Wilshire Boulevards and one at Constellation Boulevard and Avenue of the Stars ("Constellation Station") – the latter of which is near the City's western edge, less than 800 feet from Beverly Hills High School (the "High School") – will also take up to seven years to construct, and will also result in impacts within the City. *See id.* ¶¶ 2.1, 97, 122-123. The Constellation Station will be located in Century City but would require tunneling under the High School and nearby residences, though originally[5] a recommendation was adopted to locate the Century City station along Santa Monica Boulevard in order to avoid tunneling under the High School. *See* BHUSDR ¶¶ 3-4; CR ¶ 24.

Without a significant acceleration of federal funding, the Project will be constructed in three phases. *See* CR ¶ 3. Phase 1 would include the Fairfax, La Brea and La Cienega Stations, the latter being the easternmost station within the City. *See id.* ¶¶ 3, 99. Phase 2 would include the other location within the City (*i.e.* the Rodeo Station) and the Constellation Station, which is not expected to commence construction until 2019. *See id.* ¶¶ 3, 101, 122. Phase 3 would include the two westernmost stations: Westwood/ UCLA and Westwood/VA Hospital. *See id.* ¶ 3.

2. Seismic and Other Ground Conditions; Early Roadblocks

Beyond being a well-understood "seismically active region" – with earthquakes posing the risk of the ground rupturing, liquefaction, and/or causing areas of ground to settle differently, and cause general subsidence – some of the areas encompassed in the Project's study area include tar sand and subsurface gas and oil fields. *See* Federal Defendant's Response to Plaintiffs' Joint Statement of Genuine Disputes of Material Facts ("FDR"), Docket No. 122-4 ¶¶ 36-38. Virtually the entire route, or "alignment," of the Project will traverse officially-designated "methane zones," with significant stretches through a high potential risk zone. *See* CR ¶ 162.1. For instance, the High School campus, a significant focus of this case, is built in an area with a history of oil and gas production operations as well as ongoing operations; and there is a risk that methane pockets have formed or could form as a result (though such pockets are hard to detect

[5] Discussions about whether to route a subway under the High School go as far back as 1968, when the Southern California Rapid Transit District initially planned to do so as part of a planned route similar to the instant Project, before BHUSD changed its mind to a plan that would route the alignment on Santa Monica Boulevard. *See* FDR ¶¶ 1-3, 6; CR ¶¶ 5.1-5.2.

without a comprehensive sampling program). *See id.* ¶ 164. In addition, as discussed further below, Metro and the FTA (collectively "the Agencies") have taken the position that a fault zone lies directly beneath the High School. *See id.* ¶ 171.2.

"Methane is a flammable, colorless, odorless gas that is an explosion hazard when mixed with air at concentrations exceeding 5 percent and less than 15 percent," but it is not highly toxic as long as a person is also breathing enough oxygen. *See* FDR ¶¶ 25-27, 53. The methane concentration in the City from the Rodeo Station to the Constellation Station (the segment that runs beneath the High School) is within the explosive range. *See* CR ¶ 162.2. Though the Agencies analyzed the methane in the study area, between the Rodeo and Constellation Stations the distribution of soils containing methane and hydrogen sulfide – a highly toxic gas that shares methane's explosive properties[6] – is not well understood. *See id.* ¶ 163; FDR ¶¶ 52-53.

Tunneling and other construction activities can disturb gas pockets, thereby releasing gas to the surface, where it can collect below building foundations and pavement in potentially dangerous concentrations. *See* CR ¶ 167.2. For instance, on March 24, 1985, methane exploded and caused a fire at a Ross Dress for Less ("Ross") store at Third and Ogden Streets in the Fairfax District, injuring 22 people. *See* FDR ¶¶ 23-24; CR ¶ 165.1. The Ross explosion highlights the geologic hazards underlying the Project's study area. *See* FDR ¶ 35. The Agencies acknowledged the risk of explosion throughout their whole analysis. *See id.* ¶ 399.

Immediately after the event, the Los Angeles City Council created a task force to investigate the explosion and fire, to determine its cause, and to identify measures for avoiding similar "incidents in the future." *Id.* ¶ 28. The task force – which issued its report in June 1985 – found that the explosion resulted from methane seepage from below-surface gas pockets originating either from decomposing organic matter or an abandoned oil well whose casing had developed leaks. *See* CR ¶¶ 165.1-165.2; FDR ¶¶ 30-31. The report noted that, particularly in areas with abandoned oil wells or seismic faults, pockets of methane and hydrogen sulfide can move unpredictably through soils as a result of changes in pressure, and that methane likely found the path of least resistance

[6] Hydrogen sulfide gas can cause "irritation, chronic or irreversible tissue damage, or narcosis." FDR ¶ 52.

through small cracks in the floor slab and foundation walls of the Ross store. *See* CR ¶¶ 166.1-166.2; FDR ¶ 30.

In fact, Metro's predecessor itself recognized as far back as 1984 that "[c]onstruction activities…may change the pressure and concentration of gases at any specific location." CR ¶ 166.4. A later study indicated that prime conduits for "gas pathways to the surface" can include seismic faults and an old abandoned vertical well. *See* CR ¶ 166.3; FDR ¶ 30.

After the explosion, Congressman Henry Waxman successfully sponsored legislation to prohibit the United States from contributing funding for subway tunnels through the hazard zones that the task force had identified. *See* FDR ¶¶ 33, 39; CR ¶ 167.3. The ban on federal funding effectively prohibited tunneling along Wilshire Boulevard for twenty years by making it too costly. *See* FDR ¶ 41.

After Congressman Waxman and then-Los Angeles Mayor Antonio Villaraigosa worked "to select a panel of scientific experts to conduct an independent safety review," in November 2005 the American Public Transportation Association issued a Peer Review Panel Report on the Wilshire Corridor Tunneling Project. *See id.* ¶¶ 43-44. The panel intended to complete "an independent evaluation and then report on gas related safety issues associated with the proposed extension of the Metro Red Line subway along Wilshire Boulevard," and to determine if Metro could construct and operate tunnels and stations there "in a safe manner with the application of available construction and gas mitigation technologies." *Id.* ¶ 45.

The panel found that, since 1985, "[t]unnel boring machine technologies have advanced and demonstrated a good safety record," that the tunneling industry has "[g]ained extensive construction and operational experience in tunneling," that "gas measurement instrumentation has improved," and that there had not been any methane problems in deep basement construction along Wilshire Boulevard post-1985. *See id.* ¶¶ 46, 48. Until that time, tunneling engineers typically used open-face tunnel boring machines ("TBMs"). *See id.* ¶ 49. With those machines, nothing protected the workers from methane or hydrogen sulfide gas entering the tunnel. *See id.* ¶ 51.

During the late 1970s, engineers developed two varieties of TBMs "using a closed-face tunnel shield" to "handle specific soft ground/soft rock conditions." *Id.* ¶ 54.

The Agencies plan to use pressurized-face TBMs to construct the subway tunnels here, and may use both open-face and closed-face TBMs. *See id.* ¶ 55; CR ¶ 181. The machines will work so as to maintain slurry and excavated soil under seal and route it to the surface to separate the gas from the workers, before a treatment plant at the surface removes the soil and recirculates the slurry. *See* FDR ¶¶ 58-59.

Aside from the advances in tunneling technology, other developments since 1985 led the peer review panel to conclude that Metro could tunnel safely along Wilshire. *See id.* ¶¶ 62-63. The FTA has begun requiring a "rigorous safety certification review," and Metro has improved its own safety record and workplace safety. *See id.* ¶ 62.1. Moreover, the peer review panel recognized that the tunneling industry has accumulated more *experience* constructing tunnels in difficult conditions and to higher standards, stating that "over twenty years of other tunneling experience in southern California has added extensive knowledge about the regional geology and methods to mitigate safety concerns." *See id.* ¶¶ 62.2-62.3.

The panel unanimously agreed that it would be possible to construct the subway safely and that, if Metro followed "proper procedures" and used "appropriate technologies," then "the risk would be no greater than other subway systems in the United States" (though Plaintiffs point out there is no indication that the panel looked at the risk of methane gas seeping to the surface as a result of tunnel construction). *See id.* ¶ 47. With the 2005 peer review report in hand, Congressman Waxman and Senators Boxer and Feinstein supported repealing the ban on federal funding, and Congress repealed the ban on December 26, 2007. *See id.* ¶¶ 64-65; CR ¶ 170.

Though the Agencies have concluded (in an October 2011 tunneling report and, ultimately, in the FEIS) that they can tunnel safely through gassy ground, they recognized in the FEIS that "[d]uring construction, subsurface gases can be encountered in areas where tunneling and excavation will occur that may include the release of methane and hydrogen sulfide gas," and Metro acknowledged in the report that tunneling in the area presents "major challenges because of seismic conditions and the presence of naturally occurring subsurface gases." CR ¶¶ 166.5, 168.1. But Metro also concluded in the report that "it has been demonstrated many times that tunnels can safely be constructed and operated in soils containing subsurface gas," and the FTA agreed with the conclusion in

that same report that tunneling could occur safely through gassy ground. FDR ¶¶ 226, 394. In a report issued in November 2011, Metro indicated that "the tunneling industry in Los Angeles has much experience successfully driving miles of tunnels in gassy ground," including in Los Angeles. *Id.* ¶¶ 221, 397. Specifically, Metro completed the Metro Red Line and Gold Line Eastside Extension in gassy ground (although the concentrations and pressures were lower there). *See id.* ¶ 222. Still, it learned that using Earth Pressure Balance Tunnel Boring Machines ("EPBMs") "demonstrated even better success" in the Gold Line's gassy ground than the open-face machine used for the Red Line, and it expects success using EPBMs. *See id.* ¶¶ 223, 397. While Metro has had problems during construction of subway tunnels before, there is no evidence that they were methane-related. *See* CR ¶¶ 169.1-169.2.

As another aspect of the Los Angeles geology, the FTA and Metro have acknowledged the risks of encountering known and unknown abandoned oil wells during tunneling. *See* FDR ¶ 228. The Project map reveals that the selected route traverses a number of oil fields, riddled with known wells. *See* CR ¶ 182.1. People have commercially explored the oil fields since the late 1800s. *See* FDR ¶ 229. "A great number of these wells are now idle or have been abandoned." *Id.* ¶ 230. While some oil wells are accurately listed on state records, many older wells were not accurately mapped or capped following the end of their useful life. *See* CR ¶ 182.2.

Abandoned oil wells can "contain residual accumulations of pressurized and potentially explosive gases, which could pose a threat to worker safety when encountered within the proposed tunnel envelope if they were released into the tunnels." FDR ¶ 232. Steel casings can also endanger TBMs, whereas TBMs can handle wood casings (though wood is insufficient, and steel is necessary, for drilling thousands of feet for oil) or concrete plugs, because hazardous gases cannot accumulate there and because the TBMs can tunnel through them. *See id.* ¶¶ 232-34, 409. As a result, "[i]f a casing from an abandoned oil well is confirmed to be on the tunnel alignment, the exact location must be confirmed, the upper casing well must be removed, and the well must be properly reabandoned." *Id.* ¶¶ 235, 410.[7] However, the FTA admits that it does not know whether

[7] California law prescribes the methods for abandoning oil wells. *See* FDR ¶ 238.

it will encounter any active or abandoned oil and gas wells or associated equipment when it constructs a subway tunnel underneath the High School campus. *See* CR ¶ 183.

3. Early Analysis of the Project

Before settling on the Project, the Agencies considered a wide range of modes and routes to expand public transit on Wilshire Boulevard. *See* FDR ¶ 66. In 2007, Metro began[8] its evaluation of the Project after the Metro Board authorized the start of an "Alternatives Analysis Study" of several transportation options and more than seventeen subway routes/alignments. *See* BHUSDR ¶ 44; CR ¶¶ 10, 16.1; FDR ¶¶ 77, 80, 303.[9] The transportation options/modes included a no-action alternative, a low-cost transportation system management alternative using more rapid buses and local buses, heavy rail transit, light rail transit, bus rapid transit, and monorail. *See* FDR ¶¶ 80, 303.

The study noted that roadway capacity is insufficient to handle the traffic volumes and that roadway congestion also obstructs the public transit network, including buses which travel in mixed-flow lanes. *See id.* ¶¶ 71-73. "Bus speeds are slow and getting slower" as congestion increases. *See id.* ¶ 75. Bus ridership both exceeds most light rail lines and makes it the most-used bus corridor in Southern California. *See id.* ¶ 74. High congestion and high transit ridership results in "declining bus operating speeds and reliability," making public transit less worthwhile compared to private automobiles. *See id.* ¶ 76.

The Metro Board approved the finalized Alternatives Analysis Study in January 2009, and the Agencies allowed comments on the Alternatives Analysis for 41 days in 2009. *See* CR ¶ 11; FDR ¶ 339.[10] When the Metro Board approved the study, all of the

[8] Metro began with a month of early scoping in October 2007, identifying purposes and benefits of the possibilities studied. *See* FDR ¶¶ 78-79, 338.

[9] The Agencies designed the study area for the Project to include twelve "large population and employment centers," including Hollywood, the Sunset Strip, the Miracle Mile, Westwood/UCLA, West Los Angeles, and downtown Santa Monica. FDR ¶¶ 67-68. These areas generate travel demands, and the north-south and east-west freeways and streets that serve those mobility needs "carry some of the highest traffic volumes in California and throughout the country." *Id.* ¶ 69.

[10] In the end, beyond the formal documents that issued and the formal public comment periods allowed in the course of approving the Project, the Agencies contacted over 6,000 individuals, businesses, and organizations as stakeholders. *See* FDR ¶ 343. They used mailings, brochures, email notices, a website, and social media like Facebook and Twitter for outreach. *See id.* ¶ 344. They invited agencies, tribes, and other historical or cultural organizations to participate. *See id.* ¶ 345. They held dozens of community meetings and briefed businesses and elected officials. *See id.* ¶ 346. In addition to consulting with experts

rail-build alternatives that Metro considered included a subway station in Century City, with two potential locations: a station at Santa Monica Boulevard and Avenue of the Stars (the "Santa Monica Station") or a location one block to the south, Constellation Station. *See* CR ¶ 17. After consulting with the public, the Agencies winnowed down the build alternatives to five heavy rail lines on which to focus in the DEIS because only heavy rail could meet the ridership demand the Agencies anticipated, accommodating almost twice as many passengers per hour per direction as light rail, more than twice as many as a monorail, and seven times as many as bus rapid transit. *See* FDR ¶¶ 81-83, 304. The Agencies then narrowed these alternatives to extending the Purple Line or to building a line from the existing Hollywood/Highland Boulevard Red-Line station. *See id.* ¶ 84.

Most alignments included a Century City station at Santa Monica Boulevard. *See* CR ¶ 16.2. This included Alternative 2 listed in the DEIS and FEIS, an 8.9 mile extension consisting of seven base stations and six station options that travels westerly along Wilshire Boulevard from the existing Wilshire/Western station to a Wilshire/Rodeo station, and then southwesterly toward a Century City station, a Westwood UCLA station, and ultimately terminating at a Westwood/VA Hospital station. *See* BHUSDR ¶ 45.1; FDR ¶ 321.

Alternative 2 itself had several optional alignments. *See* FDR ¶ 322.[11] Two station options (with corresponding alignments) were identified in Century City: 1) a route along Santa Monica Boulevard to Santa Monica Station and 2) a route under the High School to Constellation Station. *See* BHUSDR ¶ 45.2. In addition to the route to Constellation Station under the High School, during the Alternatives Analysis process, the Agencies also explored the possibilities of more southerly routes to the Constellation

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and seeking and obtaining public comments, the Agencies also consulted with various local, state, and federal agencies that include the California Department of Transportation, the United States Army Corps of Engineers, the California State Historic Preservation Office, the City of Los Angeles, and the Beverly Hills Historical Society. *See id.* ¶ 349.

[11] For instance, Alternative 2E is "an alignment variation on Alternative 2" to Constellation Station. FDR ¶ 323. Alternative 2E includes seven stations: Wilshire/La Brea, Wilshire/Fairfax, Wilshire/La Cienega, Wilshire/Rodeo, Century City (Constellation), UCLA/Westwood and the Veterans Affairs Hospital. *See* BHUSDR ¶ 53.

Station from a Wilshire/Beverly station. *See* FDR ¶ 88.

During the Alternatives Analysis process, some attendees also suggested alternate Century City locations. *See id.* ¶ 85. One proposal suggested locating a station on Santa Monica Boulevard at Century Park East ("Century Park East Station"), 1/3 of a mile east of Santa Monica Station. *See id.* ¶ 86. The Agencies rejected that location, explaining in the DEIS (and similarly, then again later in the FEIS) that the decision was "because of better urban design characteristics at other station options, lower ridership, and its farther distance from the core of Century City." *See id.* ¶¶ 87, 421; BHUSDR ¶ 190.2.

4. The Project's Effects on the City

The construction associated with the Project will, unquestionably, have its effects in and around the City. In addition to impacts on the High School (the primary public high school located in the City) as addressed below, the Wilshire Boulevard corridor (under which much of the tunneling will take place) is a primarily commercial street containing office, retail, hotel, community, and some multi-family residential uses, and is a principal east-west road through the heart of the City. *See* CR ¶¶ 107.2, 172.1-172.2. Also, areas immediately adjacent to Wilshire Boulevard contain single and multi-family residences. *See id.* ¶ 172.2.

a. Impacts on Roads and Emergency Services

The construction of the Fairfax, La Cienega and Rodeo stations will require excavation of soils using the "cut and cover" method, requiring that giant holes be dug in the ground with the use of shoring. *See id.* ¶ 102. The cut and cover construction will involve the closure of multiple lanes of traffic, including along the City's heavily traveled Wilshire Boulevard, for a lengthy period of time. *See id.* ¶ 107.1. Thus, the construction of the Fairfax, La Cienega, and Rodeo Stations will require the establishment of multiple "traffic control zones" in the City. *See id.* ¶ 109.[12]

Specifically, the construction of the La Cienega Station will require closing some lanes of Wilshire Boulevard to through traffic, requiring that through traffic be routed on

[12] Specific areas that will be affected, respectively, include: (i) Wilshire Boulevard (between Highland Avenue and La Cienega Boulevard) and Fairfax Avenue (between Beverly Boulevard and Pico Boulevard); (ii) Wilshire Boulevard (between Fairfax Avenue and Beverly Drive) and La Cienega Boulevard (between Beverly Boulevard and Pico Boulevard); and (iii) Wilshire Boulevard (between La Cienega Boulevard and Beverly Glen Boulevard), Beverly Drive (between Sunset Boulevard and Pico Boulevard), Rodeo Drive (between Sunset Boulevard and Wilshire Boulevard) and Canon Drive (between Sunset Boulevard and Pico Boulevard). *See* CR ¶ 109.

a detour preliminarily identified as involving Fairfax Avenue, Olympic Boulevard, and North La Cienega Boulevard in the City. *See id.* ¶ 108.1. Similarly, the construction of the Rodeo Station will require closing some lanes of Wilshire Boulevard to through traffic, requiring that through traffic be routed on a detour preliminarily identified as involving Santa Monica Boulevard, Burton Way, N. Robertson Boulevard, Olympic Boulevard, and Century Park East in the City and Los Angeles. *See id.* ¶ 108.2. Many of the intersections in the City that would suffer increased traffic as a result of construction-related detours and construction traffic have poor levels of service today, before construction even begins. *See id.* ¶ 116.

Beyond the impact from the Project's construction on normal everyday traffic, there will of course be significant construction-related traffic. For instance, the total number of excavation trips required for one station – assuming the use of 15 cubic yard haul trucks generally, and 10 cubic yard haul trucks at restricted locations – will be approximately 12,000 to 25,000, meaning that, for a typical station configuration (such as at Rodeo Station), approximately 60 to 100 truck trips per day will occur during peak construction activities. *See id.* ¶¶ 103, 218. These will be operating during off-peak and nighttime hours, amounting to about 10 to 16 truck trips per hour. *See id.* For La Cienega and Fairfax, there would be between 40 and 80 haul trips per day. *See id.* ¶ 104. In addition to the haul trucks, during construction at these three stations there will be approximately 10 to 20 concrete trucks per day per station. *See id.* ¶ 105. The tens of thousands of construction trucks necessary to build the Fairfax, La Cienega, and Rodeo Stations are expected to travel along Wilshire Boulevard, La Cienega Boulevard, Santa Monica Boulevard, and Robertson Boulevard in the City. *See id.* ¶ 115.

The City is responsible for the provision of emergency services in the form of fire protection, police response, and emergency medical transportation, and its emergency services are provided by the Beverly Hills Fire Department and Beverly Hills Police Department. *See id.* ¶ 137. Road closures and increased road congestion from construction activities can impair the timely response of the emergency services provided by the City's Fire and Police Departments. *See id.* ¶ 137.2. The two City fire stations principally serving the area of the City south of Santa Monica Boulevard are located at 445 N. Rexford Drive and 180 S. Doheny Drive. *See id.* They are each located less than

six-tenths of a mile from the future Wilshire/Rodeo station. *See id.*

The City's emergency personnel must be prepared to respond to hazardous or toxic releases, fires and explosions, as the FEIS acknowledges that "[l]ocal fire departments are the primary responders in the event of a fire." [13] *Id.* ¶¶ 138.1-138.3. But, emergency vehicle access by the City's emergency services (police, fire, rescue, and ambulance) in and around the individual construction work sites may be affected by lane and temporary street closures, though "[a]lternate access points and detour routes will be identified to maintain emergency vehicle access." *See id.* ¶ 117. In addition, lane closures and inconsistent traffic patterns may increase the possibility of accidents and incidents requiring emergency services provided by the City. *See id.* ¶ 137.2.

The development and implementation of a "comprehensive emergency preparedness plan" (including "emergency responders training") and the development of "[e]mergency response or contingency plans" to address "the unlikely event of a major hazardous materials release close to or within the vicinity of construction" – both of which the FTA and Metro have decided to develop – will require extensive coordination with the City's Fire Department, the primary responder in the event of a construction accident or other calamity. *See id.* ¶¶ 138.6-138.8, 168.2-168.3. Temporary street and lane closures, detours, changes in signal timing, temporary signage, and changes in parking regulations within the traffic control zone would also require coordination with the City. *See id.* ¶¶ 110, 140.1. Metro also expects to prepare a construction period parking mitigation plan in coordination with the City, and to have the City review and approve its design work for temporary sidewalks in the vicinity of the construction work. *See id.* ¶¶ 112, 114. Routing of construction trucks will also be coordinated with the City. *See id.* ¶ 111.

Beyond the necessary coordination, there is the possibility that street cleaning services and road maintenance will be impacted. The City's Department of Public Works Services provides street cleaning services throughout the City and the increase in dust from the construction activities may require additional street cleaning. *See id.* ¶ 142. The

[13] As noted elsewhere herein, the FEIS acknowledges that tunneling in the area presents "major tunneling challenges because of seismic conditions and the presence of naturally occurring subsurface gases" and that the concentrations of methane in the area of the City between Rodeo Station and Constellation Station (the segment that runs beneath the High School) is within the explosive range. *See* CR ¶¶ 138.2, 138.4-138.5, 161, 162.2.

City is also responsible for maintaining roads that will be traversed by the tens of thousands of haul trucks and the concrete trucks. *See id.* ¶ 143. Traffic from heavy vehicles such as those used for hauling to and from construction sites reduces the lifespan of the roads and increases the City's maintenance costs by requiring otherwise unnecessary or more frequent maintenance and repairs. *See id.*

b. Air/Noise Impacts

EPBMs and their counterpart, Slurry Shield Tunnel Boring Machines ("STBMs"), require roughly three-acre staging areas for setting them up, for inserting them, and for removing them. *See* FDR ¶ 252. The construction will also need work areas to process and to remove the excavated material, to handle the tunnel lining segments, and for tunnel utilities like ventilation, water, wastewater removal, and power. *See id.* ¶ 253. Thus, construction of the La Cienega and Rodeo Stations will require the use of construction "lay-down" areas in the City. *See* CR ¶ 106.1. The two proposed "lay-down" areas for the La Cienega Station would be at the northeast corner of the intersection of Wilshire Boulevard and N. La Cienega Boulevard and the northwest corner of the intersection of Wilshire Boulevard and Gale Drive. *See id.* The two proposed "lay-down" areas for the Rodeo Station would be north of the intersection of Wilshire Boulevard and Canon Drive and the southwest corner of the intersection of Wilshire Boulevard and Reeves Drive (at the site of the Ace Gallery building). *See id.* ¶ 106.2.

The construction activities required to build La Cienega and Rodeo Stations will result in adverse air quality and noise impacts – in some circumstances, substantial, and in others, not substantial – to local residences, a holocaust memorial, a library, an elder health care facility, and a day care center. *See id.* ¶¶ 118, 121.1. In this regard, it will also impact Reeves Park, a park owned and operated by the City that is located on the west side of S. Reeves Drive, immediately adjacent to the Ace Gallery Building – Ace Gallery lies between the park and Wilshire Boulevard – that is to be demolished and used as a lay-down site for Metro's construction work on Rodeo Station and its entrances. *See id.* ¶¶ 120.1-121.1, 145, 218; FDR ¶¶ 254, 468. The construction activities will also initially have adverse effects on businesses within 500 feet of the construction work, though mitigation measures will offset them. *See* CR ¶ 119. The City is concerned that

the air pollution in the City may adversely affect the City's employees, residents and schoolchildren and their ability to do their jobs and lead healthy lives. *See id.* ¶ 141.2.

c. Financial Impact

The City derives the revenue necessary to provide its services from property tax, sales tax and transient occupancy tax collections, with property taxes accounting for approximately 24% of revenue, sales and use taxes accounting for approximately 14% of revenue and transient occupancy tax accounting for approximately 17% of revenue. *See id.* ¶ 139.5. The FEIS states that Metro intends to exercise eminent domain to acquire certain properties within the City for the Project, including two commercial office buildings, a six-unit apartment building, a bank branch, a restaurant and four retail store fronts. *See id.* ¶ 139.4. Thus, the construction of the proposed subway line will cause the City to lose revenue as a result of Metro's exercise of eminent domain. *See id.* ¶ 139.5. In addition to the fact that condemned property will be taken off the tax rolls, the FEIS discloses that the construction work "could affect access to and profitability of existing businesses as customers may choose to avoid ongoing construction." *Id.* ¶ 139.2. The negative impacts on and reduced access to local businesses will reduce sales tax receipts and the closure of metered parking along impacted roads will affect fee collections. *See id.* ¶ 139.5. In all, the City has estimated that these losses will represent $1.9 million-$6.1 million in annual tax revenue, or as much as 3.8% of the City's total annual General Fund during the years of medium and intensive construction work in Beverly Hills. *See id.*

d. Aesthetics/Public Enjoyment

The City also spends considerable sums on maintaining a visual aesthetic appropriate for and attractive to the businesses and residents of the City. *See id.* ¶ 144. In an effort to maintain this aesthetic, the City undertakes the aforementioned street cleaning, landscaping at various City-owned lands and properties, and enforces ordinances designed to ensure compliance with an overall plan. *See id.* The City accepts and investigates complaints relating to, among other things, the conditions of landscaping, the storage of junk, the accumulation of trash and debris, and the presence of graffiti. *See id.* The City asserts that construction activity, including that planned for residential areas, will have a deleterious effect on the visual aesthetic of the City, in both

residential and commercial areas. *See id.* Additionally, it believes that construction activities, including construction staging and hauling, will produce the aforementioned noise and air pollution, further affecting the aesthetic sought and maintained at significant cost. *See id.* It also believes that construction activities and the associated traffic congestion, road closures, diesel truck emissions, and general unsightliness of Wilshire Boulevard and surrounding areas will make the City a less attractive location for consumers and visitors during the years of subway construction. *See id.* Therefore, in addition to the impact from the planned exercise of eminent domain, the City asserts that this impact on aesthetics has the potential to reduce sales tax, business tax and transient occupancy tax revenues by making the City a less attractive destination for consumers and visitors and therefore limiting consumer spending in the City. *See id.*

The City also maintains parks for the enjoyment of residents of and visitors to the City. *See id.* ¶ 145. While there is little green space along Wilshire Boulevard in the City, the City has established a few "mini parks" along this corridor, which offer visitors amenities like quiet settings; art and sculptures; playgrounds; and fountains. *See id.* One of these small parks is the aforementioned Reeves Park, which contains benches, landscaping, a fountain, and a children's playground, and is used for passive recreational and playground purposes. *See id.* ¶¶ 145, 217; FDR ¶¶ 254, 467. The City is concerned that the construction – which is expected to take up to seven years – will negatively impact Reeves Park and will directly harm visitors' ability to enjoy the park (at least in part due to the noted significant negative noise and air quality impacts). *See* CR ¶¶ 145, 145.2, 218.

5. The High School

The High School is the primary public high school and occupies the only public high school campus in the City. *See id.* ¶ 33; BHUSDR ¶ 5. The High School campus includes a 1936-37 French Eclectic-style assembly of stucco and brick educational buildings with two stories in "a roughly U-shaped plan that wraps around a large central lawn." FDR ¶ 258. A square tower with a round clock occupies the center, and the south side of the parcel includes a "Streamline Moderne cylindrical-roofed swimming pool." *Id.* ¶ 259. Between 1967 and 1970, BHUSD added a north wing, a five-story building, and a two-level parking garage, and in 2005-2007, it added a science and technology

center. *See id.* ¶ 260. In an August 2010 Cultural Resources Technical Report, the FTA and Metro concluded that the original school buildings and the pool are eligible for listing on the National Register of Historic Places because of the architectural styles. *See id.* ¶ 261.

The High School's campus is used not only by the school, but by the entire community through a formal cooperative use agreement between the City and BHUSD. *See* BHUSDR ¶ 5; CR ¶ 227. The agreement covers community use of the High School's recreational facilities, including the campus athletic fields and facilities like gymnasiums and the swimming pool. *See* CR ¶¶ 146, 227. The athletic fields and other recreational facilities are used extensively by City residents, and there are no other public facilities in the City that provide similar resources. *See id.* In addition, BHUSD plans to update the High School's recreational and athletic facilities and increase the parking space available on campus (the City reports that parking facilities at the High School and in the surrounding neighborhoods are already frequently overwhelmed during community events), which the City believes will directly benefit it in its efforts to provide adequate recreational and athletic facilities for its residents. *See id.* But the City believes that BHUSD's expansion plans may be curtailed by construction of the subway tunnels under the High School. *See id.*

On August 26, 2008, BHUSD released a draft five-year master plan calling for upgrading and modernizing many of the buildings on the school's campus, in order to address overcrowding and to meet the long-term public educational needs of the City. *See* BHUSDR ¶ 6. Obligations under state law required many of the projects proposed in that master plan to involve significant underground development. *See id.* ¶ 7. In November 2008, the City passed a $334 million school bond to fund implementation of the Master Plan. *See id.* ¶ 10.

BHUSD informed Metro of its Master Plan and associated projects, including its plan to construct future athletic and recreational facilities on campus, as well as an underground parking garage to support the users of the High School's surface athletic and recreational facilities. *See id.* ¶ 286. In this regard, BHUSD eventually wrote to Metro on April 27, 2011, of its beliefs that tunneling under the High School would "impact and restrict building over virtually the entire prime building area of the [High School]

campus," and that "Metro would possess substantial control over the direction of school design and construction including the right to bar school construction that it deemed not to meet its criteria." *Id.* ¶ 287.

Construction activities at Constellation Station are expected to take from 6 to 7 years. *See* CR ¶ 131. In addition to the potential impacts from tunneling, as with the Fairfax, La Cienega and Rodeo Stations, construction of Constellation Station will also require an excavation of soils using the cut and cover method, requiring that a giant hole be dug in the ground with the use of shoring. *See id.* ¶ 124. Constellation Station will also be the location at which all of the soil will be removed from the 2.5 miles of tunneling beneath the City, requiring the excavation of 396,000 cubic yards of soil from the tunneling and 296,000 cubic yards of soil for the station (a total of 692,000 cubic yards of soil). *See id.* ¶ 125.1. With use of 15 cubic yard haul trucks, this excavation would require approximately 46,000 trips by haul trucks. *See id.* ¶ 125.2. The FEIS states that, at this location, there would be between 90 and 130 haul trips per day for the tunnel spoils removal and another 80 to 120 haul trips per day for the station excavation. *See id.* ¶ 126.2. Because the construction activities at Constellation Station also involve excavation of tunneling spoils, Metro acknowledged that they would result in "substantial" air quality impacts and adverse noise impacts at the adjoining High School facilities fronting Heath Avenue during the construction work. *See id.* ¶ 230.2.

As within the City, construction of Constellation Station will require the establishment of a "traffic control zone" encompassing the area of Century City adjoining the City. *See id.* ¶ 132. The trucks required to excavate tunneling spoils and build Constellation Station are expected to travel down Century Park East, less than one block from the High School, to enter staging areas that either adjoin or are very near the High School's playing fields. *See id.* ¶ 133.

As with the other stations, the construction of Constellation Station and excavation of tunneling spoils at this location will require the use of construction lay-down areas. *See id.* ¶ 127. The proposed lay-down areas would be on the north side of Constellation Boulevard between the Avenue of the Stars and Century Park East, at the northeast corner of the intersection of Constellation Boulevard and Century Park East, and/or at the southeast corner of the intersection of Constellation Boulevard and Century

Park East. *See id.* One of the lay-down areas will be between Century Park East and the High School, directly adjacent to an athletic field on the High School's campus. *See id.* ¶¶ 128.1, 160.3, 230.1. This field hosts high school sports, American Youth Soccer Organization activities, youth lacrosse and youth football programs. *See id.* ¶¶ 128.2, 146.

The DEIS concluded that there would be no use of the High School campus under Section 4(f), nor any "constructive use" under that statute because the campus and its athletic and recreational facilities are not "located close enough to surface-disturbing construction areas as to experience a constructive use." FDR ¶ 484; CR ¶ 229. However, between the DEIS and FEIS, Metro dropped its prior analysis of the *constructive* use of the High School's athletic and recreational facilities such that the FEIS contained no *explicit* consideration of that type of use. *See* CR ¶¶ 231-32.

In addition, notwithstanding their conclusion that parts of the school are eligible for listing on the National Register, the Agencies still concluded in December 2011 and in the FEIS (with the caveat added by Plaintiffs that the analysis did not take into account the future planned underground expansion of the campus, along with the assertion that the FEIS never considered noise or vibrations from the construction activities adjacent and proximate to the High School campus) that tunneling noise and vibration would cause no significant or adverse effect. *See* FDR ¶¶ 261-62, 489. The California State Historic Preservation Officer agreed. *See id.* ¶ 263.

C. The DEIS and Associated Analysis

While Metro is the sponsor for the Project, the FTA is supposed to have a review and approval role. *See* CR ¶ 6. Specifically, Congress charged the FTA with approving projects for funding under the federal "New Starts" program. *See id.*[14] Here, Metro has sought and is seeking federal funds for the Project, and FTA implemented the New Starts program to determine whether to provide such funding. *See id.* ¶ 7.1. Metro is planning

[14] The FTA's New Starts program is a federal funding mechanism for certain local transit projects, serving as the federal government's primary financial resource for supporting locally-planned, implemented, and operated transit guideway capital investments, including in planning, developing, and improving mass transportation facilities (including with respect to the Project here). *See* BHUSDR ¶ 24; CR ¶ 6; *see also generally* 49 U.S.C. § 5301. The transportation planning process prescribed under New Starts, which serves as the foundation for project decisions, is conducted concurrently with the NEPA-required environmental review process. *See* BHUSDR ¶ 25; *see also* 49 U.S.C. § 5309(d)(1)(B).

for New Starts and other federal funding to provide 50 percent of anticipated capital costs for the Project. *See id.* ¶ 7.2. The Agencies were, pursuant to 23 U.S.C. § 139(c)(3) and the New Starts program, "joint lead agencies" for purposes of compliance with NEPA (and other applicable federal laws[15]) and preparation of all environmental review documents required under state and federal law. *See* BHUSDR ¶ 13; CR ¶¶ 1.1-1.2, 8. In practice, however, Metro and its consultants drafted all substantive documents and conducted public outreach. *See* CR ¶ 9.

In January 2009, Metro authorized the preparation of a DEIS for what would become the Project. *See* BHUSDR ¶ 11.1; CR ¶ 11. The FTA also authorized preparation of the DEIS, and agreed to work jointly with Metro in its preparation pursuant to CEQA and NEPA. *See* BHUSDR ¶ 11.1; CR ¶ 11.

On March 27, 2009, the FTA published a Notice of Intent to prepare the DEIS in the Federal Register. *See* CR ¶ 12. The following month, Metro began to prepare the DEIS by holding scoping meetings. *See id.* ¶ 13. On May 7, 2009, the 30-day scoping process closed. *See id.* ¶ 14.

Later in 2009, facing the possibility that it could, "for the first time in six years, not be a recipient of federal New Starts funding for a major rail capital project," Metro decided to "accelerate" development of the Project. *See id.* ¶ 15.1. According to Metro, doing so was necessary to "secure Los Angeles County's fair share of federal rail funding through the New Starts program." *Id.*

1. Early Focus on Constellation Station

On April 8, 2010, prior to the publication of the DEIS, Metro submitted to the FTA a Preliminary New Starts Rating Template ("Ratings Template") for the Los Angeles Westside Subway Extension Transit Corridor "as a basis for…continuing discussions on the definition of the project for entry into New Starts Preliminary Engineering (PE) and the development of a 'PE Roadmap.'"[16] BHUSDR ¶ 48. The

[15] The FTA has acknowledged that it must comply with NEPA, the CAA and Section 4(f). *See* CR ¶ 8.

[16] The FTA must consider certain criteria before granting New Starts funding, with three key phases in the planning and development process for projects seeking New Starts funding: (i) Alternatives Analysis, (ii) Preliminary Engineering, and (iii) Final Design. *See* BHUSDR ¶¶ 26, 116; *see also generally* 49 U.S.C. § 5309. Preliminary Engineering is the "process by which the scope of the proposed project is finalized, estimates of project costs, benefits and impacts are refined, NEPA requirements are completed, project

Ratings Template – which included statistics related to anticipated population, jobs, and household growth for each proposed station, but only for Constellation Boulevard insofar as the Century City station was concerned – identified Constellation Boulevard as the "currently favored" station location for the Century City station. *See id.* ¶¶ 49-50.2; CR ¶ 18. Following that approach, shortly thereafter (in July 2010), Metro submitted a real estate acquisition management plan to FTA as part of its federal funding request, similarly stating therein that "[t]he most promising alternative is the base alternative,…but [it] would follow Constellation Boulevard instead of Santa Monica Boulevard." *See* CR ¶ 19.1.

The FTA undertakes a "Readiness Review" prior to approving a project for entry into preliminary engineering ("PE"), a review that ensures that the project has a high likelihood of successful completion. *See* BHUSDR ¶ 29. In addition, for "mega projects" costing in excess of $1 billion, the FTA must conduct a risk and contingency review ("Risk Assessment") prior to approving the project for entry into PE. *See id.* ¶ 32. The FTA defines Risk Assessment as the "evaluation of the reliability of the Grantee's project scope, cost estimate, and schedule, with special focus on the elements of uncertainty associated with the effectiveness and efficiency of the Grantee's project implementation and within the context of the surrounding project conditions." *Id.* ¶ 33. The FTA calls for the first step of this risk review process to involve scrutiny of the project's basic, known, elements – such as scope, design, quality, preliminary cost figures, and schedule – including validation or, if necessary, correction of those elements, and recognizes that "[t]he completeness and accuracy of the risk review is highly dependent on the completeness and accuracy of the project status evaluation" (which includes evaluation of Grantee Technical Capacity and Capability, Scope, Cost and Schedule). *Id.* ¶¶ 34.2, 35.

The Agencies each had a Project Management Oversight Consultant ("PMOC") – Parsons Brinckerhoff ("Parsons") for Metro and PGH Wong Engineering, Inc. ("PGH")

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management plans and fleet management plans are further developed, and local funding commitments are put in place." *See* BHUSDR ¶ 27.

for the FTA. *See id.* ¶¶ 51.1, 52.[17] Though the FTA insists that it planned to require further analysis of all alignments in the locally-preferred alternative ("LPA"),[18] as part of its risk assessment efforts, Metro engaged Parsons to conduct a risk assessment of alignment variation "Twin Bore Alternative 2E," including a pre-workshop site tour, preparation of draft and schedule risk models, facilitation of a formal three-day Risk Assessment Workshop, and the preparation of a Risk Assessment report. *See id.* ¶¶ 52, 54; CR ¶ 20. PGH also substantially participated in both the Risk Assessment and Readiness Review. *See* BHUSDR ¶ 55.

Consistent with the indications in the Ratings Template and the July 2010 real estate acquisition management plan, in July 2010 the Agencies decided to exclude Santa Monica Station from the Risk Assessment analysis. *See id.* ¶ 77. Specifically, the Risk Assessment workshop for the Project occurred from July 13-15, 2010, and was attended by representatives from Metro, Parsons, PGH and the FTA (including the head of the FTA's Los Angeles office). *See id.* ¶ 56. Prior to that workshop, Metro informed PGH that "Alternative 2E would be staff preferred alternative [*sic*] to recommend to the Board." *Id.* ¶ 57. Again, Alternative 2E was an alignment variation with Constellation Station serving as the station in Century City. *See* CR ¶ 20.

The Risk Assessment handbook provided by Parsons at the Risk Assessment workshop included only the Constellation Station location, noting that "[t]he alignment which will be studied for potential risks and assessed as to the required schedule and cost contingency requirement will be Alternative 2 with variations Alternatives 2C and 2E." BHUSDR ¶ 59.1. Both alternatives 2C and 2E included the Constellation Station for Century City, with the only difference being an additional station at Wilshire/Crenshaw in Alternative 2C (though Alternative 2 included a Santa Monica Station option). *See id.* ¶ 59.2. At that Workshop, the Agencies adopted Alternative 2E as the "baseline alignment" (though there were warnings that the route would lead to protest/litigation). *See id.* ¶¶ 60-61; CR ¶¶ 22-23, 26.1, 28. In addition to warnings of an anticipated challenge or protest, the minutes of the Workshop reveal that participants believed that if

[17] FTA regulations allow the FTA to engage a PMOC "primarily to aid [it] in its role of ensuring successful implementation of federally-funded projects." *See* FDR ¶ 299.

[18] *See* 49 U.S.C. § 5309(d)(2)(A)(i).

the Metro Board ultimately failed to adopt Constellation Station as the LPA, it "would delay the overall environmental process as well as LACMTA's work towards entry into Preliminary Engineering," a concern also reflected in a July 26, 2010 risk register for the Project. BHUSDR ¶¶ 62, 64.

Parsons ultimately issued its final Risk Assessment Report on August 24, 2010, with an identified objective of "support[ing] the project's application for entry into Preliminary Engineering." *See id.* ¶¶ 65-66, 122. As the Risk Assessment handbook foretold, only the Constellation Station – not Santa Monica Station – was studied for potential risks[19] and assessed as to the required schedule and cost contingency requirement. *See id.* ¶¶ 67-68. Taking account of concerns over potential challenges (and concomitant delays), the Risk Assessment Report also recommended that "[i]n order to mitigate the potential greatest cost and/or schedule risks to the project," Metro should "conduct a more elaborate settlement study/mitigation plan to alleviate fears of local residents and to assist in promoting the Century City Constellation to UCLA cross county alignment alternative." *Id.* ¶¶ 69, 123.

That same month, the FTA engaged Urban Engineers, Inc. ("Urban") to review the project documents prepared by Parsons and to formulate an opinion on the suitability of Metro's PE proposal. *See id.* ¶ 70.1 Urban, as the PMOC for Risk Assessment, conducted an extensive follow-up assessment "based on Metro's documentation and plans in support of the locally preferred Alternative 2E alignment," culminating in a Risk Assessment report in support of the FTA's consideration of Metro's readiness to enter into PE. *See id.* ¶ 70.2. Urban's Risk Assessment was limited to the scope of Metro's recommended project alternative and therefore assessed only those risks related to Alternative 2E. *See id.* ¶ 71. One of the "key risks" Urban identified in its Final Risk Assessment – and in its own October 2010 Risk Assessment workshop – was the possibility of an alignment reconfiguration, observing that modification to the LPA during PE "could result in impacts to cost and schedule." *Id.* ¶¶ 73, 93.

While Urban undertook the Risk Assessment, PGH was tasked with preparing what eventually became its "Westside Subway Extension Project: Readiness to Enter

[19] Although Parsons's Risk Assessment Report considered risks posed by the Constellation Station alignment on a general level, it did not address any specific risks relating to tunneling under the High School campus. *See* CR ¶ 25.

Preliminary Engineering" report (the "Readiness Report"). *See id.* ¶¶ 51.1, 74.1-74.2. For purposes of readiness to enter PE, PGH reviewed "the alignment alternative that is anticipated to be recommended for Board approval." *Id.* ¶¶ 74.2-75. Thus, again, design, engineering and cost estimates provided to the FTA to support the Project's entry into PE analyzed only Alternative 2E. *See id.* ¶ 76.

2. Early Commentary on Air Quality

In August 2010, Metro also performed some initial air quality analysis, issuing two reports: 1) an Air Quality Technical Report which recommended that the "effects of PM_{10} and $PM_{2.5}$ emissions for the project are [to be] examined on a localized, or microscale, basis, a regional basis and a statewide basis"[20] and which demonstrated that, with mitigation, expected construction-related emissions would fall below significance levels; and 2) a Construction and Mitigation Technical Report, in which Metro's consultant stated that the Environmental Protection Agency ("EPA") had promulgated National Ambient Air Quality Standards ("NAAQS") for certain "wide-spread pollutants…considered to be harmful to public health and the environment" and that "[e]ffects of construction emissions on ambient air quality are evaluated using these standards." *See* FDR ¶ 440; CR ¶¶ 149, 156.1, 157.1.

3. Issuance of the DEIS

The Agencies signed the DEIS in August 2010, and the Notice of Availability of it was published on September 3, 2010. *See* FDR ¶ 278; CR ¶ 26.2. In the DEIS, the Agencies evaluated several station and segment options for possible subways, including by examining two Century City subway station locations: Santa Monica Station and Constellation Station. *See* CR ¶ 28; FDR ¶¶ 89-90. Notwithstanding the earlier-expressed preferences for the Constellation Station location for the Century City station, when the Agencies jointly released the DEIS to the public on September 3, 2010, *see* BHUSDR ¶ 124, they referenced Santa Monica Station as the "base" or preferred alignment, while labeling Constellation Station as an "alternate station option." *See id.* ¶¶ 77-78, 125.1-125.2; CR ¶ 28; FDR ¶ 91. In the DEIS, "base" was the term used to differentiate between the primary station location and the alternative station sites. *See* BHUSDR ¶ 125.2.

[20] PM_{10} and $PM_{2.5}$ refer to, respectively, coarse particulate matter and fine particulate matter.

The DEIS represented to the public that Santa Monica Station would be millions of dollars cheaper. *See* CR ¶ 29. Meanwhile, technical reports leading up to the DEIS's issuance revealed that Santa Monica Station would have more riders than Constellation Station. *See id.* Though Metro's ridership projections to date indeed showed slightly higher ridership at Santa Monica Station – one study issued before the DEIS predicted about 650 more boardings and alightings at Santa Monica Station than at Constellation Station – the DEIS also praised the ridership benefits of Constellation Station by stating that "[t]he optional Constellation site is also more centrally located within Century City, enhancing walk access for many passengers boarding and alighting at Century City." BHUSDR ¶¶ 85, 127-28, 178, 193; FDR ¶¶ 107, 423.

With respect to the projections that, as of that time, favored Santa Monica Station, Metro's August 2010 Smart Growth Report set forth future year 2035 ridership projections through a smart growth project evaluation which considered the impact that built environment variables can have in predicting fewer vehicle trips than conventional travel demand models. *See* BHUSDR ¶¶ 175, 193. That report evaluated the built environment variables, population and employment within a 1/2-mile walking distance ("walkshed") from each of 22 station options along the Project. *See id.* ¶ 176.1 The Smart Growth Report explained the 1/2-mile walkshed by indicating that "recent research has shown that transit riders are willing to walk 1/2 mile (about a 15 minute walk) to reliable, fixed guideway transit." *Id.* ¶ 176.2.

In addition to the aforementioned indications that the run-up to the DEIS appeared to favor the Constellation Station location for a Century City station, the DEIS itself presented the prospect that the decision would be influenced by seismic considerations. While acknowledging the cost and ridership benefits, the DEIS warned that "the feasibility of the Santa Monica Boulevard (Base) site assumed in the Base Alignment for the five Build Alternatives is compromised by its close proximity to the Santa Monica Fault which runs directly beneath Santa Monica Boulevard in this area." *See id.* ¶ 126; CR ¶ 31.

a. Building Subway Stations in an Earthquake Zone

Regulatory codes and the practical difficulties of building safe and repairable structures generally prohibit Metro from building subway stations *on* active fault zones,

although it can build tunnels *through* active fault zones. *See* FDR ¶ 161. Earthquakes impact the ground and structures in two ways: shaking and surface rupture and displacement along the earthquake's fault zone. *See id.* ¶ 162.

Whereas a "pendulum effect" magnifies an earthquake's shaking force on above-ground structures, embedding a tunnel system in the ground allows it to move with the ground and to decrease the shaking forces. *See id.* ¶¶ 164-65. Experience in California has shown that well-designed tunnel systems "perform well" during shaking. *See id.* ¶ 163. For example, Metro's Red Line was operating when the 6.7-magnitude 1994 Northridge Earthquake hit. *See id.* ¶ 166. Metro inspected the system and reopened service the next day, though the earthquake had damaged bridges and Metro closed them. *See id.* ¶ 167. Similarly, when the 1989 6.9-magnitude Loma Prieta earthquake shook San Francisco, it collapsed elevated highways, but did not affect the Bay Area Rapid Transit tunnel system. *See id.* ¶ 168.

As the FEIS ultimately explained, where, as here, fault zones are miles long and the planned subway route is miles long, it can be impossible to design a route that does not intersect a fault zone and still meet the purpose and need for the project. *See id.* ¶ 174. The FEIS also made clear the Agencies' belief that, in Century City, the subway needs to pass through two fault zones: the Santa Monica fault zone ("SMFZ") and the WBHL/Newport-Inglewood fault zone. *See id.* ¶ 175.

When evaluating the risk from a fault zone, an agency first considers primarily when the fault last ruptured the surface and determines whether the fault is active, potentially active, or inactive. *See id.* ¶ 128. If the fault is active or potentially active, the agency estimates the magnitude of an earthquake and estimates its probability of an earthquake based on the amount of "potential earthquake energy…stored up in the fault per year." *Id.* ¶ 129. The State of California had classified the 25-mile-long SMFZ as an active fault. *See id.* ¶ 130. The California Geologic Society expects that the SMFZ is capable of generating an earthquake in the magnitude range of 6.9 to 7.2 on the moment magnitude scale (which has replaced the Richter scale but keeps the familiar 1-10 magnitude scale), and could result in "average surface displacements of approximately 3

to 6 feet."[21] *Id.* ¶¶ 131-32. Ultimately, in the FEIS, the Agencies identified "a broad zone along Santa Monica Boulevard in Century City in which there could be both vertical and horizontal ground rupture movement." *Id.* ¶ 134.

Tunneling engineers design tunnels to accommodate fault displacement without collapse and to allow repairs. *See id.* ¶ 176. Crossing fault zones at sharp angles "minimize[s] the length of tunnel that must be designed to accommodate fault displacements and [to allow for repair]." *Id.* ¶ 177. Tunneling engineers can accommodate fault displacement by "excavat[ing] to a larger dimension at the crossing to facilitate realignment in the event of a fault offset," as Metro did with the Red Line. *Id.* ¶ 178. Or engineers can use "a strong but flexible lining, such as ductile steel segments or segments with articulated joints" or they can "plac[e] a crushable backpacking material around the outside of the structural lining." *Id.* ¶ 179. The TBMs proposed for the Project can install a lining system that can accommodate fault displacement during an earthquake. *See id.* ¶ 180. Here, the Agencies plan to develop the appropriate lining system during the final design phase. *See id.* ¶ 181.

b. Seismic Analysis as of the DEIS

During the geologic analysis of the project area for the DEIS, the Agencies completed a 151-page Geotechnical and Hazardous Materials Technical Report and issued it in August 2010. *See id.* ¶ 92. With that report, the Agencies intended "to address geotechnical, subsurface, seismic, and hazardous materials issues and their potential impacts on the proposed project alternatives." *Id.* ¶ 93. That report discusses the geology, seismology, gaseous conditions, oil wells, and groundwater conditions in the Study Area. *See id.* ¶ 94.

Earlier, in a report shared with Parsons in March 2010, another consultant analyzed the SMFZ and "inferred traces of the Santa Monica Fault" that would pass either directly through, or to the north and south of, Santa Monica Station. *See id.* ¶ 95. Based in part on these reports, the DEIS identified 17 significant fault zones or segments that could affect the Project, including the SMFZ and the Newport-Inglewood fault zone.

[21] The Newport-Inglewood fault zone, on the other hand, produced a 6.4-magnitude Long Beach earthquake in 1933, and some geologists suspected that the WBHL was the northern extension of the Newport-Inglewood fault zone. *See* FDR ¶¶ 135-36. Until Metro undertook its geologic research in 2010 and 2011, no one had researched that hypothesis. *See id.* ¶ 137.

See id. ¶¶ 96-97.

The DEIS raised the possibility that active earthquake faults along Santa Monica Boulevard might render Santa Monica Station untenable, and discussed and described the WBHL as "a northwest trending geomorphic lineament (feature) that would cross the Westside Subway Extension alignment in the vicinity of Moreno Drive and Santa Monica Boulevard in the Century City area." BHUSDR ¶¶ 82-83; FDR ¶ 98. Specifically, the DEIS commented that "segments of the Santa Monica fault cross the Project alignment alternatives at various locations," and that the WBHL "crosses the alignment alternatives in one location." FDR ¶¶ 101, 388. Thus, the DEIS projected the possibility that "[t]hese locations could represent earthquake fault rupture hazards to the Project," *id.* ¶¶ 102, 388, and that "the feasibility of the Santa Monica Boulevard (Base) site assumed in the Base Alignment for the five Build alternatives is compromised by its close proximity to the Santa Monica Fault," *id.* ¶ 103.

However, analysis to that point had "not led to a conclusive recommendation regarding the feasibility of a station at this location." *Id.* ¶ 104. Indeed, the DEIS acknowledged scientific disagreement (1) on the existence of the WBHL and (2) on whether it represents the surface manifestation of the Newport-Inglewood fault zone, indicating that this "has not been confirmed" and "[f]urther evaluation of the [WBHL] and its significance to the Project would be performed during design level investigations for the Project." *Id.* ¶¶ 99, 106, 386-87; BHUSDR ¶ 83. Thus, in the DEIS the FTA and Metro did not include the WBHL in the list of "Active Faults and Fault Segments" in the Project area, and identified the limited information available on the WBHL. *See* FDR ¶¶ 386, 388.

Though Metro's own seismic testing as of this time lacked certainty, in contrast with its measured uncertainty regarding Santa Monica Station the DEIS stated that "[t]he optional Constellation site is farther from the fault and would have lower seismic risk" and that it was "south of the fault zone." BHUSDR ¶¶ 84, 131; FDR ¶ 105.

c. Alignment Considerations

In addition to addressing issues related to a station *location* in Century City, the DEIS identified several potential *alignment* options, including three routes from the Rodeo Station to the two potential locations for a Century City station (along with routes

from the two potential Century City station locations to the Westwood/UCLA station). *See* CR ¶ 205; FDR ¶¶ 90.1, 306. The Agencies developed and evaluated the Century City alignment options in the DEIS "in response to scoping comments to consider ways to minimize subsurface easements under residential properties." FDR ¶ 307.

One of those alignments routed along Olympic Boulevard – the southern boundary of the High School campus – but the Agencies, explaining their decision in the DEIS, rejected that route (as well as other Century City station options in the Alternatives Analysis) "[a]s a result of screening based upon public comment, further conceptual design review, and screening against the goals to address the Purpose and Need." *See id.* ¶¶ 306, 308, 311. Later, in the FEIS, the Agencies also ultimately rejected routes west to Constellation Station because they could not achieve the train speeds they needed. *See id.* ¶ 310.

d. Section 4(f) Analysis

Unlike Reeves Park, the DEIS did include the High School's athletic fields in its Section 4(f) analysis. *See* CR ¶ 225. The High School's athletic and recreational facilities contain gymnasia, a swimming pool, athletic fields, a track, and tennis courts, and they (as noted above) are regularly used by City residents and the public for recreation, sports, and community events. *See id.* ¶ 226. However, Metro did not identify the High School's campus as having a "major purpose for park or recreational activities," and it also did not acknowledge the pervasive community use of these facilities. *See id.* ¶ 228.

4. Reaction to the DEIS

The public comment period relating to the DEIS – during which the FTA made it available to stakeholders, agencies, and the general public – started on September 3, 2010 and continued for 45 days until October 18, 2010. *See* BHUSDR ¶ 86; FDR ¶ 340; CR ¶ 27; *see also* FDR ¶ 276 (stating that the comment period was 45 to 60 days). The Agencies received about 2,000 public comments on the DEIS from over 800 commenters. *See* FDR ¶ 347.

On October 18, 2010, Century City real estate developer, JMB Realty Corporation ("JMB") sent a letter to Metro expressing JMB's support for the West Side Extension and emphasizing why JMB believed Constellation Boulevard was the superior station

location. *See* BHUSDR ¶ 179.1. It attached a "technical study of the DEI[S]'s traffic assumptions" prepared by Gibson Transportation Consulting, Inc. ("Gibson"), whom JMB retained "[i]n order to provide more context and detail specific facts that could be considered when calculating ridership projections." *Id.* ¶ 179.2. JMB emphasized that the Gibson study "found that the Constellation Boulevard station alignment is far superior from a potential ridership and land use prospective [*sic*] as compared to the Santa Monica Boulevard station" and noted JMB's "strong preference for the Constellation Boulevard station alignment." *Id.* ¶ 180.

In addition, the FEIS later explained that many DEIS public comments stated that they favored Constellation Station because "it would better serve the central core of the office and residential land uses of Century City, whereas the Santa Monica Station would border on a golf course," though an approximately equal number of DEIS comments favored the Santa Monica Station. *See* FDR ¶ 424. The FEIS also commented that "[m]any stated that [Santa Monica Station] would be too far…from office and residential destinations in Century City, and that [Constellation Station] would generate higher ridership, be more visible, and more convenient." *Id.* ¶ 425.

But public opposition to a Constellation Station alignment in the DEIS comments was strong, with "[a] significant volume of comments…received on the location of the Century City Station." *See* BHUSDR ¶ 92; CR ¶ 32. These included concerns regarding environmental risks and impacts and the Agencies' failure to adequately identify, investigate, and analyze the dangers that tunneling through the City and beneath the High School's campus would impose upon the City and its citizens, businesses, homes, schools, and students. *See* CR ¶ 33.

BHUSD submitted multiple comment letters raising concerns about, among other things, tunneling under the High School campus and the impact on buildings, geotechnical considerations and oil wells, indicating that any of these things could result in long-term damage to the structural safety of current and/or future school facilities, and place students, faculty, staff and anyone else on Campus at risk. *See* BHUSDR ¶¶ 87-88.2, 91. In addition, BHUSD advised the Agencies of concerns that the tunneling would severely limit the school's ability to develop underground and execute its Master Plan. *See id.* ¶ 91. BHUSD also raised concerns about traffic and noise and the impacts they

could have on students and the school along with its programs and instruction. *See id.* ¶¶ 89-90.

The City had its own comment letter on the DEIS, indicating that it supported the Project, but that it had "significant concerns" and "strongly opposes" the possibility of relocating the Century City station to Constellation Station and tunneling under residential property and the High School. *See* CR ¶ 34. Specifically, the City "strongly request[ed] that Metro explore alternatives that do not involve tunneling under [the High School] or residential properties," including alternate alignments to reach Constellation Station if, notwithstanding Metro's identification of Santa Monica Boulevard as the "base" site, the Agencies ultimately selected Constellation Station. *Id.* ¶ 206; FDR ¶ 313. Because the identified routes to the Constellation Station option required tunneling under the High School with the attendant seismic and safety risks, the City and its residents repeatedly requested that Metro retain Santa Monica Station for the Century City station. *See* CR ¶ 205.

The City also raised concerns regarding Metro's failure to take adequate steps to identify the location of "wild cat" or "capped" oil wells at the High School; Metro's failure to identify the means and methods of addressing abandoned wells within and near the tunneling alignment; Metro's obligation to undertake additional study and analysis of potential construction-related impacts and specific effective mitigation measures to address potential construction-related effects on visual quality, air quality, noise and vibration, exposure to hazardous substances, and other construction-related impacts; Metro's obligation to undertake additional coordination with City staff relating to the development of measures to mitigate construction impacts relating to construction traffic in residential neighborhoods and other construction-related impacts; Metro's obligation to undertake additional analysis and mitigation with respect to the effect of the Project on the City's emergency response services; Metro's obligation to undertake additional analysis with respect to traffic-related impacts; and that the DEIS had not properly stated City policies relating to its parks and other community facilities, including a policy to "[p]rotect parkland from nonrecreational uses." *See id.* ¶ 34.

5. Adoption of the LPA; Plans for Further Analysis

Following the DEIS public comment period, Metro staff actually did not make the

recommendation to the Metro Board to adopt Alignment 2E to Constellation Station as the LPA. *See* BHUSDR ¶ 94. Instead, on October 21, 2010, Metro staff recommended to the Metro Board that both the Santa Monica Station and Constellation Station options be carried forward for further study before a preferred station location was selected. *See id.* ¶ 95. At the same time, that recommendation also indicated that geotechnical studies had determined that the Santa Monica Station option would be located directly above a seismic fault, but that the analysis completed by the release date of the DEIS had "not led to a conclusive recommendation regarding the feasibility of a station at [that] location." *Id.*; FDR ¶ 324. The recommendation further noted that Constellation Station was "located away from the seismic fault." BHUSDR ¶ 95. Because of opposition to Constellation Station within the City, however, it stated that "[f]urther analysis along the route of the Constellation Station Option is required to more specifically address the concerns of [the Beverly Hills] community." *Id.*

Metro staff presented the results of its work to the Metro Board at an October 28, 2010 public hearing. *See* FDR ¶ 108. The City's and BHUSD's representatives attended the hearing/meeting, with Beverly Hills Board of Education Vice President Lisa Korbatov demanding further seismic analysis in particular. *See id.* ¶¶ 117-18.

Notwithstanding the "strong" public opposition to the Constellation Station alignment during the DEIS public comment period, Los Angeles County Supervisor Zev Yaroslavsky stated at an October 28, 2010 Metro Board meeting: "I don't think anyone who has studied this would disagree…leaving routing issues aside, Constellation and Avenue of the Stars is the appropriate place for the [Century City] station, more appropriate than any other place. Why? Because it is in the center of the center. It's in the center of Century City." BHUSDR ¶¶ 92, 97. Nevertheless, Supervisor Yaroslavksy still stated – as Metro staff had recommended – that both alignments would be carried forward and studied, offering that "[i]t very well may be that Santa Monica is going to be the route [the Metro Board members] take." *See id.* ¶ 99; FDR ¶ 326.

As recommended, at the conclusion of the October 28, 2010 Board meeting, Metro approved the DEIS, deleted some stations from the LPA, and adopted Alternative 2 from the DEIS as the LPA for further evaluation in the FEIS, carrying forward both Santa Monica and Constellation Stations and alignments insofar as the Century City

station was concerned. *See* BHUSDR ¶ 100; FDR ¶¶ 109, 305, 325; CR ¶¶ 35, 44.1. That same day, in response to public concern, the Metro Board directed Metro staff to analyze the impacts of the different Century City station locations and the alignments associated with them, i.e., Santa Monica Station versus Constellation Station: "[F]ully explore the risks associated with tunneling under the high school, including but not limited to the following: risk of settlement, noise, vibration, risks from oil wells on the property, impact to use of the school as an emergency evacuation center, and overall risk to student, faculty, and the community…[and to] analyze the possibility of moving the subway tunnel in order to avoid all school buildings and avoid impacting any future plans to remodel Beverly Hills High School." BHUSDR ¶ 101; CR ¶¶ 37-38, 207; FDR ¶¶ 110-11. The Metro Board also ordered staff to work closely with the City, and to provide information to the City "as soon as [it] become[s] available." CR ¶ 38.

Notwithstanding the outcome of the October 28 meeting, three days afterwards, on November 1, 2010, Metro submitted a formal request to the FTA to approve funding for PE. *See* BHUSDR ¶ 102. That letter acknowledged that Metro's Board had "carr[ied] several station location and alignment options forward for more detailed evaluation during PE," including two station and alignment options for the Century City station. *Id.* ¶ 103.[22]

In response to Metro's request, the FTA questioned "how [to] reconcile differences between [its] review of the deliverables (including New Starts templates) for the staff recommended LPA and the LPA adopted by the Board, which includes alignments and station location options that are dependent on further study." Id. ¶ 106. On November 4, 2010, PGH informed Metro that it would need to submit scope, cost and schedule documents relating to the Santa Monica Station alignment (in light of the fact that Risk Assessment and Readiness Review had been limited to Constellation Station). *See id.* ¶ 107; FDR ¶ 327. In that same email, the FTA also let Metro know that it would need to "evaluate the Project based on all potential alignment options" to ensure there was no pre-determination problem. *See* CR ¶ 44.2.

However, less than a week later the FTA (PGH) withdrew its request for the

[22] While the Metro Board had carried forward "station" options for the Westwood/UCLA and Westwood/VA Hospital station locations, it had carried forward "station and alignments" options for Century City. *See* BHUSDR ¶ 105.2.

analysis, without explanation. *See id.* ¶ 44.3; FDR ¶ 327. The parties dispute, however, whether analysis after that point included consideration of Santa Monica Station and Constellation Station, or just Constellation Station. *See* BHUSDR ¶¶ 108-109.1, 111; FDR ¶ 327.

PGH's final Readiness Report, in which it opined on the Project's readiness to enter PE, identified Constellation Station as the "base alignment" and the "Station," while it referred to Santa Monica Station as the "optional alignment" and the "Optional Station." *See* BHUSDR ¶¶ 109.1, 112. That report concluded that the LPA approved by the Metro Board included several alignment and station variations for the western segment of the Project, including an optional station at Santa Monica Station. *See id.* ¶ 113. But rather than require an equivalent evaluation for all of the alternatives the Metro Board voted to carry forward, including the Santa Monica Station location and alignment, the Readiness Report deferred further study on these variations until PE. *See id.* ¶ 114. Ultimately, the Readiness Report (which was dated April 29, 2011, but which was prepared prior to the Project's approval into PE) recommended that the FTA approve Metro to proceed with PE for the Project, stating that: "The PMOC believes that the Grantee has provided all of the project management documents required by FTA for entry into PE. Based on the PMOC review findings of the Grantee documents, as described in this report, it is the opinion of the PMOC that the [Metro] Project Team has the technical capacity and capability to manage this Project in PE, notwithstanding the issues described within this report." *Id.* ¶¶ 109.2, 115.

On January 4, 2011, before the completion of the studies that the Metro Board had demanded at the October 28, 2010 meeting, the FTA approved New Starts funding for PE. *See id.* ¶ 116; CR ¶ 39. Cited as the basis for the approval of the entry into PE was the FTA's "assessment of scope, schedule and costs for the Westside Subway extension" and the "pre-PE risk assessment workshop." BHUSDR ¶ 117. It made no reference to any studies performed for the Santa Monica Station (which had been carried forward in the LPA) prior to PE approval. *See id.* ¶ 119.

More than a year later, when questioned by BHUSD's litigation counsel as to why it failed to include Santa Monica Station in its Risk Assessment review, the FTA explained that Constellation Station was used because that alignment "was slightly longer

than the Santa Monica Boulevard alignment and was thus a more conservative, representative alignment." *Id.* ¶ 120. The FTA now explains that this meant that Constellation Station presented the most expensive route, and that it would be more unlikely that Metro would be able to fund a more expensive route. *See id.*

D. Post-DEIS Seismic and Ridership Studies

1. Seismic Studies

Following issuance of the DEIS, Metro and its consultants completed field work using several methods to better understand the geology and attempt to determine the location of fault strands in the area, ultimately issuing two seismic studies in 2011. *See* FDR ¶¶ 138, 389; CR ¶ 193.2. In the course of doing so, Metro consulted with its Tunnel Advisory Panel ("TAP"), an independent panel created in 1995 to assist the Metro Board with analyzing tunneling possibilities in Los Angeles. *See* FDR ¶¶ 112-13. The three members of the TAP have been described in the record as "recognized throughout the world as engineering experts in the areas of geotechnical analysis, tunneling and deep excavation, earthquake engineering and soil dynamics," with "nationally recognized expertise" reaching "seismic hazards, earthquake engineering, gas hazards and mitigation and oil field development and well abandonment" and as having "unique knowledge and background on Los Angeles County's underground conditions and intimate knowledge of Metro's engineering and construction projects." *Id.* ¶¶ 114-16, 332-33.

With respect to the High School specifically, in December 2010, Metro wrote to BHUSD to inform it that Metro wanted to test the soils under the High School campus. *See id.* ¶ 119. Then, in March 2011, Metro requested that BHUSD allow a member of its TAP to walk-through the High School campus (which ultimately occurred in April 2011). *See id.* ¶¶ 119.1-120.

In the first six months of 2011, among other techniques Metro drilled 7 rotary-wash continuous core boreholes, 49 hollow stem auger continuous core boreholes,[23] 192

[23] To obtain rotary wash borings, a truck-mounted drill rig pumps fluid into the borehole as it drills. *See* FDR ¶ 141. It takes soil samples every 2.5 to 5 feet. *See id.* ¶ 142. A different truck-mounted drill rig can obtain hollow stem borings. *See id.* ¶ 143. That drill rig spins a 6- to 8-inch-diameter casing with a drill bit and "collects continuous core soil samples." *Id.* ¶ 144.

cone penetrometer tests ("CPT"),[24] 5 P-wave seismic reflection profiles, 5 S-wave seismic reflection profiles,[25] and 5 down hole suspension PS velocity[26] measurements. *See* BHUSDR ¶¶ 136.1, 240.2; CR ¶ 193.2; FDR ¶¶ 140, 328. However, Metro did not perform any "trenching,"[27] though the parties dispute the utility of that method of fault analysis (the parties also dispute the adequacy, without subsequent testing, of subsurface data to establish the existence of an active fault). *See, e.g.*, BHUSDR ¶¶ 135.1, 136.2, 148, 155.2, 169.3, 240.1; CR ¶ 193.4. Metro also did not conduct any site-specific aging of the soil or sediments. *See, e.g.*, BHUSDR ¶¶ 135.2, 148, 155.2.

At the same time that the Agencies and their consultants were conducting post-DEIS studies, Plaintiffs were in the early stages of doing their own seismic examinations. By March 2011, BHUSD had engaged consultants to request information on "geotechnical reports, boring logs and test data related to the Constellation station—Santa Monica station—BHHS campus area as they become available," and on "[s]eismic analysis related to the presence or absence of faults near other Westside Extension stations and the alignment." FDR ¶ 121.

By May 2011, BHUSD or its lawyers had engaged Kenney Geoscience ("KGS") and Dr. Miles Kenney, Phd, PG, "a well-known and well-respected geologist who specializes in seismic studies," to analyze the Santa Monica Fault, an engagement that later widened to eventually review Metro's later conclusion that there were two active earthquake faults in Century City. *See id.* ¶ 122; BHUSDR ¶ 257. A May 2011 letter regarding that engagement referred to the DEIS's language asserting that the Santa Monica Station "is compromised." FDR ¶ 123. However, Dr. Kenney explained his

[24] Cone penetrometer tests require someone to push a steel probe into the ground to "measur[e] the friction resistance at the tip of that probe and the side friction along [its] edge." FDR ¶ 145. Reading the electrical signal gives geologists some "idea of what the soil conditions are." *Id.* ¶ 146. The FTA cites evidence – disputed by Plaintiffs – that "when verified with other traditional subsurface information, the data [from cone penetrometer tests] are generally acceptable for planning and design purposes." *Id.* ¶ 147.

[25] P waves are compression waves and S waves are "shear" waves. *See* FDR ¶ 148. "The seismic reflection method involves projecting a wave down from the surface and then recording the returning wave back at the surface as it reflects off formations at depth." *Id.* ¶ 149.

[26] P-S suspension "measures P-wave and S-wave velocities over a 3 foot interval at discrete depth points in the borehole." FDR ¶ 150.

[27] "Seismic trenching" is a time-consuming process that involves digging up huge sections of earth to determine whether or not faults exist. *See* CR ¶ 63.

view that "there is no clear understanding of the location, magnitude and style of deformation associated with the Santa Monica Fault in the vicinity of Century City," and that "[d]etailed geologic and geotechnical studies are needed in the Century City region to define the nature and potential of the fault and how it might affect the two station locations." *Id.* ¶ 124.

Preparing for the release of the FEIS, on August 9, 2011, the City sent a letter asking Metro for information along the lines of what the Metro Board had, on October 28, 2010, ordered Metro to provide the City. *See* CR ¶ 41.1. Metro responded that "more information about the Santa Monica Fault and the West Beverly Hills Lineament will be available when the technical information and the Final EIS/EIR are released" together with "more information…regarding construction techniques." *Id.* ¶ 41.2.

Parsons completed two seismic reports created as a result of the studies that the Metro Board had commissioned at the October 28, 2010 meeting – the Century City Area Fault Investigation Report ("Fault Report") and its "companion report," the Century City Area Tunneling Safety Report ("Tunneling Report") – while the TAP evaluated (and approved) those two reports in a third report. *See* FDR ¶¶ 127, 153-54, 279, 329, 334; BHUSDR ¶¶ 139.1, 141; CR ¶ 46. Metro issued final versions of those reports in November 2011. *See* FDR ¶ 280; CR ¶ 191.1; BHUSDR ¶ 139.1.

Beyond Parsons and the TAP, Metro retained a third group of consultants, an Independent Review Panel, to provide feedback directly to Metro's CEO. *See* FDR ¶¶ 156, 335. That panel includes Caltech and Cornell professors, Pacific Gas and Electric Company earthquake managers, and a United States Geological Survey seismology and natural hazard expert. *See id.* ¶ 157. Their expertise spans from theoretical approaches to practical applications. *See id.* ¶ 158. The Independent Review Panel approved of both Parsons and the TAP's work, concluding that the Fault Report and the Tunneling Report are "highly professional and technically sound," and praising the "high quality data assembled about active faults in the Century City area." *See id.* ¶¶ 159, 336. Thus, all three – Parsons, the TAP and the Independent Review Panel – agreed on the seismic situation in Century City. *See id.* ¶ 160. In addition, the TAP and Independent Review Panel both agree with Metro's conclusion that Metro can tunnel safely in areas with subsurface gas. *See id.* ¶ 227.

The Tunneling Report indicated that the findings in it and the Fault Report "should be read and evaluated concurrently because they are both needed to establish the preferred alignment alternative…and the location of the station to serve Century City." BHUSDR ¶ 141. Together, the studies addressed seismic issues in west Beverly Hills and Century City and the safety of tunneling under the High School. *See* CR ¶ 47.

The Tunneling Report commented that it was "present[ing] results of engineering studies for, and an assessment of, tunneling safety along the proposed Constellation Boulevard Station route." *See* BHUSDR ¶ 139.2. It concluded that tunneling could be safely carried out beneath the High School campus, along with the West Beverly Hills, Century City and Westwood neighborhoods, and would not prevent future development of the High School campus. *See id.* ¶ 140; CR ¶ 47. It also concluded, generally, that tunneling through fault zones and gassy ground could be done safely, and that oil wells do not pose an "unmitigatible" risk to tunneling because, if they are encountered, procedures would be in place for their safe removal and re-abandonment.[28] *See* BHUSDR ¶ 140. Furthermore, it discounted any vibration and noise levels, reporting that they would be within FTA requirements. *See id.*

The Fault Report discussed the geotechnical studies that had supported Metro's assertion in the DEIS that Santa Monica Station was compromised. *See id.* ¶ 129. It stated that these pre-DEIS studies only showed that "the proposed Santa Monica Boulevard Station (centered on Avenue of the Stars) could be within the Santa Monica fault zone" because "the Santa Monica fault zone includes strands that are farther south than previously mapped." *Id.* ¶ 130.

At some point in time during their investigation in the Spring of 2011, Metro's consultants concluded that the SMFZ "cross[ed] Santa Monica Boulevard at approximately Avenue of the Stars." FDR ¶ 184. The Agencies then turned their attention (insofar as a station located on Santa Monica Boulevard was concerned) also to

[28] The TAP report explained that, where Metro – in conducting its research – suspected abandoned oil wells and where it could reach (buildings such as the High School or residences precluded investigations), it used a surface magnetometer (limited to 15 feet below the ground surface) to investigate at the tunnel depth to locate any well casing. *See* FDR ¶¶ 239, 411-12. Where Metro suspected abandoned oil wells, but could not use a surface magnetometer, the TAP report observed that it can either (a) use a magnetometer probe and horizontal directional drilling along the tunnel line to detect steel casings or (b) use a probe in front of an advancing tunneling machine. *See id.* ¶¶ 240, 412.

the Century Park East Station (one block east from Santa Monica Station) and conducted further seismic and geotechnical testing there. *See id.* ¶ 186; CR ¶ 40. The first time the Agencies informed the City or the public of the seismic concern underlying this decision was by way of a reference to that decision on the Frequently Asked Questions section of Metro's website in August-September 2011. *See* CR ¶ 40; BHUSDR ¶¶ 132, 192.1.[29] On the website, the explanation provided for the change indicated that it was to avoid locating the station on the Santa Monica Fault. *See* BHUSDR ¶ 132.

The Fault Report updated the analysis from the pre-DEIS geotechnical studies, concluding that *both* Santa Monica Boulevard station locations were unsuitable due to active seismic faulting. *See id.* ¶ 133; CR ¶ 191.2. Specifically, as to Santa Monica Station, Metro stated that "active traces of the Santa Monica fault zone…would pass through the proposed station location on Santa Monica Boulevard at Avenue of the Stars," thereby making a station at that site infeasible. BHUSDR ¶ 133

The Tunneling Report and Fault Report also reported the WBHL as a newly-discovered active fault zone. *See* CR ¶ 191.2. The Agencies relied on the conclusions in those studies to themselves conclude that the WBHL was a manifestation of the active Newport-Inglewood fault zone's northern section, stating in the Fault Report that "[t]he WBHL is a wide fault zone with several well-defined strands situated along the eastern margin of Century City. It is the inferred northern extension of the active Newport-Inglewood fault zone." CR ¶ 193.3; FDR ¶¶ 152, 330, 390. The studies then concluded that the WBHL is located directly below the High School and Century Park East Station. *See* CR ¶¶ 47, 191.3. Metro also conducted regression analysis of the maximum magnitude for past earthquakes and concluded that a major event on the WBHL could generate earthquakes between 6.4 and 7.2 in magnitude, "with surface displacements of up to 3 to 6 feet." FDR ¶ 152.1.

With all of the information the various investigative methods generated, Metro had produced information on several different transects in the Century City area. *See id.*

[29] BHUSD asserts that the reintroduction of the Century Park East Station into the equation had not been made public before then because, while it had been discussed in a May 24, 2011 "Final Century City Station Options Updated Jobs and Population Inventory Memorandum," that document (along with a September 2011 Updated Direct Ridership Forecasting Report) was not disclosed to the public until April 2012. *See* BHUSDR ¶¶ 191-192.1, 199. The FTA has not cited any other evidence in the record publishing the fact of Century Park East Station's "revival" prior to August 2011. *See id.* ¶¶ 191-192.2.

¶¶ 151, 330. This information covered the Constellation Station site. When they were boring, completing cone penetrometer tests, seismic reflection profiles, and suspension PS velocity measurements, they developed Transect 8 to cross the Constellation Station location area. *See id.* ¶ 360. Transect 3 also reaches Constellation Boulevard west of Constellation Station. *See id.* ¶ 361. Thus, the Agencies analyzed the Constellation Station site when analyzing sites on Santa Monica Boulevard. *See id.* ¶ 359. From this, the Agencies developed a "profile" of Constellation Station, finding that it "shows continuity of stratigraphy and an absence of faulting west of Century Park East Boulevard at [Constellation Station]." *Id.* ¶ 362.

Metro's discovery of the WBHL led it to conclude that Century Park East Station was unviable, stating in the Fault Report that "[t]he new CPT and seismic data show clear evidence that the WBHL is a wide zone of faulting [and that the] proposed Santa Monica Boulevard (east) Station would straddle the zone of faulting along the WBHL…. [I]t is recommended that the proposed Santa Monica Boulevard (east) Station no longer be considered." BHUSDR ¶ 134; CR ¶ 48.1; *see also* FDR ¶ 357. Similarly, because Metro's experts could identify "no clear evidence for a fault-free section along Santa Monica Boulevard in the vicinity of Century City that is large enough to accommodate a station," the TAP "recommended that proposed station locations along Santa Monica Boulevard no longer be considered acceptable options" in its own October 14, 2011 report. FDR ¶¶ 188.1, 331.[30]

As to Constellation Station, however, the Fault Report commented that "[n]o evidence of faulting was found on the proposed Constellation Boulevard Station site," leading it to summarize that "[b]ased on the results of these fault investigations, there is clear evidence that the proposed station locations on Santa Monica Boulevard (both east and west) would be in active fault zones, and are not viable options for station locations. The proposed station on Constellation Boulevard would not be within an active fault zone

[30] Although it could be possible with enough time and money, no one has ever built a subway station – a complex, multi-story, structure that can be up to 1,000 feet long with associated systems, services and entrances – to "withstand active faulting without collapsing or endangering the public." FDR ¶¶ 170-71. Building a station on a fault zone, "[e]ven with a complex and sophisticated design," would create "unacceptable risks." *See id.* ¶ 172. As a result, "Metro underground stations are sited so that they are not on active faults." *Id.* ¶ 173.

and is a viable option for a station location." BHUSDR ¶ 137; CR ¶ 48.1; FDR ¶ 363. The TAP also concluded that "the proposed Constellation Station site is located outside zones of active faulting and can be considered an acceptable option for a station location." FDR ¶ 189.

These recommendations were later included in the FEIS. *See id.* ¶¶ 187-88, 189.

2. Ridership Studies

After the results of the August 2010 Smart Growth Report came back with higher ridership projections at the Santa Monica Station, after public comments were taken on the DEIS, and after receiving JMB's letter, Metro undertook several additional ridership studies "to refine ridership projections at the Century City Station." *See* BHUSDR ¶ 174; FDR ¶ 201. These refinements led, ultimately, to a projection that Constellation Station would have about 3,350 more boardings. *See* FDR ¶¶ 202, 432.

One of the studies, resulting in the May 24, 2011, "Final Century City Station Options Updated Jobs and Population Inventory Memorandum" (the "Jobs Memorandum"), focused only on the Century City station. *See* BHUSDR ¶ 182.1.[31] The purpose of that report was to "present a revised estimate of the population and employment accessible within various walking distances (600 feet, 1/4 mile, and 1/2 mile)" of the potential Century City station locations, including Century Park East Station, which had previously been eliminated, as noted in the DEIS. *Id.*

Though the August 2010 Smart Growth Report stated that "recent research has shown that transit riders are willing to walk 1/2 mile (about a 15 minute walk) to reliable, fixed guideway transit," the Jobs Memorandum added the 600-foot and 1/4-mile walksheds to the inquiry. *See* BHUSDR ¶ 183. Specifically, while the Smart Growth Report stated that "a mile walking distance has typically been the pedestrian catchment area assumed for transit," the Jobs Memorandum explained that "[a] walkshed of 600 feet has also been evaluated to provide more detailed information on population and employment within the immediate vicinity of each station option." *Id.* In addition, rather than using projected 2035 data, as had been done in the Smart Growth Report, the Jobs

[31] Though the Jobs Memorandum was completed on May 24, 2011, Metro set an April 24, 2012, "absolute deadline" for posting it to the Project's FEIS webpage, a date that was exactly 30 days prior to a May 24, 2012 Board Meeting (discussed further *infra*) at which the Board "adopt[ed] the decision with findings regarding the reasonableness of the Constellation Station and the related subway tunnel alignment beneath Beverly Hills High School." BHUSDR ¶¶ 187-88.

Memorandum used population data from the 2000 United States Census to estimate 2010 population numbers. *See id.* ¶¶ 184, 198.2.

The Jobs Memorandum's results were significantly different than those of the Smart Growth Report, finding that Constellation Station had a higher population and more jobs than Santa Monica Station for all three walksheds, with the disparity being the most significant in the 600-foot and 1/4-mile walksheds. *See id.* ¶ 185. The results also showed that Santa Monica Station had superior numbers than Century Park East Station. *See id.* ¶ 186.

Almost four months after the Jobs Memorandum was completed came an August 11, 2011 report titled "Addendum to the Transportation Impacts Technical Report" that supplemented an August 2010 "Transportation Impacts Technical Report." *See id.* ¶ 189. The refinements delineated in that report included "[n]ew analysis, such as revised ridership model outputs." *Id.* ¶ 190.1. The original Santa Monica Station was not evaluated in this report, but instead Constellation and Century Park East Stations, notwithstanding the fact that the DEIS had eliminated Century Park East Station "because of better urban design characteristics at other station options, lower ridership, and its farther distance from the core of Century City." *Id.* ¶ 190.2. Use of the Century Park East station, one block east of Santa Monica Station, and away from the Westfield Mall, ultimately brought ridership projections for a Santa Monica Boulevard station far below those for Constellation Station. *See* BHUSDR ¶ 192.2.

Metro next updated the findings of its August 2010 Smart Growth Report – which, again, had projected higher year 2035 ridership at Santa Monica Station – by issuing a September 8, 2011 "Updated Direct Ridership Forecasting Report" ("Forecast Report") *See id.* ¶ 193. The identified purpose of this report was "to present daily ridership estimates (both boardings and alightings) using a Direct Ridership Forecasting (DRF) model" through the use of "a more refined land use and demographic data set." *Id.* ¶ 194. "[D]etailed existing (year 2010) land use and demographic data" was used rather than future year 2035 projections that had been used in the Smart Growth Report, despite an acknowledgment that "[f]uture changes in land use, which would result in population and employment increases or decreases, would affect future ridership projections." *Id.* ¶¶ 195, 198.1. And, as with the Addendum to the Transportation

Impacts Technical Report, the Updated Direct Ridership Forecasting Report analyzed Century Park East Station, not Santa Monica Station. *See id.* ¶ 196. Again, ridership projections favored Constellation Station. *See id.* ¶ 197.

Then, in February 2012, the Agencies completed a supplemental ridership study, the "Century City Transit Oriented Development and Walk Access Study" ("Walk Study"). *See id.* ¶ 200.1; FDR ¶¶ 203, 433. Like the Jobs Memorandum, the Walk Study evaluated ridership only at the potential Century City station locations. *See* BHUSDR ¶ 200.1. But it updated travel forecasts in anticipation of the FEIS for Constellation and Century Park East Stations, not Santa Monica Station. *See id.* ¶ 201.[32]

Whereas an earlier refined analysis model included bus boardings, the Walk Study focused on projecting ridership just for people in walking distance. *See* FDR ¶ 203.1. This study's purpose was to "evaluate[] the relative accessibility of three potential station locations to surrounding commercial and residential development within a 1/2-mile walking distance." BHUSDR ¶ 200.2. Again, however, while the Smart Growth Report had indicated that "recent research has shown that transit riders are willing to walk 1/2 mile (about a 15 minute walk) to reliable, fixed guideway transit," the Walk Study found 600-foot and 1/4-mile walksheds – which were not applied to any of the non-Century City stations covered by the Project – to be "critical" based on a "review of literature on walking to transit" which found that "proximity to transit has a bigger impact on ridership than the absolute total number of jobs and residents near transit." *Id.* ¶¶ 202.1-202.2, 203.1, 203.3, 216.

The Walk Study explained that it could differentiate estimated ridership between stations by analyzing shorter distances from the stations, and it concluded that the Constellation Station will have "by far the highest concentration of future jobs and residents within the critical 600-foot and 1/4-mile walksheds." FDR ¶¶ 204, 435, 439. The FTA notes that the Walk Study explained that all three station options had similar employee and resident populations within a 1/2-mile walkshed, and that to differentiate the stations it reviewed expert studies and concluded that "the proportion of transit riders walking to transit is greatest within 1/4 network mile or less of a station, typically

[32] The FTA asserts that the Walk Study analyzes ridership projections in detail for all three stations. *See* FDR ¶ 434.

declining by one-half between 1/4 and 1/2 mile, and becoming insignificant beyond 1/2 mile." BHUSDR ¶¶ 202.1, 203.2; FDR ¶¶ 437-38. It projected 14,005 riders for Constellation Station, but only 8,145 and 9,359 riders for the Santa Monica Stations. *See* FDR ¶¶ 205, 436. From all this, Metro concluded that "the Constellation/Avenue of the Stars Station is, and will continue to be, in the most advantageous location for attracting the most Westside Subway Extension riders compared to the station locations along Santa Monica Boulevard." BHUSDR ¶¶ 203.2-203.3.

Additional "refinements" to ridership forecasts came in the Agencies' March 2012 "Technical Report Summarizing the Results of Forecasted Alternatives." *See id.* ¶ 204.1; FDR ¶¶ 426-27. That report – which used a year 2035 horizon – documented the travel forecasting evolution and results only for the Century City station location options, with no refinement of forecasts for any other stations. *See* BHUSDR ¶ 204.2; FDR ¶¶ 426-28. A "coding refinement" led to the forecasted walk times from the "centroid" of the "traffic analysis zone (TAZ)" to the potential station locations being three minutes for Constellation and eight minutes for Santa Monica Boulevard. *See* BHUSDR ¶¶ 205-206.2. The "centroid" itself was moved as part of this process, to a point deeper into the high rises in Century City, after careful study of the land use, streets and traffic around Century City. *See id.* ¶¶ 208-11; FDR ¶ 429. In addition, a move of a potential Santa Monica Boulevard station one block east to Century Park East "to avoid locating the station box on the Santa Monica Fault" increased the walking time to a Santa Monica Boulevard station by five minutes, to a total of thirteen minutes. *See* BHUSDR ¶ 207. The Agencies also tried refining the bus routes to see if they could increase ridership at either station. *See* FDR ¶ 431. As reported in the FEIS, the report concluded that about 3,350 more people would board at Constellation Station than Century Park East Station. *See id.* ¶¶ 202, 432.

E. Additional Seismic Studies and the FEIS

1. Communications and Events Between Metro's Seismic Studies and Issuance of the FEIS

Once the Fault Report and Tunneling Report were issued, the City and BHUSD again consulted with their own experts, planning for their own seismic studies and attempting to better understand the risk presented by the Agencies' proposal to tunnel

under the High School and residences. *See id.* ¶ 190; CR ¶¶ 50.1-50.2. The City engaged Exponent Failure Analysis Associates ("Exponent"). *See* FDR ¶ 191. In addition to KGS, which (as noted above) BHUSD had by then already engaged, BHUSD also engaged Leighton Consulting, Inc. ("Leighton") as geologic consultants, and the City engaged Shannon and Wilson ("S&W") as geotechnical and environmental consultants. *See id.* ¶ 192; BHUSDR ¶¶ 167, 238.1. BHUSD also requested the involvement of the California Geological Survey ("CGS"), the state agency responsible for the State's Alquist-Priolo seismic fault hazards program, which prohibits any occupied construction over active faults, and with exclusive purview to identify active earthquake faults. *See* CR ¶¶ 50.1, 194.2; BHUSDR ¶ 163.3.

In a January 6, 2012, letter, BHUSD informed the FTA that its consultants were conducting ongoing studies in response to the Tunneling Report and Fault Report. *See* BHUSDR ¶ 144.1. Plaintiffs asked the FTA to delay the release of the FEIS until this information could be gathered, so that the Agencies could act based upon complete information. *See* CR ¶ 195.1. In that same letter, BHUSD requested that a supplemental DEIS ("SDEIS") be prepared and issued to address the new seismic information and to provide the public the opportunity to comment on that information. *See* BHUSDR ¶ 144.1; CR ¶ 49. It also identified what the authors believed were flaws in Metro's seismic studies, "call[ing] their conclusions into question." BHUSDR ¶ 144.2. It stated the beliefs or conclusions that: no seismic studies had been conducted in the vicinity of the Constellation location, "making it impossible for [Metro] to know whether there are any seismic risks attendant to locating a station" there; that Metro had concluded there were many fault strands that crossed the High School's campus "even though the fault lines drawn extend well beyond the testing data that [Metro's] consultants obtained for" the studies, and that the closest "actual identification" of the Newport-Inglewood fault was more than two miles south of the campus; that Metro's consultants had not done any testing between the High School and the "last confirmed location of the Newport-Inglewood fault;" and that "perhaps most importantly," Metro had not performed the trenching and sampling work that BHUSD felt was "necessary to properly date the fault strands that it did find." *Id.* From this, the letter concluded that "it is impossible to determine whether the faults described in the Seismic Studies are active." *Id.* As

addressed in further detail below, as it turned out, the Agencies did not wait for BHUSD's consultants work, but issued the FEIS. *See* CR ¶ 195.2.

On January 12, 2012, the FTA itself asked PGH to review the Tunneling Report and Fault Report and to provide "a professional assessment as to whether or not the appropriate standard of care and due diligence was exercised in the process of reaching the conclusions [Metro] did, and if in fact the conclusions were justified and are reflective of typical industry standards." BHUSDR ¶ 145. A January 24, 2012 email between PGH employees explained that the FTA was "specifically concerned about whether sufficient investigations were done at the Constellation site." *Id.* ¶ 146. That same email indicated that "2 transects cross the Constellation station alignment while 6 transects cross (or run parallel to) the Santa Monica Blvd alignment." *Id.* A later email reflects the belief that "the transect lines were chosen as they were more for the purpose to define the locations of the inferred Newport-Inglewood coming up to intersect the Santa Monica fault zone than the much better known Santa Monica Fault zone." *Id.* ¶ 147.1.

In February 2012, the Agencies released a "Century City Station Location Report," with a designed purpose of evaluating the alternative station locations included in the LPA for the Century City Station. *See id.* ¶ 159; FDR ¶ 182. That report summarized the evidence from the Fault Report and the Tunneling Report and other analysis and set forth a comparison of numerous factors between the Santa Monica Station and Constellation Station options. *See* BHUSDR ¶ 160.1; FDR ¶ 183. Its "Recommendations" section stated, in its entirety, as follows:

> In light of the unsuitability of the Santa Monica Boulevard sites for a Century City station due to seismic considerations, and the conclusion of the Century City Area Tunneling Safety Report that tunnels to the Century City Constellation station site can be constructed safely and without adverse impact to the properties above, it is recommended that the Century City station be sited at Constellation Boulevard.

See BHUSDR ¶ 160.3. During that same month, there is evidence that at least one individual at the FTA was willing to overlook mistakes in Metro's work to speed the process. In particular, in reviewing the draft FEIS sent for review, FTA staff stated, in a February 10, 2012, internal email, that they were "trying very hard to ignore mistakes so

this review process can be over with." CR ¶ 55.

By February and April 2012, respectively, Plaintiffs began submitting expert reports that criticized Metro's studies – submissions that would continue until they sent the last of their studies in May 2013, 18 months after Metro issued the 2011 seismic studies and 9 months after the FTA ultimately issued the "Environmental Record of Decision for the Westside Subway Extension Project" ("ROD"). *See* FDR ¶¶ 281, 294. The reports and submissions began when, on February 7, 2012, Exponent – one of the City's consultants – released an Independent Seismic Report, in which it too evaluated the assessments contained in the Tunneling Report and Fault Report and concluded that additional effort was required to accurately identify, quantify, rank and mitigate hazards before any alternatives were selected for implementation. *See* BHUSDR ¶¶ 153, 158; CR ¶ 51. BHUSD attached a copy of Exponent's report to a February 6, 2012, letter to the FTA, stating that the report "brings into question the conclusions reached in [Metro's] two seismic reports," BHUSDR ¶ 161.1, and raises significant issues regarding the public safety risk of tunneling through the High School campus, *id.* ¶ 161.2. The letter further advised that the Beverly Hills School Board had commissioned its own report that would be based on trenching and that had an expected issuance date of no later than that April. *See id.* ¶ 161.2. BHUSD also asked that the FTA issue a SDEIS to address Exponent's report and Metro's seismic studies. *See id.* ¶ 162; CR ¶ 51.

In its report, Exponent criticized the Tunneling Report and the Fault Report as failing to present findings on fault rupture, gas explosion and ground settlement that were based on rigorous risk assessments. *See* BHUSDR ¶ 154. Specifically, Exponent's position was that "no attempt [was] made to quantify or even qualitatively assess the potential risks from these scenarios," either to estimate the likelihood of such events or to characterize the potential severity of such events. *Id.* It concluded that:

> [w]ithout quantification and comparison of potential risks for both alternative tunnel alignment options (Constellation Boulevard or Santa Monica Boulevard), it is not possible to make a sound assessment and decide as to which alternative tunnel alignment option imposes a higher risk and which risk mitigation measures may be appropriate…. It is Exponent's view that the alternative Constellation Boulevard station, while generally in a more favorable location with regards to faulting issues, is instead faced with potential methane gas hazards that could represent at least as great a hazard to the public as the faulting hazards

associated with the Santa Monica Boulevard station.

Id. Exponent believed that gassy ground conditions "would strongly affect the design, construction and future operation of the Constellation Station," *id.* ¶ 157.3, and recommended "as much as possible" avoiding construction in the formations present at the Constellation location because of high methane and hydrogen sulfide concentrations, *see id.* ¶¶ 157.1-157.2.

With respect to the Fault Report in particular, Exponent criticized "limitations" in "the data and methodology" it used to conclude that Santa Monica Station was not viable because "the proposed footprint of the Santa Monica station is intercepted by several newly interpreted faults within the WBHL." *Id.* ¶¶ 155.1-155.2. Exponent also had criticisms of the Fault Report's conclusion concerning Constellation Station's proximity to active faulting, in particular inferred fault traces of the WBHL. *See id.* ¶ 156.

BHUSD wrote again to the FTA on February 29, 2012, sharing preliminary observations from its "ongoing geological and geotechnical investigations," noting that its work product had to satisfy the CGS, as well as "alert[ing]" the FTA of what it believed were "some significant, perhaps egregious, errors contained in [Metro's] studies." *Id.* ¶¶ 163.1-163.3. The letter set forth numerous concerns BHUSD had with Metro's methodologies backing the Tunneling Report and Fault Report, including with regard to its borings and questions about the resulting soil analysis, the absence of trenching, and differences in the extent of work performed with respect to Santa Monica Station as opposed to Constellation Station (leading to what the BHUSD termed "a double standard"). *Id.* ¶ 164. Its preliminary observations – which the FTA ultimately rejected when it issued the ROD – included that it had not found any of the shallow, active faults on the High School campus that Metro had predicted (and that BHUSD felt were explained by errors in Metro data and analysis), and that its "emerging area geological model" did not support the "predetermined tectonic theory postulated by [Metro] for the Century City-West Beverly Hills area." *Id.* ¶ 165. Based on the issues BHUSD's experts had identified, BHUSD again requested that the FTA not release the Final EIS/EIR until BHUSD's consultant and the CGS had completed their work. *See id.* ¶ 166; CR ¶ 52. It also asked that FTA require Metro to prepare a SDEIS to address all of the new seismic reports. *See* BHUSDR ¶ 166; CR ¶ 52.

Then, on March 8, 2012, S&W released a report presenting its analysis of the Tunneling Report and Fault Report. *See* BHUSDR ¶ 167. S&W highlighted the distinctions it perceived in the testing at Santa Monica Station and Constellation Station, asserting that "the relatively sparse exploration data presented for the Constellation Station does not indicate, nor fully negate, the presence of faulting," and that the studies for Constellation Station were "not as thorough" as those for Santa Monica Station. *Id.* ¶ 168. Thus, S&W "recommend[ed] that comparable geological and geotechnical explorations be carried out for the Constellation Station," commenting that the "assertion that Constellation Station is not within a fault zone and that it is a viable option is premature based on the level of study presented in the Fault Report." *Id.* S&W asked for "justification" from the Fault Report authors "that the profile drawn from the existing explorations along the Constellation Boulevard alignment is sufficient, or label it as preliminary, warranting a much greater level of study as was undertaken in other areas (even in some areas where faults were not previously mapped)." *Id.*

S&W also found that the WBHL did not appear to be active, contrary to Metro's findings. *See id.* ¶ 169.1. S&W reached this conclusion based on trenching done at the High School. *See id.* ¶ 169.2. It also recommended trenching along Santa Monica Boulevard in order to confirm that the WBHL is not an active fault, a recommendation that Metro rejected. *See id.* ¶ 170.2.

However, S&W "generally agree[d]" that a station along Santa Monica would be "more risky" than at Constellation "due to increasing likelihood of faults to the north, along the SMFZ." *Id.* ¶ 169.1. Thus, though it felt that the conclusion was "premature," and that a "much greater level of study" was needed, S&W also agreed – with those caveats – "that the Constellation Station location appears to be more favorable than the [Century Park East Station] location" because the exploration data showed no faulting at Constellation. FDR ¶ 364.

The same day that S&W released its report – March 8, 2012 – the FTA responded to BHUSD's January 6 and February 6 and 29 letters. *See* BHUSDR ¶ 171; CR ¶ 53. In that response, the FTA declined to prepare a SDEIS,[33] explaining its position that neither

[33] In fact, the Agencies denied all of BHUSD's and the City's requests to prepare an SDEIS. *See* BHUSDR ¶ 217.2.

Metro's studies nor Exponent's report "provide 'new information' or 'create substantial change in the level of detail on project impacts,'" as the "studies are simply a subsequent technical analysis of information regarding geologic hazards already discussed and made available to the public in the DEIS/EIR." BHUSDR ¶ 171; CR ¶ 53. The FTA did not specifically address what Exponent had identified as errors in Metro's seismic reports. *See id.* ¶ 172. At the same time, the FTA also refused to initiate a separate comment period on the Tunneling Report and Fault Report. *See* CR ¶ 53.

On March 16, 2012, BHUSD wrote to the FTA responding to the FTA's March 8, 2012 letter in which the FTA declined to issue a SDEIS. *See* BHUSDR ¶ 222.1. In addition to providing its view of when NEPA regulations require preparation of supplements to a DEIS, the letter expressed BHUSD's disagreement with the FTA's assertion that the Tunneling Report, Fault Report and Exponent's report were "simply a subsequent technical analysis of information regarding geologic hazards already discussed and made available to the public." *Id.* ¶ 222.2. The letter also reminded the FTA of the forthcoming Leighton report BHUSD had commissioned (and that was ultimately released the next month) and the significance of the seismic trenching performed in connection therewith, stating the belief that it would "allow the experts to determine conclusively the presence or absence of seismic faults along Santa Monica Boulevard." *See id.* ¶¶ 223-24. It ended by urging the FTA to review the Leighton report prior to releasing the FEIS to the public for comment. *See id.* ¶ 224.

2. Issuance of the FEIS

On March 9, 2012, the Agencies issued the FEIS. *See* CR ¶ 56.1; BHUSDR ¶ 220; FDR ¶ 282. Then, on March 23, 2012, the FTA published the Notice of Availability for the FEIS in the Federal Register. *See* CR ¶ 56.2; FDR ¶ 282.

a. Seismic and Ridership Discussion and Station/Alignment Decisions

Following on from the Tunneling Report and Fault Report, the FEIS included the conclusion that active faults at Santa Monica Boulevard rendered both station options on that street infeasible and recommended locating the Century City station at the Constellation Station site. *See* BHUSDR ¶¶ 221.1-221.2. In part, the FEIS explained the Agencies' opinion that further analysis had confirmed that Santa Monica Station would

be "directly above the Santa Monica Fault zone and is not a safe location and thus not considered a viable option for the station."[34] FDR ¶¶ 185, 418, 420. In addition, though the Agencies had declined to allow for a stand-alone public comment period on the Tunneling Report and the Fault Report, they relied on them in the FEIS (attaching them as appendices thereto) to assert that the WBHL is a "north-northwest trending fault that will cross the alignment…in the Century City Area" and conclude that the WBHL was an active fault that exposed Santa Monica Station to unacceptable seismic risks. *See* CR ¶¶ 57, 192.1.

Thus, the FEIS's conclusions about the location and activity of the WBHL and related seismic faults "influence, if not determine, [FTA's] selection of the Century City Constellation Station." CR ¶ 192.3. However, the FEIS itself does not disclose that the Agencies had incomplete information about the existence and specific location of the WBHL. *See* CR ¶ 193.1. As noted above, at the time the DEIS was released, the Agencies did not know whether the WBHL was an active fault. *See id.*

The FEIS also explained why it analyzed the Century Park East Station, despite it having been rejected in the DEIS. *See* FDR ¶¶ 416, 419-20. It should be noted that during preparation of this Final EIS/EIR, the Century City Santa Monica Station was shifted approximately 900 feet to the east along Santa Monica Boulevard from the location in the Draft EIS/EIR. As described in Section 2.6.4, this shift was determined to be necessary during preparation of Preliminary Engineering in order to avoid placing the station within the Santa Monica fault zone – an active earthquake fault zone that passes under Santa Monica Boulevard at Avenue of the Stars. BHUSDR ¶ 214. But, as referenced above, the FEIS also revealed that Century Park East Station was unviable as well: "Although the [Century Park East] Station is discussed herein for purposes of analysis, it should be noted that, following a hard look in this environmental review process, the location is no longer considered a viable option because of its position on the Newport-Inglewood fault zone." BHUSDR ¶ 215.1.

In addition to their conclusion that it was not within an active fault zone, the Agencies also concluded, in the lead-up to the FEIS's issuance, that – while Century Park

[34] As noted previously, the Agencies had analyzed the Santa Monica Station in the DEIS, and stated therein that that location "is compromised." *See* FDR ¶ 417.

East Station outperforms Constellation Station by requiring fewer underground easements, and the possibility of fewer "full takes" – Constellation Station "outperformed" both Santa Monica Station and Century Park East Station on a variety of other metrics. *See* FDR ¶¶ 197, 199-200. In the FEIS, the Agencies concluded that Constellation Station would have lower traffic impacts during construction. *See id.* ¶ 199. They also relied therein upon data demonstrating that Constellation Station had more existing residents within 1/4-mile, twice as many jobs within that distance, and twice as many jobs within 600 feet. *See id.* ¶ 198. Thus, the FEIS – which repeated the Smart Growth Report's statement that research showed transit riders were willing to walk up to 1/2-mile to access a rail station – stated that there would be higher ridership at Constellation Station as compared to Century Park East Station. *See* BHUSDR ¶¶ 213, 216.[35] The FEIS indicates that the FTA and Metro staff recommended Constellation Station in part because of the changed ridership conclusions. *See* FDR ¶ 206. BHUSD, on the other hand, highlights that notes from a January 3, 2012 "Westside NEPA Call" between Metro and FTA personnel question how to "elevate ridership as one of the reasons for the station selection" and indicate that one individual "said that MTA was originally going to depend on ridership until the geotechnical reports came out overwhelmingly in favor of Constellation." BHUSDR ¶ 173.2.

The FEIS also noted that several alignments were studied for the Constellation Station alignment in order to "minimize impacts to Beverly Hills High School structures as well as to achieve maximum safe train speeds between stations (by minimizing curves and grade differentials)." CR ¶ 58. But it concluded that "[t]here is no reasonable tunnel alignment that does not pass under structures within the [campus]" because the alternatives would not allow Metro "to achieve maximum safe train speeds between stations (by minimizing curves and grade differentials)." *Id.*; FDR ¶ 320. The Agencies also indicated in the FEIS that they advanced the alignment to Constellation Station under the High School campus to "minimize[] tunneling under buildings to the east and west of [Constellation Station]." FDR ¶ 309.

[35] The FEIS also revealed that, while the ridership projections for the two Century City options showed a 56% difference between Constellation Station and Century Park East Station, total projected ridership for the entire Project varied by only 4% depending on whether Constellation Station or Santa Monica Station was used. *See* BHUSDR ¶¶ 212.1-212.2.

b. Tunneling Risks

The FEIS discusses the presence of underground methane gas throughout the westside and the risk of this and other hazardous gases escaping into Metro's newly-constructed tunnels and station areas, and also proposes mitigation measures to prevent the intrusion of hazardous gases into these new Metro facilities. *See* CR ¶ 173. The FEIS also explained that, to evaluate the presence of hazardous gases and their potential to affect the construction and design of the subway, Metro (and the FTA, insofar as the Agencies acted as "joint lead agenc[ies]" for NEPA compliance) considered both "existing data along the Study Area" and the results of "install[ing] new gas monitoring wells at 48 locations along the alternative alignments." FDR ¶ 211. They mapped the methane zone, the buffer zone, the potential methane risk zone, the high potential risk zone, and the tar pit area (with methane concentration reaching 90 to 100 percent in some areas near the La Brea Tar Pits). *See id.* ¶¶ 212, 214. They recognized that "[t]he entire alignment passes through an area characterized by oil and gas fields," so there could be no complete elimination of the possibility of tunneling into gas pockets. *See id.* ¶ 213. They also contemplated that construction will disturb the ground, and tunneling and excavation may reach pockets of subsurface gases and may release methane and hydrogen sulfide. *See id.* ¶¶ 216, 393. The Agencies relied on their experience and their studies in concluding that "tunneling can be safely carried out beneath the Beverly Hills High School campus and the West Beverly Hills, Century City, and Westwood neighborhoods." FDR ¶ 398.

The Agencies considered the possibility of explosions and concluded that they could tunnel safely. *See id.* ¶ 401. The FEIS requires specific mitigation measures to avoid the risk of explosions, including ventilation systems, monitoring to detect gas, allowing welding only when gas levels are "less than 10% of the lower explosive limit," automatic shutdowns of the power grid and evacuations when gas levels reach 20% of the lower explosive limit, and notifying California's OSHA whenever construction encounters "gas levels in excess of 10% of the lower explosive limit." *Id.* ¶ 402. In response to the comment, "Will exceptional care be taken to avoid Gas explosions?," Metro concluded in the FEIS that, "[w]ith implementation of these mitigation measures, risks associated with hazardous subsurface gases will be reduced to less than significant

levels during both construction and operation of the [subway]." *Id.* ¶ 403.

In the FEIS, the Agencies also acknowledged that the subway "will pass through or near several active or abandoned oil fields, and [that] existing oil wells (active and abandoned) are also present in the Study Area." *Id.* ¶ 207. They observed both that "rocks and soils overlaying the oil fields are known to commonly contain naturally occurring methane and/or hydrogen sulfide gases" and that those gases are hazardous because they can cause explosions *Id.* ¶¶ 208-09. The Agencies also recognized in the FEIS that those "gases can seep into tunnels and other excavations from the surrounding soil and also through discontinuities (fractures, faults, etc.) in bedrock." *Id.* ¶ 210.

While the Agencies described how consultants looked for unmapped wells located below certain open space areas, they deferred until after project approval the effort to identify unmapped wells under existing structures such as the High School and City residences. *See* CR ¶ 190. Though the FTA approved the Project without checking the length of the proposed route for most unmapped wells, *see id.*, evidence in the record demonstrates that Metro has encountered abandoned oil wells in the past, and it and the FTA did not need to know the location of every unknown, abandoned oil well to analyze the impact of encountering them during tunneling. *See* FDR ¶ 407.

As the FEIS explained, if Metro identifies an abandoned oil well on the tunnel alignment and cannot avoid it, Metro will confirm its precise location, remove the upper casing, and properly reabandon the well. *See id.* ¶ 237. If Metro's contractor encounters an unknown well during construction, it will notify Metro, California OSHA, and the California Department of Conservation (Department of Oil, Gas and Geothermal Resources) for well abandonment, and comply with state procedures. *See id.* ¶¶ 242, 413.[36] Though Plaintiffs dispute the process leading up to it, in the FEIS the Agencies concluded that "[w]ith these safeguards, the presence of existing oil wells is not considered a hazard for design or operation of the LPA, including all station, alignment, and station entrance options still under consideration." *Id.* ¶¶ 243, 414. Metro feels that

[36] In response to one of Plaintiffs' studies, Metro stated on May 15, 2012, that "should a well casing be detected [beneath the High School campus], consideration would be given to either adjusting alignment slightly to avoid a casing or to gaining access using ground control procedures, such as grouting or freezing, to excavate and remove the casing prior to tunneling without impacting the buildings above." CR 186.2.

its experience confirms this conclusion, having seen "[t]unnels, through known oil well fields,…safely constructed with no adverse incidents with either hazardous gas or oil casings." *Id.* ¶¶ 244, 415. And, as the FEIS explains, "[i]n recent Los Angeles tunneling history, there have been no oil well incidents related to tunneling, and oil well casings have been safely removed and re-abandoned." *Id.* ¶¶ 245, 415.

The FEIS announced that, for the tunnels, including the tunnels through the City and beneath the High School campus, Metro will use EPBMs or STBMs. *See id.* ¶¶ 217, 395. Where the TBM is likely to encounter hazardous gases, Metro will likely use an STBM – which Metro conceives "as a submarine" that can confine the gas until releasing it in a controlled chamber[37] – to ensure that any gases that are actually encountered make their way to a treatment plant at the surface in a controlled way. *See id.* ¶¶ 218-19, 396.

In the FEIS, the Agencies also explained that tunneling with any method inherently removes soil and introduces the possibility of the surface settling. *See id.* ¶ 246. The FTA and Metro plan to use EPBMs and STBMs because they believe that they can create a tunnel with "little or no disruption at the surface…." *Id.* ¶ 247. The FEIS states that EPBMs and STBMs "developed over the past 30 years now provide reliable control of ground movements around the tunnel and have become a standard throughout the world." *Id.* ¶ 248. It also points out that Metro successfully used such machines on the Metro Gold Line Eastside Extension Project to "pass[] beneath structures with no measurable surface subsidence and no substantiated damage claims from settlement." *Id.* ¶ 249.

The FEIS further indicated that Metro will also conduct reconstruction surveys "to document the existing conditions of buildings along the alignment," and it will put instruments in place to provide information on ground settlement during tunneling. *See id.* ¶ 250. In addition, it will complete additional geotechnical exploration and analysis to predict where removing water presents a greater risk of subsidence, and it will provide additional support to the ground in those locations if it finds any. *See id.* ¶ 251.

[37] Metro has concluded that "[t]he volume of gas (or water containing dissolved gas) released from the soil during TBM tunneling is confined to the excavated material chamber because of the closed-face and gas-tight lining that is installed immediately behind the TBM (though Plaintiffs assert that STBMs do not ensure that other gases in the area, contained in unexcavated soils, will not migrate to the surface as a result of changes in pressure from construction). *See* FDR ¶ 220.

c. Risks *Not* Discussed/Revealed in the FEIS

The FEIS does *not* openly discuss the risk that tunneling through methane poses to *existing* buildings, or explain that tunneling and other construction activities can disturb gas pockets, releasing gas to the surface where it can collect below building foundations and pavement in potentially dangerous concentrations. *See* CR ¶ 174.1. The FEIS also does not discuss the possibility – reflected in the studies of the 1985 Ross explosion – that pockets of methane and hydrogen sulfide can move unpredictably through abandoned oil wells or seismic faults. *See id.* ¶ 174.2.

Although the Agencies did not conclude that NEPA *never* would require them to analyze a possible risk of methane explosions (as noted above, deciding on the facts, instead, that they could implement mitigation measures to tunnel safely and to avoid explosions), the FEIS did not analyze the environmental or public safety impacts of a construction-related explosion or other calamity. *See id.* ¶ 179; FDR ¶ 404. Neither the FEIS nor the later-issued ROD provides any discussion or impact analysis of what would occur in the event of a methane explosion at the High School, or elsewhere along the tunneling alignment. *See* CR ¶ 179. Those documents also did not discuss whether Metro intends to undertake its tunneling, drilling and other activities beneath the High School while it is occupied by students, teachers and administrators. *See id.* The FEIS also did not consider alternatives that would avoid tunneling beneath older buildings that lack both barriers to prevent the intrusion of explosive gases and the ability to monitor for methane accumulation. *See id.* ¶ 180.[38]

While the Agencies acknowledged the risk of encountering known and unknown, abandoned oil wells during tunneling, Plaintiffs feel the Agencies did not acknowledge *all* such risks. *See* FDR ¶ 408. In particular, the FEIS does not assess the potential risks and environmental impacts of horizontal directional drilling beneath the High School

[38] In the wake of the DEIS, BHUSD brought to the Agencies' attention the fact that the DEIS omitted any discussion of the risk of surface explosion to existing and older buildings. *See* CR ¶ 175. Still, the FEIS did not contain any new studies or analysis of the issue. *See id.* ¶ 176. The only discussion of the issue occurred *after* the FEIS was released, in response to the City's previously submitted Exponent Hazard Assessment Study, which pointed out that "faults and existing oil wells…can act as conduits for gases, allowing pockets of concentrated gas to form." *Id.* ¶ 177. In a response dated April 4, 2012, Metro asserted that "the presence of the tunnel will not change the [gas] flow" "to the surface." *Id.* ¶ 178. But this still said nothing about *construction* of the tunnel – activity that, in the words of Metro's predecessor – "may change the pressure and concentration of gases at any specific location." *Id.* ¶ 178.2.

campus (which it will do to investigate the potential presence of abandoned oil well casings in advance of construction) or the removal of a well found as a result. *See* CR ¶¶ 186.1, 187.

Elsewhere along the route, including the alignment located below City residences, the Agencies have stated that they will use a magnetic probe extending from the TBM to detect oil wells while tunneling. *See* CR ¶ 188.1. If an oil well is located in the path of the TBM, the machine will need to stop while the well is properly removed or "re-abandoned" from the surface. *See id.* ¶ 188.2. In April 2012, Exponent concluded that the Agencies did not sufficiently address – the FEIS does not discuss the issue – the potential hazards (including subsidence) that could potentially result from having to stop drilling and remove a casing while a TBM is parked beneath a sensitive structure, such as an older house or apartment building. *See id.* ¶¶ 188.2-188.3. The FTA denies that when such delays occur, Metro may lose control of the tunneling operations and ground settlements could be compromised, and that this condition may lead to damage to buildings and an unnecessary increase in hazard exposure to residents of the City. *See* CR ¶ 189.

d. Air Quality/Noise

In preparing the FEIS, Metro undertook a detailed quantitative analysis of the subway's *operational* impacts on air quality. *See id.* ¶ 235.1. The Agencies analyzed air quality impacts from operation of the subway at two scales: (1) the study area, and (2) the entire region that includes Los Angeles, Ventura, San Bernardino, Riverside, and Orange Counties. *See* FDR ¶ 266. Metro's consultant projected changes in traffic patterns as a result of some people driving to the new subway stations and then used dispersion modeling to conclude that these changes in traffic patterns, and the subway's operation, would not cause any new NAAQS violations or "hot spots." *Id.* ¶¶ 235.1, 235.3. The FEIS concludes that the operation of the subway – once it is built – will not cause any significant air quality issues, because it will promote mass transit rather than driving automobiles. *See id.* ¶ 235.2. Specifically, the FEIS explains that "[a]lthough the air quality impacts will remain significant and unavoidable during construction, in the long-term, the[y] result in air quality benefits, reducing emission of some criteria pollutants." FDR ¶ 460.

The FEIS states that adverse effects from the *construction* could include "dust, noise and traffic disruption." CR ¶ 141.1. The FEIS also acknowledges that "[t]raffic impacts associated with…construction include reduced roadway traffic lanes and temporary street closures that could result in major traffic disruptions and bottlenecks" and that the construction activities associated with a single subway station will cause hundreds of pounds of air pollution to be emitted into the air daily. *See id.* ¶ 136.1.[39]

The Agencies relied on the South Coast Air Quality Management District's ("SCAQMD")[40] regional air quality thresholds to determine whether the subway would cause significant air quality effects/impacts, comparing "pounds per day" data for *construction*-related emissions to those thresholds. *See* FDR ¶¶ 264, 447; CR ¶¶ 152.1-152.2. According to SCAQMD, these regional emission thresholds are set to determine when "mass daily emissions [] may have significant adverse regional effects." CR ¶ 153.1.

While the FEIS presents dispersion modeling as to the Project's *operational* impacts, it does not present dispersion modeling results for the Project's *construction*-related activities and emissions, including those in close proximity to the High School and other sensitive uses. *See id.* ¶¶ 148, 237. In fact, neither the FEIS nor an Addendum the Agencies later added to it (discussed further *infra*) analyze whether local air pollutant concentrations resulting from construction activities will cause or contribute to an exceedance of the NAAQS. *See id.* ¶¶ 151, 156.2. Indeed, the administrative record does not document any effort by FTA to perform "hot spot" analysis for the construction-related air emissions. *See id.* ¶ 238.1. However, except in the context of a discussion of *operational* air quality impacts, the FEIS and Addendum do not disclose that the SCAQMD Thresholds cited as benchmarks therein have nothing to do with *local* air

[39] The Agencies relied on multiple emissions models to develop construction emissions levels. *See* FDR ¶ 444. The road construction model estimates emissions of fugitive dust PM_{10} based on each acre of unpaved activity emitting 20 pounds per day of fugitive dust, and it reduces estimated dust emission by fifty percent if the user plans to use water trucks for dust control. *See id.* ¶ 445. The Agencies applied the EMFAC2007 emission factors to estimate worker and delivery trip emissions. *See id.* ¶ 446.

[40] The State of California created SCAQMD, which "monitors air quality and implements and enforces programs designed to attain and maintain state and federal ambient air quality standards" (though Plaintiffs assert that, with respect to construction emissions, SCAQMD's technique for achieving that goal is to require an analysis of whether project construction would cause or contribute to the contravention of federal ambient air quality standards in the *local* area near the construction site). FDR ¶¶ 265, 457.

quality, but are instead *regional* emission thresholds. *See* CR ¶¶ 153.1, 154.1-154.2, 157.2; FDR ¶ 458.

The FEIS and Addendum reveal expected emissions by pollutant and type of excavation site (calculating the highest daily construction emissions for each major construction element), but the FEIS does not disclose the concentrations that will result from the air pollution. *See* CR ¶¶ 147.1-148; FDR ¶ 267. Locations at which tunneling spoils are excavated (such as Constellation Station) will have emission rates that are higher than station locations that do not involve the removal of tunneling spoils. *See* CR ¶ 147.2. Using the regional emission thresholds, the FTA and Metro initially found that the highest daily construction emissions would exceed SCAQMD thresholds for NOx, PM_{10} and $PM_{2.5}$ pollutants at the stations where they were inserting or removing a TBM. *See* FDR ¶¶ 268, 448. Later analysis showed that the air impacts would only exceed the regional thresholds for NOx at those locations. *See id.* ¶¶ 269, 448. At tunneling spoils removal sites, the emissions of PM_{10} will be up to 140 pounds in a day, emissions of $PM_{2.5}$ will be up to 33 pounds in a day, and emissions of nitrogen oxides (NOx) will be up to 196 pounds in a day. *See* CR 147.2.

The Agencies identified several mitigation measures to attempt to reduce the air quality emission impacts. *See* FDR ¶ 270. As one mitigation measure, the FEIS recommends the use of "Tier 3 or greater engine standards," though the "Tier 3" standard had been superseded by EPA's "Tier 4" standards by the time of the FEIS's publication in 2012. *See* CR ¶¶ 159.1-159.2.

The City recommended a number of specific mitigation measures relating to air quality that neither the FEIS (nor the ROD) adopted or discussed. *See id.* ¶ 141.2. The FTA did not discuss the possibility of requiring air quality monitoring at and near the excavation sites or the maximum use of electrical, rather than diesel, construction equipment. *See id.* ¶ 159.3.[41] Though the laydown area for Constellation Station – which the FTA points out is not a "surface disturbing construction area" – will be the "main base of operations for Phase 2 [construction]," the FTA also did not consider the feasibility of moving the construction staging areas further from the High School. *See id.*

[41] Part of the construction will involve"[d]iesel trains (mine trains)…in the tunnel to transport workers, pre-cast concrete tunnel liner segments, and other materials to the TBM," and to remove some spoils. *See* FDR ¶ 463.

¶¶ 160.1, 160.4.

In the post-FEIS Addendum, the Agencies recognized that emissions would cause temporary adverse impacts, but that apart from NOx emissions, there would be no adverse impacts from construction activity. *See* FDR ¶¶ 271, 456. The Addendum and Metro's findings also report that – with mitigation – there would be no adverse particulate matter impacts, because emissions of particulate matter would be less than the specified SCAQMD Thresholds and on that basis conclude that the "construction-related air quality particulate matter impacts will be reduced to a less than significant level." CR ¶ 152.2; FDR ¶¶ 271, 456.[42]

Insofar as noise is concerned, the FEIS ultimately concluded that "[a]lthough the construction noise effects would be adverse, they would be temporary, occur in an urban environment, and would not be considered substantial." FDR ¶ 481. The FEIS requires Metro to develop a Noise Control Plan that "includes an inventory of construction equipment used during daytime and nighttime hours, an estimate of projected construction noise levels, and locations and types of noise abatement measures that may be required to meet the noise limits specified in the Noise Control and Monitoring Plan." *Id.* ¶ 479. Thus, Metro will monitor the noise; use noise-control devices, temporary noise barriers and sound-control curtains; and limit use of horns, whistles, alarms, and bells…as warning devices. *Id.* ¶ 480.

Because of the plan for extensive truck traffic in the evening hours, the truck noise will be more audible and intrusive because ambient background noise declines after the evening rush hour. *See* CR ¶ 136.3. But the FEIS claims that the tens of thousands of haul trucks rumbling through the City will not result in "an adverse noise effect," though it does not present any acoustical modeling results for any of the construction activities. *See id.* ¶¶ 136.2-136.3. The FEIS did, however, find that excavation of the Rodeo Station station box will result in a temporary adverse noise effect (and that construction will cause significant air quality impacts even after all mitigation measures have been implemented). *See id.* ¶ 218.

[42] The Agencies also separately analyzed the particulate matter emissions from excavated soil, again comparing them to the SCAQMD regional emission thresholds. *See* FDR ¶ 272. They concluded that they would be able to mitigate below those thresholds for excavations as well. *See id.* ¶ 273.

e. 4(f) Analysis

i. The High School

The FEIS identified the High School's campus as a park and some of its buildings as historic properties, and analyzed the campus as a recreational facility.[43] *See* BHUSDR ¶¶ 281, 289. Although Plaintiffs dispute the conclusion (and assert that the analysis did not take into account the future planned underground expansion of the High School campus), the Agencies concluded that the subway would not cause a use of the High School campus or its buildings because it would tunnel deep enough beneath them that the noise and vibration would not be significant. *See* FDR ¶¶ 257, 483; BHUSDR ¶ 282.[44]

In the FEIS, the Agencies differentiated between ground-borne vibration impacts and ground-borne noise impacts.[45] *See* FDR ¶ 490. They assessed ground-borne vibration in velocity decibels, which are vibration amplitudes. *See id.* ¶ 491. When transit system operations cause "excessive levels of vibration" to impact a building's floors and walls, ground-borne noise manifests as a "low-frequency rumble noise." *Id.* ¶ 492. The FTA and Metro assessed ground-borne noise in A-weighted decibels to "account for the human perception of sound with less sensitivity to low pitch and very high pitch sounds." *Id.* ¶ 493.

Again, with the caveat that Plaintiffs believe the Agencies did not consider

[43] Also in March 2012, Metro issued a "Section 4(f) Evaluation Technical Report." *See* BHUSDR ¶¶ 283.1-283.2 That report acknowledged that the High School contains "recreational amenities includ[ing] football field, baseball field, basketball courts, track and field, and soccer field" available for public use, but concluded that these facilities did not have a "major purpose for park or recreational activities." *Id.* ¶ 284.1.

[44] In the FEIS, the FTA adopted a March 2005 Section 4(f) Policy Paper's conclusion that tunneling "uses" a resource only if it "[c]auses disruption that would permanently harm the purposes [of] the park [or] recreation [area],…or" it "[s]ubstantially impairs the historic values of the historic site." FDR ¶ 485. The FEIS concluded that "tunneling would not prevent future development of the Beverly Hills High School campus." *Id.* ¶ 486. It found that the top of the tunnel "would be 55 to 70 feet below the ground surface," and that distance would allow BHUSD to construct "an underground structure over the tunnel at a later date." *Id.* ¶ 487. Specifically, it found that BHUSD could safely set "foundations for a future structure, including deep underground parking," above the tunnel, or, if necessary, it could extend foundations deeper, "so they are adjacent to or between the tunnels." *Id.* ¶ 488.

[45] The FEIS explained that some land uses, like schools, "are more sensitive to noise than others," so the Agencies divide land uses into three categories and measure noise impacts differently. *See* FDR ¶ 494. Under the FTA's guidance, schools fall under Category 3 for "[i]nstitutional land uses with primary daytime and evening use – including schools, libraries, and churches where it is important to avoid interference with such activities as speech, meditation, and concentration on reading material." *Id.* ¶ 495.

BHUSD's planned underground development, the FTA considered the distance from the source "[b]ecause…the level of ground-borne noise is a function of the distance from the tracks to the building," considered the impacts of train frequency (because more frequent, softer trains may be equally annoying as fewer, louder trains), and calculated the vibration and noise from the subway "at 80 vibration-sensitive receivers along" the subway route, stationing one right at the High School's campus. *Id.* ¶¶ 496-97, 499. For the most frequent events, which includes more than 70 trains per day like most rapid transit projects, the Agencies set the ground-borne vibration threshold at 75 velocity decibels, and they set the ground-borne noise threshold at 40 decibels. *See id.* ¶ 498. They calculated – using ground-level predictions, not taking into account the future planned underground expansion – the subway trains would cause 64 velocity decibels of ground-borne vibration, which is less than the 75-velocity decibel threshold; and they calculated 33 decibels of ground-borne noise, which is less than the 40-decibel threshold. *See id.* ¶ 500.

Thus, commenting on the *operation* of the subway – not whether *construction* would cause air pollution and noise resulting in a constructive use of the High School or its playing fields – the Agencies concluded that "[t]here would be no impairments to the properties due to noise, vibration, or visual quality [and] therefore, there is no use under Section 4(f)." *Id.* ¶ 501. In addition, the FEIS concludes that the High School campus "is not adjacent to surface disturbing construction areas," though Plaintiffs assert that the High School's lacrosse field is directly adjacent to the construction staging and laydown area for Constellation Station and the FTA failed to consider the air pollution and noise resulting from the activities that will still occur at the construction staging and laydown area. *See id.* ¶¶ 465, 502.

ii. Reeves Park

The FEIS provided notice that the Agencies were analyzing effects on Reeves Park. *See id.* ¶ 471. In the FEIS, the Agencies stated, in a column headed "Direct Use," that there would be "[n]o use" and "[n]o direct use of land," under Section 4(f), with respect to the park. *See id.* ¶ 256.

Though the DEIS stated only that it *may* remove Ace Gallery, *see id.* ¶ 470, the FEIS demonstrated that Metro *will* remove Ace Gallery to provide a TBM staging area

and ultimately the Wilshire/Rodeo Station entrance. *See id.* ¶ 469. Though the DEIS failed to identify Reeves park as a park adjoining the construction of the Rodeo Station, by the time of the FEIS, the Agencies had identified the park as adjacent to the primary staging site (the Ace Gallery building location) for construction of the Rodeo Station. *See* CR ¶¶ 214-15. In particular, in an email sent on September 30, 2011, the FTA noted that Reeves Park is considered a Section 4(f) resource. *See id.* ¶ 219. However, although the FEIS ultimately included a noise analysis (which the City asserts is not an analysis of whether there will be use), Metro's *draft* Section 4(f) report provided no evaluation of whether the Project would use this resource; the report's entire analysis of the Project's use of park and recreational resources consisted of a single sentence, which cross-referenced a single table. *See id.* ¶ 220.

This missing analysis initially alarmed FTA staff (though the FTA indicates that it later completed further analysis and substantiated its legal conclusions). *See id.* ¶¶ 45.1, 221; BHUSDR ¶ 288. In particular, they offered the following comments: "I would think there would be some impact upon the park during the construction period. [Has] any discussion occurred amongst the team or with the City of Beverly Hills regarding this potential impact?"; "Check out the property immediately south of Ace Gallery [Reeves Park]. Um…constructive use anyone?"; "In some places, there is an insufficient description of what the use would be… This is a particular concern in one of the tables that provides a summary of what the 'use' would be."; "[L]arge portions of [Metro's 4(f) report] did not reflect our comments…. Frankly, it's a poor effort that makes one question whether the author has enough familiarity with [the applicable Transportation Act provisions], Part 774 and FHWA's Policy Paper [on Section 4(f)]." CR ¶ 221.[46] However, in response to one of these emails, another FTA staffer noted in an email his "belie[f]" that there was no "need to worry about 'constructive use'" of the park because "there is no substantial noise and visual impairments as a result of the project [and] [p]eople can still access the park during construction and post construction; the project will not interfere with the use of the park." *Id.* ¶ 222.1; FDR ¶¶ 255, 472, 482. It is this email that the Agencies point to for their conclusion that subway construction would not

[46] This last criticism originally came shortly after BHUSD provided Metro with a "Beverly Hills High School Plan Implications for Metro" letter, on October 3, 2011. *See* BHUSDR ¶ 288.

substantially impair (considering noise or visual appearance), or use or constructively use Reeves Park. *See* FDR ¶¶ 255, 472, 482. Yet, that email did not address the noise and air quality impacts that the FEIS later concluded would result during the seven-year construction period. *See* CR ¶ 222.2.

While the FEIS concluded that the subway would not impact Reeves Park and there would be no direct use of it, the FTA ignored that Metro had revised later versions of its 4(f) reports to omit any discussion of use of Reeves Park at all. *See id.* ¶ 45.2. And Chapter 5 of the FEIS (titled "Section 4(f) Evaluation") does not contain any assessment of whether the intensive construction activities adjacent to Reeves Park would constitute a *constructive* use of that resource. *See id.* ¶ 224.

In the DEIS, Table 5-1 included a column labeled "Assessed for Constructive Use." *See id.* ¶ 216.1. For reasons not disclosed in the record, however, the FEIS version of Table 5-1 omitted this column. *See id.* ¶ 216.2. Although the FEIS assessed noise impacts on Reeves Park, the mere inclusion of Reeves Park in Table 5-1 in the FEIS did not present any analysis of whether that resource would be subject to a "constructive use" by way of the years of construction activities at the adjacent Ace Gallery location. *See id.* ¶ 216.3.

In their noise analysis in the FEIS, the Agencies studied existing noise levels at the Wilshire/Rodeo station, given that Reeves Park would be adjacent to the construction there. *See* FDR ¶ 473. The FEIS found that "[w]hen the construction site for the station box is open, noise from construction equipment will be audible at street level and result in an adverse effect." *Id.* ¶ 474. Construction will produce "the highest levels of construction noise with unmitigated noise levels above the criteria" in the subway's technical report. *See id.* ¶ 475. The Agencies expect excavation and installation of street decking to last "four to five months," but "[a]s the excavation continues below street level, the noise of construction will be reduced because the sides of the excavated opening will act as a sound barrier." *Id.* ¶ 476. When Metro can cover the opening "with temporary decking, construction noise at the surface will no longer be noticeable above the traffic noise." *Id.* ¶ 477. The FEIS therefore concluded that "the excavation of the station box will result in a *temporary* adverse noise effect." *Id.* ¶ 478 (emphasis added).

3. Timeline of Post-FEIS/Pre-ROD Communications and Studies

The comment period on an FEIS is 30 days before issuing an ROD, although "persons may make comments before the final decision." *Id.* ¶ 277. Thus, the NEPA regulations would have allowed the FTA to issue the ROD as early as April 22, 2012. *See id.* ¶ 282.2. Consequently, upon release of the FEIS, the Agencies immediately noticed a hearing to approve the project the following month. *See* BHUSDR ¶ 220.

Seismic studies continued to be submitted by Plaintiffs after the Agencies issued the FEIS (and, as discussed further below, even after the issuance of the ROD). *See* FDR ¶ 368. After the release of the FEIS, the City, BHUSD and others also submitted numerous comments, alleging that the Project, as described in the FEIS, would severely impact and impose great risk to human health and safety and that such impacts and possible mitigation measures were not adequately disclosed or analyzed in the FEIS. *See* CR ¶ 61. In addition, the City and other concerned individuals commented that the FEIS's changes to the Project and the new information added after the DEIS's release, including the Tunneling Report and the Fault Report, required the Agencies to prepare a SEIS for public comment prior to approving the Project. *See id.* ¶ 62. But the FTA rejected the contentions and the Agencies did not prepare a SEIS. *See id.*

On March 23, 2012 – the day the FTA published the Notice of Availability for the FEIS – BHUSD again wrote to the FTA. *See* BHUSDR ¶ 225. It expressed disappointment with the release of the FEIS for public comment despite the FTA's knowledge of the impending release of the seismic report BHUSD had commissioned, which BHUSD believed would "prove the presence or absence of a seismic fault in Century City." *Id.* Again, BHUSD asserted that the FEIS and any decisions based on it should be delayed until the information from this study was available "to assure compliance with [NEPA]." *Id.* ¶ 226. BHUSD also requested that the 30-day public comment period on the FEIS be extended to at least 60 days. *See id.*; CR ¶ 59.

On March 27, 2012, BHUSD similarly requested that Metro extend the 30-day NEPA public comment period and delay approval of the FEIS to allow for consideration of the findings in BHUSD's forthcoming seismic report. *See* CR ¶ 59; BHUSDR ¶ 227. Then, on April 3, 2012, BHUSD's Board President wrote to the Chairman of Metro's Board of Directors asking for a postponement of consideration of the FEIS until May 30,

2012, indicating that work had been done to complete the study as soon as possible and that BHUSD had incurred expenses in excess of $1,000,000 "for a comprehensive geotechnical investigation to evaluate Metro's conclusions." *See* BHUSDR ¶¶ 228-229.1.

On April 3, 2012, the Beverly Hills City Council held an "Independent Review of Westside Subway Extension Century City Area Fault Investigation and Tunneling Safety Reports Presentation," given by S&W. *See id.* ¶ 230. The FTA asked PGH for an assessment of the meeting. *See id.* Though the FTA asserts "later analyses overruled th[ese] preliminary impression[s]," PGH or its employees commented on the presentation by saying, in part, that "[t]here are concerns that do warrant additional geotechnical and fault investigations in the area of the Constellation Station. These should be recommended to be undertaken as part of the next phases of design." and "[c]oncerning the investigation, it would seem that Metro/PB should have considered more detailed investigation of the Constellation sit [*sic*]…. Do we have a geotech on board? If so, he/she should take a look at the technical issues raised. There seems to be some merit to S&W's conclusion." *Id.* ¶¶ 231-32.

On April 4, 2012, Metro issued a response to Exponent's February 7, 2012 report, disputing its findings. *See id.* ¶ 161.2.

On April 6, 2012, the FTA granted a 30-day extension on the public comment period (from 30 to 60 days), extending it to May 22, 2012 "[g]iven the importance of the Project" (but rejected a request to recirculate the FEIS as a revised DEIS). *See* CR ¶ 67; BHUSDR ¶¶ 219, 233; FDR ¶ 283. On that same day, Metro rejected these requests, informing BHUSD that the Metro Board Planning and Programming Committee would consider the FEIS on April 18, 2012, and that it would be considered by the full Metro Board on April 26, 2012. *See* CR ¶¶ 67, 69.1; BHUSDR ¶ 234.1.[47] In a letter dated April 10, 2012, BHUSD informed Metro of the FTA's decision to grant an extension, and renewed its request with Metro in light of the FTA's recognition of its importance. *See* BHUSDR ¶ 234.1.

[47] Evidence in the record reflects Metro's concern about avoiding delays, including a request that the FTA "consider reducing the 45-day Public Review Period" following the FEIS to avoid jeopardizing the NEPA schedule. *See* BHUSDR ¶¶ 218.1-218.2, 234.1. In December 2011, the FTA agreed to use a 30-day comment period, down from 45 days, but later extended the FEIS comment deadline from 30 days to 60 days, as set forth above. *See id.* ¶ 219.

As it had in its response to Exponent's report, in an April 17, 2012 response, Metro rejected the conclusions S&W had reached in its March 8, 2012 report. *See id.* ¶ 168. Metro acknowledged therein that it had completed a more thorough analysis of the stations on Santa Monica Boulevard, offering the explanation that it did so because it "tried very hard to find a suitable site on Santa Monica Boulevard which required more investigation." FDR ¶ 365. Metro also offered in that response that it had evidence of faulting on Santa Monica Boulevard "based on regional mapping and the geomorphology," but "the geomorphic evidence is that the [Constellation Station] site is not located in an area of active faulting." *Id.* ¶ 366.

On April 18, 2012, Leighton released its first report on the possible fault presence along the WBHL. *See* BHUSDR ¶¶ 224, 238.1; CR ¶ 63. Leighton's findings included that the faults identified by Metro as allegedly crossing both the High School campus and the Century Park East Station did not exist and that there were no active seismic faults in the areas around the High School campus that were tested. *See* CR ¶ 63. Leighton used "site-specific trenching and logging," "[d]eep borings" and the "recovery and interpretation of continuous cores and cone penetrometer data," "expos[ing] sediments and soils…as being unfaulted and substantially older than 11,500 years, the defining number for an active fault in California." BHUSDR ¶ 238.2. Leighton concluded – unlike Metro, which rejected Leighton's analysis in a May 14, 2012 response – that there was no evidence of active faults "associated with the WBHL hav[ing] ruptured to the surface for at least 100,000 years and as such [it] poses no hazard to the BHHS campus or nearby structures."[48] *See* BHUSDR ¶¶ 223, 238.2; CR ¶ 63.

Specifically, Leighton set out what it considered four "significant findings" (which Metro later rejected):

> We find direct geologic evidence that there has been no faulting associated with the WBHL at BHHS for at least 70,000 to 100,000 years and perhaps more than 500,000 years. We find direct geologic evidence to refute the north-south WBHL faults mapped by Parsons through BHHS. Fault trenches specifically excavated across the surface trace of these faults…did not encounter evidence of active faulting. We find direct geologic evidence that the escarpment below BHHS was created by lateral erosion from Benedict Canyon Wash more than 100,000 years ago and no

[48] California law defines an "active fault" as one which has broken the surface within the past 11,000 years. *See* CR ¶ 63.

> evidence to suggest an active fault origin for this escarpment. Based on our study no fault-related structural setbacks associated with the WBHL are recommended for BHHS.

Id. ¶¶ 223, 239.

Also on April 18, 2012, BHUSD objected to the Metro Planning and Programming Committee's decision to proceed with consideration of the FEIS. *See id.* ¶¶ 235.1-235.2. In that same letter, BHUSD noted that it was in the process of doing the trenching and sampling work that Metro did not do and that BHUSD's investigation would be overseen by CGS. *See* CR ¶ 194.2. But the Planning and Programming Committee recommended the FEIS for full board approval at the scheduled April 26, 2012 board meeting. *See* BHUSDR ¶ 236; CR ¶ 69.1.

Shortly before the Metro Board meeting, in an April 23, 2012 letter to Metro, the City raised specific concerns in connection with the environmental analysis presented in the FEIS. *See* CR ¶ 65. These included that the FEIS: changed the alignment within the City without providing the City and members of the public a meaningful opportunity to comment on the underlying assumptions and analyses that allegedly informed the decision; failed to adequately disclose the air quality, noise, and traffic impacts of the construction work; failed to include any modeling of construction noise impacts or properly disclose construction-related noise impacts; failed to analyze the impact of construction traffic on area streets; failed to analyze the local impacts of air pollutants related to construction; failed to discuss the public health impacts of the construction-related air pollution; failed to include customary measures to mitigate construction-related air emissions; and failed to adequately analyze impacts to the City's tax revenue resulting from construction-related disruptions and the resulting compromise of City services to its residents. *See id.* The letter requested that a new public comment period be established on the FEIS, that it be treated as a revised DEIS, and that the Agencies prepare a revised FEIS to allow adequate opportunity for public comment and to allow the Agencies to fix what the City had identified as deficiencies. *See id.* ¶ 66.

That same day, based on the findings in Leighton's April 23 report, BHUSD again requested that the Metro Board postpone certification of the FEIS to allow for completion of the additional seismic studies by Leighton of the Santa Monica Boulevard

sites. *See* BHUSDR ¶ 241.1. BHUSD expected those additional studies to be completed during the extended FEIS comment period the FTA had provided. *See id.* In doing so, BHUSD expressed to Metro its opinion that Metro would be "ignoring its obligations under [CEQA] and denying the public information that is critical to its decision" if Metro were to proceed with its certification decision on April 26, 2012, notwithstanding the contents of Leighton's report and the FTA's decision to wait. *See id.* ¶ 241.2.

Also on April 23, 2012, the City asked Metro for an adjudicatory hearing with an opportunity to cross-examine witnesses, pursuant to California Public Utilities Code § 30639. *See* CR ¶ 69.2. Nonetheless, Metro went ahead with the April 26 hearing. *See id.* ¶ 70.1; BHUSDR ¶ 243.1. At the end of that public hearing, the Metro Board certified the FEIS under CEQA and approved Phase 1 of the Project, which extended the Purple Line heavy rail subway 3.8 miles from its current terminus at the Western Station to the planned La Cienega Station in Beverly Hills. *See* CR ¶ 70.1. Even though Metro indicated to the public that it was making route determinations only on Phase 1, which did not include the route to Century City, Metro also made findings that the Tunneling Report and Fault Report rendered a station on Santa Monica "infeasible" and thus "influence, if not determine, the selection of the Century City Constellation Station." *Id.* ¶ 70.2. Its certification stated further that "there is clear evidence that the station locations on Santa Monica Boulevard (both east and west) would be in active fault zones and are not viable locations for station options. The station on Constellation Boulevard would not be within an active fault zone and is a viable option for a station location." BHUSDR ¶ 243.3. On or about May 3, 2012, the City received notice that Metro had granted its request for a Public Utilities Code § 30639 hearing, setting it for May 17, 2012. *See* CR ¶ 71.

On May 8, 2012, BHUSD mailed a copy of Leighton's April 23 report to the FTA. *See* BHUSDR ¶ 244.1. Then, on May 14, 2012, BHUSD wrote to the FTA to ask for an additional 30-day extension of the public comment period in order to allow more time for completion of Leighton's two further seismic studies at Santa Monica Boulevard and for the FTA to respond to BHUSD's outstanding Freedom of Information Act requests pertaining to cost estimates, ridership projections and engineering assumptions in the FEIS. *See id.* ¶¶ 246-247.1; CR ¶ 68. In a letter dated May 16, 2012, the FTA

denied this request. *See* BHUSDR ¶ 247.2; CR ¶ 68.

Meanwhile, as referenced briefly above, on May 14, 2012, Metro issued a report entitled "Response to Leighton Consulting Report" demonstrating that Metro had analyzed Leighton's borings and correlated the new data, and asserting that it had used the additional data to make its analysis of the WBHL more precise.[49] *See* BHUSDR ¶ 245.1; FDR ¶¶ 350-51. In that responsive report, Metro took the position that there is nothing in the Leighton report data that contradicts Metro's conclusions that there is no safe location to site a station on Santa Monica Boulevard in Century City." *Id.* ¶ 245.3; CR ¶ 63.

In response to BHUSD's trenching that showed no active earthquake fault under the High School, the Agencies did not dispute the accuracy of this report (which CGS later confirmed on March 15, 2013). *See* CR ¶ 196. However, Metro rejected Leighton's assertion that "trenching is…the single most definitive tool to determine the activity or inactivity of faults." FDR ¶¶ 352, 358. In its view, the weakness in trenching is that "[i]n the absence of continuous trench exposure showing unbroken deposits or soils of known age, it is not possible to prove that any particular fault strand that Metro identified within the [WBHL] is active or inactive." *Id.* ¶ 353. In addition, it found that "[g]aps of even a few feet between adjacent trenches can result in surface faults being missed." *Id.* ¶ 354. It therefore felt that, for trenching to be conclusive, Metro would have had to "expos[e]…the entire width of the potential fault zone." *Id.* ¶ 355. Consequently, the responsive report commented that "given the urban infrastructure and logistical constraints, especially the presence of subsurface infrastructure (e.g., storm drains, water mains, gas, sewer, and electric lines), it will be impossible to confirm that all of the faults that Metro has identified along the WBHL are inactive, particularly in the area of Santa

[49] Two different scientists, Dr. Miles Kenney and Philip Buchiarelli, a principal geologist with Leighton, later commented (in July and May 2012, respectively) that in response to Leighton's trenching and report, Metro had relocated or changed the length of faults that it had previously inferred. *See* BHUSDR ¶¶ 245.5, 260.2. Indeed, after acknowledging in its response to Leighton's report that "the new Leighton data, combined with previously collected data, provide[d] a more comprehensive data set" and stating that it "confirm[ed] the presence of a zone of right-lateral strike-slip faulting along the WBHL through the Century City area and through the Santa Monica Boulevard station location," Metro revised the fault map in that response by removing, shortening or shifting seven of its predicted fault lines where they intersected with Leighton trenches. *See* CR ¶¶ 64, 198.

Monica Boulevard." BHUSDR ¶ 245.4.

The May 17 Public Utilities Code § 30639 hearing (to address the reasonableness of the Century City station location) lasted approximately 3-1/2 hours, but the City was not permitted to cross-examine any of Metro's witnesses. *See* CR ¶ 72; BHUSDR ¶¶ 237, 248.1.[50] In fact, Metro did not present any witnesses, but simply offered into evidence the expert reports it had previously submitted. *See* CR ¶ 73.2. The City presented testimony from six witnesses. *See id.* ¶ 73.1. The City's and BHUSD's experts gave their views as to the origins of the WBHL, the aging of the faults plotted by Metro's consultants on the WBHL and SMFZ, the failures of Metro's studies to adequately identify and investigate geologic uncertainties of the Constellation Station location (along with the presence of methane), the variations in the rigor of the reviews between Constellation Station and Santa Monica Station, and the concern that tunneling under the High School would impede the High School's development. *See* BHUSDR ¶¶ 248.2-249.

At that hearing, the City also addressed the issue of alternative alignments to Constellation Station. When the FEIS was published without an analysis of alternative routes to Constellation Station, the City had engaged experts to develop its own alternative alignments for consideration by the Agencies. *See* CR ¶ 209. At the hearing (nineteen months after the Agencies issued the DEIS, and three months after they issued the FEIS), the City offered evidence demonstrating that at least three alternative alignments (with sharp curves) between Rodeo Station and Constellation Station were feasible and did not extend under residential homes or the High School campus. *See id.* ¶ 73.1; FDR ¶ 312. Via letter, the City proposed these same alignments directly to the FTA five days later. *See* FDR ¶ 312; CR ¶¶ 76.2, 209.

At BHUSD's request, and in response to the report issued by Leighton, the CGS also issued a report on May 21, 2012. *See* FDR ¶ 193. That report suggested that BHUSD undertake additional seismic investigations at the High School, stating that "the fault rupture hazard issues at this site are not adequately assessed in the [Leighton] report," and indicating that CGS was "concerned with the gaps between [Leighton's]

[50] The sufficiency of the Public Utilities Code hearing was a significant focus of the state court litigation concerning the Project. *See Beverly Hills Unified Sch. Dist. v. L.A. Cnty. Metro. Transp. Auth.*, 241 Cal.App.4th 627, 668-75 (2015).

fault trenches at the [High School campus]." BHUSDR ¶ 252; FDR ¶ 356.

That same day, BHUSD again wrote Metro to request postponement of a decision on Phase 2 and Phase 3 of the Project and to "convene a meeting of all retained expert geologists who have studied these locations, including geologists from the CGS, to formulate a consensus on the appropriate testing protocol necessary to resolve the outstanding pertinent questions." BHUSDR ¶¶ 251.1-251.2.

The FEIS review period closed on May 22, 2012, the same day as the City sent its proposed-alignment letter to the FTA. *See* FDR ¶¶ 284, 312; CR ¶ 209. Although the FTA could have issued the ROD that day, it again waited and continued accepting and reviewing comments on the FEIS until it finally issued the ROD on August 9, 2012. *See* FDR ¶¶ 285, 342.

On May 24, 2012, the Metro Board met and adopted its decision from the May 17, 2012 PUC hearing that the Constellation Station and the related subway tunnel alignment beneath the High School were reasonable. *See* BHUSDR ¶ 253.1. It approved Phases 2 and 3 of the Project from the La Cienega Station to the Westwood/VA station. *See* CR ¶ 74.1. The approved alignment included Constellation Station, tunneling beneath the High School, and construction lay-down areas. *See id.* ¶ 74.2. In addition, the Metro Board adopted the aforementioned Addendum to the FEIS which contained significant revisions to the air quality impacts of the Project, reducing the Project's construction-related air emissions from what had been disclosed in the FEIS. *See id.* ¶ 75; BHUSDR ¶ 254.1. This Addendum was publicly distributed for the first time at this meeting. *See* CR ¶ 75.

At that final approval hearing on May 24, Metro's staff asserted that the City's proposed alignments were unreasonable or infeasible, offering oral analysis of the multiple features it believed made them so: 1) the routes were too narrow because they would not fit standard-sized tunnels; 2) the sharp curves required slowing to 25 mph or slower for some of the curves, whereas the current-slowest corner only requires reducing speed to 45 mph (though the FEIS itself explains that trains must slow *by* as much as 25 mph as they approach Constellation Station even under the adopted alignment); 3) the alignments require passing under the footings for high-rise buildings; and 4) the routes would require lowering Constellation Station at a cost of $30 million. *See* FDR ¶¶ 315-

19; CR ¶¶ 210-211.1. Yet, the record demonstrates that the more preliminary choice itself between Santa Monica Station and Constellation Station (i.e., the move from a straighter to a more curved track) "would have [no] significant impact on transit travel time[s]" despite the addition of a curve to Constellation Station. *See* CR ¶ 212. In addition, there is nothing in the record demonstrating an empirical comparison between any additional reduction of speed (and the concomitant increase in travel time) assertedly required under the City's proposed alternative and the alignment Metro selected. *See id.*

The following day, on May 25, 2012, BHUSD submitted a supplemental comment letter on the FEIS to the FTA in response to the distribution of the Addendum, offering the comment/objection that the changes were made without public review or opportunity for comment. *See* BHUSDR ¶¶ 254.1-254.2; CR ¶ 77. BHUSD also requested in that letter that the FTA complete a SEIS prior to issuing the ROD. *See* CR ¶ 77.

In June 2012, BHUSD sent the FTA three documents: the May 21, 2012 CGS report (on June 6), Leighton's initial response to the May 21 CGS report (on June 11), and the June 27, 2012 preliminary report by KGS (on June 27). *See id.* ¶¶ 78-80; BHUSDR ¶¶ 255.1, 256.1. In providing the CGS report, BHUSD asserted that the report concluded that additional seismic testing was warranted, and was "further evidence" that an SEIS was required. *See* BHUSDR ¶¶ 255.1-255.2. And in providing Leighton's response to the CGS report, BHUSD took the position that Leighton's response reiterated that Leighton's findings had demonstrated the absence of active faulting on the High School campus (though Metro disputed Leighton's studies in this regard). *See id.* ¶ 256.2. BHUSD also again called for an SEIS. *See id.* ¶ 256.3.

KGS's preliminary report determined that the seismic conclusions reached by Metro were "not supported by the data or by rigorous analysis" and were "not consistent with emerging data and analysis from other sources." *Id.* ¶ 258.1; CR ¶¶ 78-80. KGS's preliminary report also identified what it viewed as problems with Metro's methodology, including "disproportionate reliance on widely spaced CPT data with relatively few continuous core borings" and "a lack of any fault trenching or age dating of the local sediments." BHUSDR ¶ 258.2. However, in the ROD the FTA later disagreed. *See id.* ¶¶ 258.1-258.2.

On July 2, 2012, BHUSD wrote a letter to the FTA requesting that the FTA appoint a PMOC "to assess the presence of active earthquake faults in Century City, including those near the selected Constellation Boulevard location, and to examine the public safety risks of tunneling through the BHHS campus." *Id.* ¶ 259.1. The letter also asserted that, since the release of the FEIS, "numerous seismic experts have issued a series of studies highlighting serious technical deficiencies in the FEIS document," which BHUSD felt required an SEIS to "review[]…and evaluat[e] the presence of active earthquake faults in Century City and related impacts of the Project." *Id.* ¶ 259.2. It counted and enumerated 12 reports, counter-reports, and counter-counter-reports regarding the seismic and safety issues that various parties had issued – and BHUSD had sent to the FTA – since the Agencies had issued the DEIS, while also noting that "[a]t least two more studies are expected to be released in the near future…." CR ¶ 81.1; FDR ¶¶ 286, 288-89.[51] BHUSD's letter listed important questions that it felt had been raised and that were still outstanding, including "whether there are active faults in the vicinity of Century City," "whether Metro performed adequate seismic testing along Constellation Boulevard as part of its environmental impact study for the Project," and "whether it is possible to safely tunnel through the [High School] campus." BHUSDR ¶ 259.2. BHUSD also reiterated its request for a SEIS. *See* CR ¶ 81.1.[52]

BHUSD wrote to the FTA again on July 23, 2012, this time enclosing a July 18, 2012, *final* report from KGS. *See* BHUSDR ¶ 260.1; CR ¶ 82. That report similarly contradicted Metro's seismic studies regarding the presence of active earthquake faults in Century City. *See* BHUSDR ¶ 260.1; CR ¶ 82. It repeated KGS's preliminary report's conclusions, commenting further that Metro's studies "provided absolutely no data regarding fault activity because neither study provided any quantitative sediment age data" and "did not provide any fault strike data with the exception of attempting to connect certain faults identified on local transects which by its nature is speculative." BHUSDR ¶ 260.2. It also criticized Metro's response to Leighton's report, noting that it

[51] Eventually, at least 16 reports, counter-reports, and counter-counter-reports were completed regarding seismic issues and safety. *See* CR ¶ 81.2.

[52] By the FTA's own count, between the issuance of the FEIS and ROD, BHUSD eventually sent nine letters in total requesting that the FTA issue a SEIS. *See* CR ¶ 81.2; FDR ¶ 287. The FTA ultimately denied all of the requests. *See* FDR ¶¶ 291, 293.

had adjusted the location of certain faults identified in previous Metro studies: "[w]here a Leighton fault trench and boring series showed that a [fault identified by Metro] did not exist, [Metro] either shortened the proposed fault length so that it did not extend to the Leighton trench, or moved the fault location slightly to just slide between a small gap between Leighton trench locations." *Id.* BHUSD also again requested a PMOC with regard to siting of the Century City station and "review [of] Metro's assertion that a subway station along Santa Monica Boulevard is not viable." *Id.* ¶ 261.[53]

On July 25, 2012, Metro issued a response to the final KGS report, stating that "there is no new information in this report that changes previous recommendations by Metro's technical team." *Id.* ¶ 262. On August 8, 2012, the FTA denied BHUSD's requests for an SDEIS, indicating that "[t]here have been no changes to the proposed action or new circumstances or information necessitating the preparation of a SDEIS under 23 C.F.R. § 7771.130(a)." *Id.* ¶ 263.

F. The ROD

On August 9, 2012, the FTA issued its ROD, prepared by Metro, which relied upon the analysis contained in the FEIS and Addendum. BHUSDR ¶ 264.1; FDR ¶ 290; CR ¶¶ 83-84.1. The FTA issued the ROD after accepting comments on Metro's seismic studies for approximately nine months. *See* FDR ¶ 274.[54] In the ROD, the FTA defined the Project's design parameters, approved the environmental analysis in the FEIS as sufficient under NEPA and advanced the Project to the next stage of eligibility for FTA funds. *See* CR ¶¶ 84.2.

In the ROD, the FTA also recited Metro's findings regarding the location of active seismic faults and ridership projections, as follows:

> The Century City Santa Monica Station at Century Park East is located above a northern extension of the Newport-Inglewood Fault zone, and thus was not considered a viable option for the station. In the FEIS, the location of the Century City Santa Monica Station (at Century Park East) was shifted farther east to Avenue of the Stars in an attempt to minimize

[53] The FTA highlights that Plaintiffs' consultants and the CGS issued all of the aforementioned reports before the FTA issued the ROD, but Plaintiffs respond assert that many of the reports were designated as interim or preliminary. *See* FDR ¶ 195. The FTA also points out that Metro responded to these reports. *See id.* ¶ 194.

[54] Agencies have discretion in setting time limits, though they are not allowed to disregard new information that is significant to a project's impacts or effects or the choice between alternatives. *See* FDR ¶ 275.

> seismic issues. Based on seismic and geotechnical testing and refined seismic analysis conducted in Century City, it was determined that the location of the Century City Santa Monica Station at Avenue of the Stars was directly above the Santa Monica Fault zone and thus not considered a viable option for the Century City Station. The Constellation Station site showed no evidence of faulting…. A station on Constellation Boulevard would be more centrally located within Century City. Despite the longer alignment and slight increase in travel time, compared to the Century City Santa Monica Station, the ridership model predicted more than 3,000 additional daily boardings at the Century City Constellation Station and the seven new Purple Line stations west of Wilshire/Western.

BHUSDR ¶ 264.2; CR ¶¶ 84.4, 192.2.

The ROD also approved the decision to tunnel beneath the High School, deciding – despite objections by Plaintiffs and others – to approve the Project in the exact configuration that Metro had proposed. *See* CR ¶¶ 84.3, 85. Though there was evidence to the contrary, when the FTA issued the ROD, it specifically concluded that "tunneling can be safely carried out beneath the Beverly Hills High School campus," and that "[t]unneling underneath Beverly Hills High School would not prevent future development of the Beverly Hills High School Campus" because "[t]he crown of the tunnels has been set 55 to 70 feet below the ground surface, which is sufficient depth for the future construction of multiple levels of underground structures above the tunnels." FDR ¶ 292. The ROD (like the August 2012 Summary of Comments on the FEIS) does not mention the City's proposed alternatives (which were provided after the release of the FEIS). *See* CR ¶ 213.

In the ROD, the FTA also announced its final agency action and determinations regarding Section 4(f) and Section 176 of the CAA. *See* CR ¶ 86. The FTA made a CAA finding in its ROD, finding that the Project "would neither cause new PM_{10} or $PM_{2.5}$ hot spots nor increase the frequency or severity of existing PM_{10} or $PM_{2.5}$ violations." *Id.* ¶ 234. But the ROD's conformity determination itself does not even mention *construction* emissions. *See id.* ¶ 238.2.

A "Mitigation Monitoring and Reporting Plan" was attached as "Attachment A" to the ROD. *See* BHUSDR ¶ 265.1. This plan included a mitigation measure for the geologic hazard presented by the seismic conditions at Century City: "The Metro Tunnel Advisory Panel (TAP) will review designs with respect to geologic hazards in areas

identified as higher risk [including] the Century City area (seismic risk)." *Id.* ¶ 265.2. The ROD – via the Mitigation Monitoring and Reporting Plan – also requires Metro and its contractors to monitor and record air quality at the worksites; alter construction "to maintain a safe working atmosphere;" comply with federal, state, and local regulations like the SCAQMD thresholds; prohibit contractors from unnecessarily idling heavy equipment; require contractors to maintain and to tune engines consistent with the manufacturer's specifications; require equipment to meet EPA certification levels if such levels apply to the equipment; encourage its contractors to lease new, clean equipment meeting the most stringent of applicable federal or state standards (referencing "Tier 3" equipment) or best available emissions control technologies on all equipment; and locate equipment and staging zones "away from sensitive receptors and fresh air intakes to buildings and air conditioners" (though Plaintiffs assert that this is inconsistent with placing a construction laydown area next to one of the High School's playing fields). *See* FDR ¶¶ 450-54, 464. It also requires that Metro water the excavation and surface soil regularly, to wash streets near station construction regularly, to water surface during wind to keep dust from blowing, to install wind fencing, and to limit speeds for hauling material and equipment. *See id.* ¶ 461.[55]

In the ROD, the FTA rejected BHUSD's contentions in its February 29, 2012 letter, about purported errors in Metro's studies, *see* BHUSDR ¶ 163.1. The ROD also rejected the findings of KGS's preliminary report. *See id.* ¶¶ 258.1-258.2. The ROD also dismissed the City's and BHUSD's ongoing request for an SEIS. *See* CR ¶ 84.5.

Two weeks after the ROD's issuance, on August 23, 2012, the FTA issued a "Limitation on Claims Against Proposed Public Transportation Projects" in the Federal Register. *See* BHUSDR ¶ 266.

G. Post-ROD Studies and Communications

A number of seismic studies were completed in 2012 and 2013, after the ROD was issued. *See* CR ¶ 199; FDR ¶ 368. They included studies from Feffer Geological Consulting ("Feffer") and Geocon West, Inc. ("Geocon"); Leighton; the CGS; and KGS. *See* CR ¶ 199. Plaintiffs repeatedly requested that the FTA set aside the ROD to consider

[55] As they had explained in the FEIS, the Agencies expected these measures to reduce air quality particulate matter impacts, but they acknowledged that they would be unlikely to maintain NOx levels "below the SCAQMD threshold during construction." FDR ¶¶ 455, 462.

the then-ongoing studies by CGS and the technical consultants to BHUSD, which analyze seismic conditions within Century City. *See* CR ¶ 88.

On August 24, 2012, Feffer issued a "Report of Fault Rupture Hazard Investigation, 10000 Santa Monica Boulevard, Los Angeles, California" (the "Feffer Report"), prepared under the supervision of the City of Los Angeles in connection with a 39-story office development planned at 10000 Santa Monica Boulevard (located near the southeast corner of Santa Monica Boulevard and Century Park East). *See* BHUSDR ¶ 267; CR ¶¶ 199, 201.1. The study of the 10000 Santa Monica Boulevard site – located directly atop the fault lines that Metro had identified in the Fault Report and the Tunneling Report – entailed "a site-specific fault rupture hazard investigation to evaluate the presence of the faults identified by Parsons…at the 10000 Santa Monica site [and] included excavation of one continuous exploratory trench across the Project Site to depths between 18 and 20 feet beneath the existing ground surface." BHUSDR ¶ 269; CR ¶¶ 201.1-201.2. The Feffer Report concluded that no faults, active or inactive, were present, and that the project site was thus "considered free of hazards associated with surface fault rupture." *See* BHUSDR ¶¶ 270, 271.1; CR ¶ 201.2. It noted that its conclusions were consistent with Leighton's study's and KGS's study's conclusions "that indicate[] that the WBHL faults identified by Parsons…do not exist in the study area." BHUSDR ¶ 271.1.

In Leighton's post-ROD reports, it indicated that it had completed trenching work beneath the High School through the exact fault lines the Agencies had inferred comprised the WBHL. *See* CR ¶ 200.1. On December 28, 2012, Leighton issued a "Second Response to California Geological Survey Review Comments." BHUSDR ¶ 272.1. Responding to CGS's comments that further study of the High School campus was needed to conclude the absence of active faulting, Leighton performed "additional review of [Leighton's] core boring interpretations [together with] the [CGS],…Earth Consultants International, and AMEC," drilled "5 additional core borings," and excavated an additional trench on the western property line of the High School. *Id.* ¶ 272.2. Contrary to Parsons' "map of 'well-understood' active [WBHL] faults that intersected the [High School] campus," Leighton "found no evidence of active faulting and our findings refute the presence of the[] active faults" inferred by Parsons. *Id.* ¶

273.1. This Second Response laid out how Leighton's trenches and the trench excavated for the 10000 Santa Monica Boulevard construction directly intersected the trend of the faults mapped by Parsons, but that "[t]he subsurface details of both investigations reveal[ed] no evidence of [WBHL] faulting in the study area." *Id.* ¶ 273.2. It concluded that the faults mapped by Parsons did not exist on the High School campus. *See id.*

On February 20, 2013, Leighton issued an "Addendum to Second Response to California Geological Survey Review Comments," addressing CGS's final questions about Leighton's data and conclusions. *See id.* ¶ 274. Then, on March 15, 2013, the CGS issued a report indicating that "[t]he consultants performed a thorough fault investigation program at the subject site and it appears evidence for active faulting related to the [WBHL] or the [SMFZ] was not encountered within the limits of this investigation," and that it had "reviewed the interpretations and much of the original data provided by the consultants and finds that their conclusions are consistent with the available data." *Id.* ¶¶ 275, 277; CR ¶ 202. That report also detailed the substantial involvement CGS had in Leighton's investigation and the visit of CGS representatives to the fault trench excavated at 10000 Santa Monica Boulevard, the subject of the Feffer Report. *See* BHUSDR ¶¶ 267, 276.

In sum, the trenching performed by Leighton, Feffer and Geocon after the ROD was issued confirmed that the WBHL is not active and does not preclude a station on Santa Monica Boulevard that would avoid tunneling under the High School. *See* CR ¶ 203.2.

On May 9 and May 22, 2013, BHUSD sent the FTA some of those studies and again requested that the FTA set aside the ROD and draft a SEIS. *See id.* ¶ 88; FDR ¶ 295; BHUSDR ¶ 279. The May 22 letter enclosed a copy of a May 15, 2013 Final KGS Report. *See* BHUSDR ¶ 278.1. That letter indicated that the report concluded that the Tunneling Report and Fault Report seismic studies had not included adequate seismic testing at Constellation Station, that the WBHL fault zone identified in those studies does not exist, that there was ample room to place a subway station on Santa Monica Boulevard east of Avenue of the Stars without encountering any faults or fault zones, and that Constellation Station was susceptible to earthquakes, not the Santa Monica Boulevard station sites, all of which the FTA and Metro rejected. *See id.* ¶ 278.2.

In response to the post-ROD studies, Metro's consultants prepared several internal memoranda. *See* CR ¶ 92.1. In one dated May 8, 2013, Parsons and TAP sought a comprehensive theory to combine the evidence they obtained at the Century Park East Station site and the new evidence from the other studies, explaining that they had identified three "major fault systems that intersect" in the Century City area: the Santa Monica, northern Newport-Inglewood, and Hollywood fault zones, and these have all "been demonstrated in areas close to Century City to be active" (while Plaintiffs assert that Parsons and the TAP did not acknowledge that they no longer interpret the data on Santa Monica Boulevard as associated with the WBHL, meaning they have no evidence that the Newport-Inglewood Fault either extends to, or is active in, the area). FDR ¶¶ 371-72, 385. They stated that "recently active strands of the Santa Monica fault zone extend farther east and south than previously observed," suggesting the possibility that they are actually associated with the East-West Santa Monica Fault as opposed to – as identified in the FEIS – being part of the WBHL, which is oriented roughly North-South. *See* CR ¶ 92.2. Parsons and the TAP concluded (and the FTA adopted the analysis and conclusion) that "[t]hese complex zones comprise numerous individual fault traces and generate complicated ground deformations that can include wide zones of over-thrusting, strike-slip displacement, tilting, and folding." FDR ¶ 373. Parsons and the TAP also explained (and, again, the FTA adopted the explanation and analysis) that "[i]n the absence of direct evidence that an individual fault trace is inactive within a complex area of known active faulting, the accepted standard is to assume that the fault trace is active." *Id.* ¶¶ 374, 385.

Then, in a June 20, 2013 memorandum, the Agencies, Parsons and the TAP acknowledged and recognized the possibility that the WBHL may not have caused the geologic data that they had earlier identified at the Century Park East Station. *See id.* ¶¶ 369, 382; CR ¶ 203.1. In doing so, Parsons and the TAP summarized the rejection of Plaintiffs studies, offering that they could not ignore the "extensive [cone penetrometer test] and borehole data" that demonstrated to them "clear evidence of the presence of significant faults that cross Santa Monica Boulevard in the middle and edge of the previously proposed [Century Park East Station]." FDR ¶¶ 196, 370, 384. Parsons, the TAP, and the Agencies concluded that the SMFZ may produce the fault traces that Metro

found passing through the Century Park East Station site (though the CGS had concluded that active faulting relating to the SMFZ "was not encountered" in Leighton's trenching). *See id.* ¶ 376; CR ¶¶ 204.1-204.2. But in any event, Parsons and the TAP also concluded (and the FTA adopted the conclusion) that "any Santa Monica Boulevard Station option lies within an extremely complex zone of faulting that extends both south and north of the Boulevard and to the east and west of South Moreno Drive." FDR ¶ 375.

After considering all of the evidence from the various studies, Parsons, the TAP, PGH and the FTA all thus concluded (or adopted the conclusion) that the Century Park East Station should be rejected based on a possible fault zone underlying it, regardless of the source of the fault. *See* FDR ¶¶ 377, 383. For all of these reasons, Parsons, the TAP and the FTA identified "no reason to reconsider a Santa Monica Boulevard Station option." *Id.* ¶ 378.

On August 8, 2013, the City requested that the FTA reopen its review and prepare a SEIS, attaching the studies performed by CGS and BHUSD's technical consultants. *See* CR ¶ 89; FDR ¶ 295. By then, Metro had already started analyzing some of those new studies, and it ultimately rejected the conclusions in them. *See* FDR ¶¶ 296-97.

At the FTA's request, Metro itself – actually its outside litigation counsel – prepared a "LACMTA Assessment," concluding again that Plaintiffs' post-ROD studies did "not alter the conclusion that a station should not be located on Santa Monica Boulevard or that station at Constellation Boulevard is safe" and did not "provide new information to support changing the Century City Station from Constellation Boulevard to Santa Monica Boulevard." CR ¶¶ 93.1, 94; FDR ¶ 300. In reviewing the LACMTA Assessment, the FTA consulted with PGH. *See* FDR ¶ 298. PGH briefly reviewed the LACMTA Assessment and reached the same conclusion, incorporating wholesale (verbatim) into its report on that document the summary of the seismic-related facts that had been drafted by Metro's litigation counsel. *See* CR ¶ 95.1; FDR ¶ 300. After reviewing the Feffer Report and the latest BHUSD consultant reports, PGH concluded in October 2013 that those studies did not collect data near the SMFZ, and therefore the reports do not undermine Metro's conclusion that the SMFZ could underlie both Santa Monica Boulevard station locations. *See* FDR ¶ 379. PGH indicated that it "read the applicable reports and [found] that the LACMTA assessment [was] appropriate based on

the noted studies." *Id.* ¶ 300. [56]

On January 28, 2014, the FTA wrote a brief letter responding to BHUSD's May 9 and May 22, 2013 letters, and to the City's August 8, 2013 letter, which had enclosed copies of the CGS, KGS, Feffer and Leighton reports and which had requested that the FTA prepare a SEIS. *See* BHUSDR ¶¶ 280.1-280.2; FDR ¶ 297; CR ¶ 96. The FTA indicated that it had reviewed the post-ROD reports to "determin[e] whether the collective weight of information presented in those documents established a new, significant environmental impact requiring the preparation of a supplemental EIS." FDR ¶¶ 301, 380. It explained its position that the letters and reports had "not identified any new, significant environmental impact that the proposed Project would cause," meaning that Plaintiffs had not raised an issue for which NEPA required the FTA to prepare a SEIS. BHUSDR ¶ 280.3; FDR ¶¶ 301, 381; CR ¶ 96. It also explained that it was "not required to reconsider a Century City Station on Santa Monica Boulevard because FTA has already evaluated such alternative station location and resulting alignment in the EIS, that evaluation remains valid and, as discussed, nothing in the [submitted letters and reports] identified a new, significant environmental impact that would be caused by the proposed Project." BHUSDR ¶ 280.3. The FTA again denied Plaintiffs' requests for a SEIS. *See* FDR 302.

The post-ROD seismic studies were never released for public comment or incorporated into the Agencies' environmental analysis (other than as stated above). See CR ¶ 90.

II. Analysis

A. Legal Standards

1. NEPA

"NEPA 'is our basic national charter for protection of the environment.'" *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting 40 C.F.R. § 1500.1(a)); *see also* 42 U.S.C. § 4321 ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable

[56] To this point, however, Plaintiffs respond that the Agencies had always asserted that the Century Park East Station was precluded by *the WBHL*, whereas now the Agencies assert that an entirely different fault zone precludes the station, but the public has not had an opportunity to present data near that fault zone. *See* FDR ¶ 379.

harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."). "The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) ("*Powell*"); *see also WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015) ("NEPA serves two fundamental objectives. First, it 'ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' And, second, it requires 'that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). "To that end, 'NEPA imposes procedural requirements, but not substantive outcomes, on agency action.'" *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 111 (9th Cir. 2015) (quoting *Powell*, 395 F.3d at 1026); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."). Thus, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Blue Mountains Biodiversity Project*, 161 F.3d at 1216 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)). It thus also protects against a predetermined decision made without considering environmental issues. *See Robertson*, 490 U.S. at 349 ("Simply by focusing the agency's attention on the environmental

consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."). "[T]he comprehensive 'hard look' mandated by Congress and required by the statute…must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); *id.* at 1143 ("[T]his court has interpreted [NEPA] regulations as requiring agencies to prepare NEPA documents, such as an…EIS, 'before any irreversible and irretrievable commitment of resources.'") (quoting *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988)); *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 471-72 (9th Cir. 1984) ("[I]nflexibility may occur if delay in preparing an EIS is allowed: 'After major investment of both time and money, it is likely that more environmental harm will be tolerated.'") (quoting *Envtl. Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979)); 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."). At the same time, however, "an agency can formulate a proposal or even identify a preferred course of action before completing an EIS." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997); *Metcalf*, 214 F.3d at 1145.

"An agency is entitled to wide discretion in assessing the scientific evidence, so long as it takes a hard look at the issues and responds to reasonable opposing viewpoints." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003). "Because analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies." *Id.*; *see also Cal. ex rel. Imperial Cnty. Air Pollution Control Dist.*, 767 F.3d at 792 ("For issues requiring agency expertise, '[a court] must defer to the informed discretion of the responsible federal agencies.'") (omitting internal quotation marks) (quoting *Marsh*, 490 U.S. at 377). "'When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive.'" *Earth Island Inst.*, 351 F.3d at 1301 (quoting *Marsh*, 490 U.S. at 378). "At the same time, courts must independently review the record in

order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence." *Id.*

"NEPA and the Council on Environmental Quality's…regulations implementing NEPA, 40 C.F.R. §§ 1500-1508, prescribe the procedures that must be followed in conducting environmental review." *Montana Snowmobile Ass'n*, 790 F.3d at 924; *see also* 40 C.F.R. § 1500.1(c) ("These regulations provide the direction to achieve [NEPA's] purpose."). "The procedures prescribed both in NEPA and the implementing regulations are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (quoting 42 U.S.C. § 4332(1)). "'[G]rudging, *pro forma* compliance will not do.'" *Id.* (quoting *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) ("*Block*")).

As an "'action-forcing device to ensure that [NEPA's] policies and goals' are considered during agency decision making," *id.* at 1167 (quoting 40 C.F.R. §1502.1), "NEPA requires the preparation of an EIS for 'major Federal actions significantly affecting the quality of the human environment.'" *Cascadia Wildlands*, 801 F.3d at 1111 (quoting 42 U.S.C. § 4332(2)(C)[57]). First, a DEIS is prepared if an EIS is considered

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[57] Section 4332(C) reads, in pertinent part, as follows:

> The Congress…directs that, to the fullest extent possible…all agencies of the Federal Government shall—
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

42 U.S.C. § 4332(C).

necessary, and is presented to the public for notice and comment.[58] *See* 40 C.F.R. §§ 1502.9(a), 1503.1(a). After an evaluation and response to comments, a FEIS is prepared. *See* 40 C.F.R. § 1502.9(b). All of this eventually culminates in a record of decision explaining the rationale. *See* 40 C.F.R. § 1505.2.

"NEPA regulations require an EIS to '[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.'" *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 797 (quoting 40 C.F.R. § 1502.14(a). "[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences" because "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." *Robertson*, 490 U.S. at 351-52.

"[A]n EIS is adequate if it 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Montana Snowmobile Ass'n*, 790 F.3d at 924 (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004)); *see also Ctr. for Biological Diversity*, 349 F.3d at 1166 (referencing a "rule of reason [standard]"). "Although the adequacy of an EIS is reviewed for 'reasonableness' and [a] no-supplemental-EIS determination for 'abuse of discretion,' the standards are the same." *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 792; *Ctr. for Biological Diversity*, 349 F.3d at 1166. "Under either rubric, [a court] must decide whether the [agency] took a 'hard look' at the environmental consequences of the proposed actions and reasonably evaluated the relevant facts." *Id.* However, "[t]o take the required 'hard look' at a proposed project's effects, an agency may not rely on incorrect assumptions or data in an

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[58] For purposes of NEPA compliance, the FTA and Metro are considered "joint lead agencies," but the FTA must furnish guidance, independently evaluate and approve the NEPA documentation:

> Any project sponsor that is a State or local governmental entity receiving funds under this title or chapter 53 of title 49 for the project shall serve as a joint lead agency with the Department [of Transportation] for purposes of preparing any environmental document under [NEPA] and may prepare any such environmental document required in support of any action or approval by the Secretary [of Transportation] if the Federal lead agency furnishes guidance in such preparation and independently evaluates such document and the document is approved and adopted by the Secretary prior to the Secretary taking any subsequent action or making any approval based on such document, whether or not the Secretary's action or approval results in Federal funding.

23 U.S.C. § 139(c)(3).

EIS." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005); *see also Montana Snowmobile Ass'n*, 790 F.3d at 927 (ruling that "NEPA requires more" than asking a court "to assume the adequacy and accuracy of partial data without providing any basis for doing so").

An "agency 'shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.'" *Ctr. for Biological Diversity*, 349 F.3d at 1167 (quoting 40 C.F.R. § 1502.9(b)). "This disclosure requirement obligates the agency to make available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken." *Id.* (citing 40 C.F.R. § 1500.1(b)).

"[P]recedent makes clear that an agency 'need not respond to every single scientific study or comment.'" *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021 (9th Cir. 2012) ("*Earth Island Inst. II*") (quoting *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009) ("*Castaneda*")). However, an agency must "acknowledge and respond to comments by outside parties that raise significant scientific uncertainties and reasonably support that such uncertainties exist." *The Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008) (*en banc*) ("*McNair*"), *overruled on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The "mere presence of [this] information in the record alone does not cure" a failure to address this information in the final statement. *See Ctr. for Biological Diversity*, 349 F.3d at 1169.

Supplements to a DEIS or FEIS are "required if (a) the 'agency makes substantial changes in the proposed action that are relevant to environmental concerns;' or (b) there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'" *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist.*, 767 F.3d at 795 (quoting 40 C.F.R. § 1502.9(c)); *see also Marsh*, 490 U.S. at 372; *id.* at 374 ("[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal action[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.").

2. The APA

NEPA claims are reviewed under the Administrative Procedures Act ("APA"), which means that "an agency decision will be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Cascadia Wildlands*, 801 F.3d at 1110; 5 U.S.C. § 706(2)(A); *see also Montana Snowmobile Ass'n*, 790 F.3d at 924 ("A final agency action 'for which there is no other adequate remedy in a court' is subject to judicial review under the APA.'") (quoting 5 U.S.C. § 704). Such review "is narrow, and [a court does] not substitute [its] judgment for that of the agency." *Castaneda*, 574 F.3d at 656 (quoting *McNair*, 537 F.3d at 987); *see also Building Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1032 (9th Cir. 2015). The Ninth Circuit has also described this "standard of review [a]s 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007).

An agency decision is only arbitrary and capricious where it "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or 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." *Castaneda*, 574 F.3d at 656 (omitting internal quotation marks); *see also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). Also, "a court 'will…uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.'" *McFarland v. Kempthorne*, 545 F.3d 1106, 1113 (9th Cir. 2008) (quoting *Motor Vehicle*, 463 U.S. at 43) (upholding decision based upon written decision and correspondence between Park Service and plaintiff). An agency's action "need only be a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

Part of the discretion granted to federal agencies is the freedom to change positions. As the Supreme Court has explained, '[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1075 (9th Cir. 2010) (quoting *Motor Vehicle*, 463 U.S. at 57).

Conformity determinations under the CAA[59] are also examined under the APA. *See Cal. ex rel. Imperial Cnty.*, 767 F.3d at 791-92; *Sierra Club v. U.S. Envtl. Prot. Agency*, 346 F.3d 955, 961 (9th Cir. 2003) ("*Sierra/EPA*"). Again, in that context as well, the APA standard has been "interpreted…as requiring the agency to 'articulate[] a rational connection between the facts found and the choice made.'" *Sierra/EPA*, 346 F.3d at 961 (quoting *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001)). As *Cal. ex rel. Imperial Cnty.* acknowledged in the NEPA context, *see* 767 F.3d at 792, "where…a court reviews an agency action 'involv[ing] primarily issues of fact,' and where 'analysis of the relevant documents requires a high level of technical expertise,' [a court] must 'defer to the informed discretion of the responsible federal agencies.'" *Sierra/EPA*, 346 F.3d at 961 (quoting *Marsh*, 490 U.S. at 377). However, while that deference is "significant," a court "may not defer to an agency decision that 'is without substantial basis in fact.'" *Id.* (quoting *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972)).

Section 4(f) determinations are also subject to the arbitrary and capricious standard of review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984).

B. Procedural Standard

Courts commonly decide cases subject to the APA at the summary judgment stage because, generally-speaking, they "are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *See Fla. Power & Light*, 470 U.S. at 744.

[59] "The CAA 'conformity provision' requires that no federal agency 'shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.'" *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 798 (quoting 42 U.S.C. § 7506(c)(1)).

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. *Id.*; *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114-15 (9th Cir. 2007). However, even in the context of an administrative record review, the Ninth Circuit has indicated that "[s]ummary judgment is appropriate when the pleadings and record demonstrate that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *San Luis & Delta-Mendota*, 776 F.3d at 991.[60] When parties file cross-motions for summary judgment, the Court must consider the evidence submitted in support of both motions before ruling on either motion. *See Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).[61]

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[60] In the same context, the Ninth Circuit has also stated the traditional standard that "[w]hen reviewing an order granting summary judgment, '[w]e must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Building Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1032 (9th Cir. 2015); *see also, e.g.*, *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004). Considering the Supreme Court's discussion in *Florida Power & Light*, this Court is not aware of the Ninth Circuit explaining how the principles of viewing the evidence in the light most favorable to the nonmoving party and determining whether there are any issues of material fact would be employed in the summary judgment-setting of an APA administrative record review case (or at least as to the merits of the claims raised in such cases). *See, e.g.*, *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the administrative record."); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) ("[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record, to which the plaintiff and the Defendants have stipulated to [*sic*]. Because this case does not present any genuine issues of material fact, summary judgment is appropriate.") (omitting internal citations). *But see Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) ("[W]e need to determine whether appellant raised a genuine issue of material fact as to whether the Service acted arbitrarily and capriciously in issuing the Permit under the [Endangered Species Act].").

[61] The City and BHUSD have filed separate motions, whereas the FTA has filed one cross-motion. Here, as referenced *supra*, the Court has considered and described the facts presented in the parties' joint statement. If any party has any objection to the Court having considered *all* of the facts presented in the joint statement for purposes of analyzing *all three* motions, it/they should voice that objection (and authority in support thereof) at oral argument on the motions.

C. The NEPA Claims

The meat of these two cases consists of Plaintiffs' claims under NEPA.

The City argues that the FTA violated NEPA by not taking a "hard look" at several issues. It asserts that the EIS included no analysis of local air quality and public health impacts, such that the public lacked information about serious impacts involving diesel emissions and dust concentrations and about potential mitigation measures. In addition, it contends that the FTA failed to consider the environmental consequences of several potential catastrophic risks, including construction and tunneling traversing below-ground "methane zones," active earthquake fault zones, and an area rich with unmapped and/or improperly-capped active and abandoned oil wells.

The City also argues that the FTA violated NEPA by not reopening the administrative process to assess additional reports identifying flaws in assumptions underlying the switch of subway station locations. This assertion is part of the City's larger charge that the Agencies rushed to the conclusion in the FEIS that Constellation Station was the proper location for a Century City station without waiting for studies Plaintiffs had commissioned.

For its part, BHUSD argues that the FTA failed to take a "hard look," and thereby violated NEPA, in three ways: 1) approving the Project even though it knew Metro had committed to the Constellation Station location before the Agencies had completed the analysis of environmental impacts that they now claim support the contention that a Santa Monica Boulevard location was seismically-infeasible and also inferior in ridership; 2) by conducting seismic studies that were focused on foreclosing a Santa Monica Boulevard station location and that did not adequately analyze the seismic feasibility of the Constellation Station location; and 3) refusing to supplement the DEIS with significant new seismic information or provide the public with an opportunity to comment.

Summarizing its view of why it satisfied NEPA, the FTA emphasizes that it sought out several groups of experts, relied on that expertise and on public comment, deliberately and thoroughly analyzed seismic/geologic conditions, and refined its conclusions to accommodate all available information.

1. Air Quality/Public Health

   a. The City's Opening Argument

The City draws attention to the *lack* of attention it believes the FTA gave to the air pollution that will necessarily result from the massive amount of soil excavation involved in the construction of the Project, leading directly to transportation by way of diesel trucks which will itself result in major traffic disruptions. While the City acknowledges that there was a disclosure of the gross air pollutant load, it complains that such raw data does not shed any light on the air quality and public health impacts on local residents. Especially because Constellation Station and the staging areas will be in such close proximity to the High School, and in order to assess the impacts on, among others, schoolchildren, preschoolers, residents and the elderly, the City believes that the FTA needed to convert the anticipated gross emissions into air pollution concentrations in the affected areas, and then compare those concentrations to a health-related benchmark. Specifically, the City believes that this should have taken the form of "dispersion modeling," which would compare concentration levels at specific locations to the EPA's NAAQS.

Instead of local air pollutant concentrations, however, the FEIS only compared pounds-per-day data to SCAQMD thresholds, concluding that, with mitigation, air pollution levels would be okay. But, as the City emphasizes, SCAQMD thresholds do not relate to *local* air quality, only to *regional* levels. The City notes that SCAQMD itself recommends that agencies employ "localized significance thresholds" when assessing localized impacts, and that this requires dispersion modeling. It also observes that this method is consistent with EPA guidance and with the approach that Metro itself initially suggested should occur.

Nevertheless, the FTA did not engage in dispersion analysis for construction emissions. The City believes that this failure – the failure to even disclose that SCAQMD thresholds are regional thresholds or that SCAQMD itself recommends a different approach for local air quality impacts, and the failure to disclose that the FEIS approach is inconsistent with both EPA guidance and Metro's own initial suggested course – violates NEPA's requirement regarding professional integrity and the scientific integrity of the EIS's discussion, analyses and disclosures of the methodologies and scientific sources relied upon. *See* 40 C.F.R. § 1502.24 ("Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in

environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement."). Because the FTA failed to assess localized air impacts, the City also identifies a failure to properly analyze whether and how dust and other particulate emissions could be minimized. As a result of all of this, the City argues that the FTA improperly acted on incomplete information.

b. The FTA's Response

On the topic of air quality, the FTA first raises an Article III standing argument. As addressed in further detail below in connection with the CAA claims, the Court rejects that argument. Beyond that, the FTA notes that a rule of reason standard is applied to the question of whether the discussion of an issue was reasonably thorough, and argues that the analysis here *was* reasonably thorough.

The FTA notes that it analyzed air pollutants from both emissions and excavations, relied on three emission models to develop construction emission levels, and compared impacts to SCAQMD thresholds. Initial analysis suggested emissions would exceed thresholds for several types of pollutants, but the analysis ultimately showed that this would be true only for NOx. Nevertheless, mitigation measures would be implemented to reduce the impacts anyway, as set forth in the FEIS Addendum.[62] It acknowledged that those measures would be unlikely to maintain NOx levels below the SCAQMD threshold during construction (though it would reduce particulate matter impacts), but that these would only cause *temporary* adverse impacts. Moreover, the Agencies acknowledged that SCAQMD thresholds were regional thresholds (and that they were designed to attain and maintain state and federal ambient air quality standards).

The FTA argues that it is entitled to deference with respect to the determination of the methods to identify significant impacts under NEPA, and that it was reasonable for the agencies to rely on measurements based upon SCAQMD thresholds. *See McNair*, 537 F.3d at 993 (commenting that a court's "proper role" under the APA's arbitrary and capricious standard is not to "assess[] the quality and detail of on-site analysis and ma[k]e

[62] Because of this, the FTA argues that any argument regarding a failure to consider measures to reduce dust and particulate matter is misguided. In addition, as to any argument specifically referencing "Tier 4" engines, the analysis acknowledged their existence, but simply chose not to require them, and the FTA contends that this simply cannot serve as a NEPA or APA claim.

'fine-grained judgments of its worth,'" but to "simply…ensure that the Forest Service made no 'clear error of judgment' that would render its action 'arbitrary and capricious'") (quoting *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1077 (9th Cir. 2005) (McKeown, J., dissenting)). It also asserts that the FEIS *does* explain how the air quality impacts will impact the population – that it will cause a *positive* impact in the long-term.

Finally, the FTA argues that the FEIS did address impacts on the High School campus from the staging for Constellation Station, indicating that because the campus was not adjacent to surface-disturbing construction areas, there would be no significant impacts with respect to the campus.

c. The City's Reply

In its Reply, the City again argues that there was no "hard look" at whether construction emissions would cause a significant adverse impact to the air quality near construction sites because there was no analysis of localized air pollution impacts at all, nor whether the pollution would contravene NAAQS in the air near construction sites. It also again emphasizes that the SCAQMD guidance document that was referenced in the FEIS with respect to regional thresholds actually recommends that local impacts be assessed using local thresholds or, alternatively, dispersion modeling.[63] Further, it argues that the EPA's guidance (calling for a comparison to NAAQS) and case law – *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009)[64] – is to the same effect, as was the recommendation from Metro's own consultant. *See Natural Resources Defense Council, Inc. v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1264 (9th Cir. 2014).

Acknowledging that the FTA has simply argued it is entitled to deference, the City responds – citing *Earth Island Institute v. Hogarth*, 494 F.3d 757, 766 (9th Cir.

[63] The City argues that the Court can take judicial notice of this fact under *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) and *Oregon Natural Desert Association v. BLM*, 625 F.3d 1092, 1112 n.14 (9th Cir. 2010), because the admission and consideration of extra-record evidence is permissible "if 'the agency has relied on documents not in the record'" and "'when supplementing the record is necessary to explain technical terms or complex subject matter.'" *Powell*, 395 F.3d at 1030; *see also Or. Natural*, 625 F.3d at 1112 n.14 (taking judicial notice of public documents). The FTA does not appear to have argued otherwise.

[64] The City asserts that *South Fork Band Council* "require[es] air dispersion modeling of $PM_{2.5}$ emissions." *See* Docket No. 116, at 4:11-13. That case says nothing about dispersion modeling, at least not on its face. What it says is that the Bureau of Land Management must do separate modeling for $PM_{2.5}$ emissions rather than using PM_{10} emissions modeling "as a surrogate." *See S. Fork Band Council*, 588 F.3d at 727-28.

2007) – that this is true only when an agency has articulated a rational basis for its methods, whereas here there was no rationale put forth for ignoring all of the foregoing suggestions and advice. In addition, the FTA has cited to models that only estimate *emission rates*, not whether those estimations would result in adverse localized air quality impacts. And because it never analyzed local air quality impacts at all, the FTA's discussion of mitigation activities does not indicate that they will reduce emissions below the levels required to avoid localized exceedances of standards such as NAAQS. In sum, the City characterizes the FEIS as setting forth vaguely-specified mitigation measures reducing unidentified impacts. *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) ("It is also not clear whether any mitigating measures would in fact be adopted. Nor has the Forest Service provided an estimate of how effective the mitigation measures would be if adopted, or given a reasoned explanation as to why such an estimate is not possible."); *id.* at 1380 ("'Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.' 'A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.'") (quoting *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) and *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986)); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002).

In addition, the City says the only attempt to address potential public health impacts is to say that there will be "temporary adverse impacts" to air quality during the construction period. But the City asserts that the FEIS must then also analyze and disclose how those impacts will affect the health of area residents/citizens. *See Natural Resources Defense Council*, 770 F.3d at 1271 (noting that the plaintiff argued that the defendants violated NEPA by not addressing whether the potential increase in $PM_{2.5}$ concentrations would violate 2006 NAAQS standards "and failed to fully disclose the Project's likely effects on public health"). Instead, there is no such analysis, but only the statement that the subway will eventually lower – after years of construction and emissions associated therewith – regional emissions.

d. The FTA's Reply

In its Reply, the FTA asserts that it chose the SCAQMD regional significance

thresholds based on state CEQA guidance (and because SCAQMD implements and enforces CAA direction), and that here too – as with the examination of subsurface geology, discussed further *infra* – the APA does not require the agencies to use any particular guidance or protocol, such as the SCAQMD's recommendation to use localized significance thresholds or air dispersion modeling. *See Ass'n of Pub. Agency Customers*, 126 F.3d at 1188 ("The requisite 'hard look' does not require adherence to a particular analytic protocol."). It argues that, so long as the decision is not arbitrary and the "choice of analysis scale[] represent[s] a reasoned decision," an agency has discretion on this issue. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1173 (9th Cir. 2008) (omitting internal quotation marks) (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002)); *id.* (rejecting argument that "Forest Service erred by narrowing its soil conditions analysis to particular proposed harvesting units instead of taking a broader landscape view" where Forest Service explained why broader data and analysis was unreliable).

In the end, the FTA insists that it performed a reasonably thorough analysis of air quality impacts based on the threshold they identified as most useful. *See Montana Snowmobile Ass'n*, 790 F.3d at 924. Moreover, the FTA asserts that it did not fail to conduct analysis of localized impacts from construction – it analyzed NAAQS emissions at station construction areas using three models and then compared the resulting emissions to SCAQMD thresholds in order to identify impacts. It explains that using the single regional threshold allowed an easy comparison of impacts on both the study area and the region. Referencing the D.C. Circuit's observations that "[i]t is of course always possible to explore a subject more deeply and to discuss it more thoroughly" and that "[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts, the FTA argues that NEPA does not require it to repeat its analysis using different thresholds. *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). The FTA also believes that it can measure localized air impacts during operations in order to assess the effectiveness of mitigation measures.

The FTA rejects the suggestion that it had to specifically consider the effects from the emissions on public health (beyond the comparison of emissions to thresholds). It argues that this case is unlike *Natural Resources Defense Council*, where a Health Risk

Assessment was required, because here the concentrations of $PM_{2.5}$ and PM_{10} did *not* exceed the thresholds.

e. The Court's Assessment

For the City to prevail on its NEPA argument directed at the issues of air quality and public health, it must demonstrate that NEPA essentially *required* the FTA to analyze emissions of pollutants at a localized level and/or that it essentially *required* the FTA to address public health impacts by saying something more than that there will be a temporary adverse effect but, in the long run, construction of the Project will have a positive impact on public health, such that a failure to do one or both of these things amounted to something less than a "hard look" or was otherwise arbitrary and/or capricious.

i. Regional Thresholds

The Court sees no sign here that failing to perform dispersion modeling or otherwise analyzing *localized*, as opposed to *regional*, impacts from emissions constitutes the FTA "rel[ying] on factors which Congress has not intended it to consider, entirely fail[ing] to consider an important aspect of the problem, offer[ing] an explanation for its decision that runs counter to the evidence before the agency, or [providing] [an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *McNair*, 537 F.3d at 993 (quoting *Motor Vehicle*, 463 U.S. at 43). The FTA undoubtedly has considered air quality-impacts from the Project's construction, and has reached a decision that is consistent with the evidence before it. And, in selecting regional thresholds, the Court does not believe that the FTA has advanced an explanation that is so implausible that it could not be ascribed to a difference in view or as a result of expertise. In this light, the City's suggestion that the administrative record reveals a lack of attention to the issue of air pollution is simply not a realistic assessment of the analysis.

The approach set forth in *McNair* "respects our law that requires us to defer to an agency's determination in an area involving a 'high level of technical expertise.'" *McNair*, 537 F.3d at 993 (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003)). Courts "are to be 'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science'" and

"are to conduct a 'particularly deferential review' of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise…as long as they are reasonable.'" *Id.* (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003) and *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)). The *McNair* approach "also acknowledges that '[w]e are not free to impose on the agency [our] own notion of which procedures are best or most likely to further some vague, undefined public good.'" *Id.* (quoting *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001)).

Requiring localized analysis and/or dispersion modeling would amount to "non-scientists" – this Court – "impos[ing] bright-line rules on the [FTA] regarding particular means that it must take in every case to show…that it has met [NEPA's] requirements" in connection with air quality impacts, something the Ninth Circuit in *McNair* rejected. 537 F.3d at 993-94. Instead, the FTA simply must support its conclusions "with studies that the agency, in its expertise, deems reliable," and "explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable." *Id.* at 994. This the FTA has done.

The City has somewhat misstated its case for reliance on *Earth Island Institute v. Hogarth* ("*Hogarth*") in its Reply. That case did not condition deference to an agency on the agency's articulating a "rational basis for its methods," as the City argues. Instead, it made such deference dependent upon a "rational connection between the facts found and the determination made." *Hogarth*, 494 F.3d at 766-68. This is the only context in which the Ninth Circuit mentioned anything about "rationality" in that case. Here, given the emissions evidence before the FTA and the regional threshold it selected for comparison purposes, there is no doubt that there is a "rational connection between the facts found and the determination made."

Still, *Hogarth* comes *close* to providing the City with the one hook it might have hung its air quality hat on here (and perhaps it is this point that the City was attempting – unsuccessfully – to make). In that case the Ninth Circuit concluded that "no deference to agency discretion as to methodology is appropriate when the agency ignores its own statistical methodology." *Hogarth*, 494 F.3d at 763. Here, however, the City's argument is that the FTA is ignoring *the EPA's* guidance on this topic, not *its own* guidance. *See*

Natural Resources Defense Council, 770 F.3d at 1264 (noting that "the EPA has promulgated regulations that mandate a 'hot-spot analysis' for several air pollutants, including $PM_{2.5}$," with that analysis described as "an estimation of likely future localized…PM*2.5* pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards," "assess[ing] impacts on a scale smaller than the entire nonattainment or maintenance area…and us[ing] an air quality dispersion model to determine the effects of emissions on air quality").[65]

The FTA does not hide here from the fact that its choice in this regard runs counter to the opinions or recommendations of others on the matter. While there might very well be a good reason to disagree with the FTA's explanation for why it elected to employ regional, as opposed to local, thresholds, that it may or may not have made the wrong choice is not the analysis here. *See Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1184 (9th Cir. 2000) ("Although the Alliance's attack on the scientific underpinnings of the FEIS raises reasonable questions, the agency's methodology does not fail the 'rule of reason.'"); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994) ("While there are weaknesses in the EIS's analysis of growth-inducing impacts, these weaknesses do not prevent us from concluding that the discussion of growth-inducing impacts in the EIS easily meets our 'rule of reason.'").[66]

The only close question here might be not whether the FTA gave a *correct* explanation for its choice of regional thresholds, but whether it gave a *sufficient* explanation. In its final brief on the subject, it explains that using the single regional threshold allowed an easy comparison of impacts on both the study area and the region

[65] The City also argues that the FTA ignores SCAQMD guidance and the statement of Metro's consultant in an August 2010 report (concerning, at that point, what *the CAA* requires, that "[e]ffects of construction emissions on ambient air quality are evaluated using [the NAAQS]," AR012688. Neither of those sources is any closer to causing the FTA a problem under *Hogarth* than is the guidance from the EPA even though the FTA elected to use SCAQMD thresholds in general (but the wrong thresholds, according to the City).

[66] It is this Court's view that the City's attempt to rely upon 40 C.F.R. § 1502.24 to support its position is just an attempt to have "professional integrity" and "scientific integrity" as used in that regulation serve as synonyms or proxies for "correct answer," and it is not this Court's role to determine whether the FTA got the answer correct on its merits. *See also Hells Canyon Alliance*, 227 F.3d at 1184 ("Nor can we agree that the FEIS fails adequately to set forth its methodology, as required by 40 C.F.R. § 1502.24…. As we see it, the Alliance's true quarrel is with the sufficiency of the methodology used."). Certainly, the FTA was "not arbitrary and capricious in failing to fulfill the requirement[s]" of this regulation. *Earth Island Inst. II*, 697 F.3d at 1020; *see also Hells Canyon*, 227 F.3d at 1185 ("Even if the agency's tools are 'primitive,'…the decision not to employ a different methodology or particular empirical studies does not suffice to show arbitrary or capricious action.").

and that it chose the SCAQMD regional significance thresholds based on state CEQA guidance (and because the SCAQMD implements and enforces CAA direction). *See* Docket No. 122, at 34:9-22. It cites AR19304, FEIS 4-109, and FEIS 4-114 to -116 as its record support for these explanations, so it is worth examining those materials directly.

AR19304 is a page from the Addendum to the FEIS, issued in May 2012. It states, in part, as follows: "Based on CEQA guidelines, the significance criteria established by the applicable air quality management or air pollution control district, in this case SCAQMD, may be relied upon…." Certainly, this does not amount to a clear and direct discussion of the fact that the SCAQMD "significance criteria" the FTA selected were regional thresholds, but it does indicate that it was relying upon those criteria "[b]ased on CEQA guidelines."

FEIS 4-109 does not appear, on its face, to explain that the Agencies "used the SCAQMD thresholds *because* SCAQMD implements and enforces CAA direction," as the FTA asserts in its briefing. *See* Docket No. 122, at 34:12-13 (emphasis added). It simply notes, in explaining the "Regulatory Setting" at the "State and Local" level, FEIS 4-108 – 109, that "SCAQMD monitors air quality and implements and enforces programs designed to attain and maintain state and federal ambient air quality standards." FEIS pages 4-114 through 4-116 reveal that an analysis was conducted for both "the Study Area" – defined as "in western Los Angeles County and encompass[ing] approximately 38 square miles" – and "the entire region" – defined as "the five-county region of Los Angeles, Ventura, San Bernardino, Riverside, and Orange Counties." FEIS 4-114. However, those pages also do not explain that the regional thresholds were chosen because – as the FTA's brief now offers – "using a single, regional threshold allowed the agencies to easily compare the Subway's impacts on both the study area and the region…." Docket No. 122, at 34:18-19. From the Court's review of the cited materials, therefore, it would seem that the FTA is attempting to craft a clearer explanation and justification now, in this litigation, than may have been present in the FEIS.

Connected to the question of the sufficiency of the FTA's explanation is its disclosures regarding the SCAQMD thresholds themselves. As an initial matter, the City is wrong that the FTA did not disclose that they were regional thresholds. *See* FEIS 4-114 ("Overall, the Project's air quality impacts are below the SCAQMD regional

significance thresholds."); *id.* ("SCAQMD has developed regional significance thresholds for each of the pollutants estimated in the regional analysis… If the emission burden of a particular pollutant is estimated to increase beyond these thresholds with implementation of the Project, then the impact is considered to be significant….. [N]o pollutants would increase in excess of SCAQMD thresholds. As such, there will be no significant impacts."). The question is whether it also had to disclose and discuss that the SCAQMD itself recommended using localized thresholds, that EPA guidance was similar, and that Metro's initial recommendation concurred.

In the end, even though the Court believes that the FTA was not as clear in these regards as it purports to have been and that it could have provided a fuller discussion of the propriety of the selected thresholds, the Court is not convinced that the FTA *must* have made these disclosures, or had these discussions, to meet NEPA's requirements. The FTA engaged in a reasonably thorough discussion of the air quality impacts from the Project and explained why it reached its conclusions on the matter. Forcing it to explain, at each junction in the analysis, what it might otherwise have done, or what others suggest should be done, would be to "fly-speck" its process. *See Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) ("In determining whether the EIS contains a 'reasonably thorough discussion,' we may not 'fly-speck the document and hold it insufficient on the basis of inconsequential, technical deficiencies….' That is to say, once we are satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, our review is at an end.") (omitting internal citation) (quoting *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996)).

The Court concludes that the FTA took the necessary "hard look" at the relevant environmental consideration of impacts on air quality from construction of the Project and engaged in a "reasonably thorough discussion of the significant aspects" of increases in emissions. *Montana Snowmobile Ass'n*, 790 F.3d at 924. It did not act in an arbitrary or capricious manner in this regard. If the FTA did not err, under the arbitrary and capricious standard, in applying regional thresholds, the City's additional argument that the FTA did not adequately discuss mitigation measures for localized impacts (because it engaged in no assessment of localized impacts) goes nowhere. Likewise, because the Court rejects the City's argument that the FTA is effectively required to have performed

pollutant impacts using local thresholds, the Court also rejects the assertion that the FTA has acted upon incomplete information.

ii. Public Health

On the issue of public health impacts, the FTA's argument for why it need not have done more than it did makes some sense with respect to PM_{10} and $PM_{2.5}$ because the FTA found – applying regional thresholds – that those pollutants would not exceed thresholds. The Court does, however, have some question concerning why the FTA did not have a more robust discussion of public health impacts at least insofar as NOx is concerned. As noted above, the FTA concluded that NOx levels would exceed the applicable (as the FTA defined them) thresholds, even after mitigation, but would only amount to a temporary adverse impact.

In *Natural Resources Defense Council*, the Ninth Circuit concluded that the EIS adequately disclosed the project's likely health effects. *See*770 F.3d at 1272. There, the EIS included a Health Risk Assessment (that was subject to the public comment and review process), in which the defendants disclosed that the project would lead to increased PM_{10} and $PM_{2.5}$ concentrations in the immediate vicinity of the project and how those increased concentrations could have adverse health effects for local residents. *See id.* They also "conducted detailed studies based on 2006-2007 meteorological data, where they estimated cancer- and other health-risk increases at thousands of residences, schools, parks, and other areas in the immediate vicinity of the Project," explaining the study results "with color-coded diagrams illustrating the precise locations where adverse health effects would be the greatest." *Id.* "They also included statistical discussions and tables illustrating that roughly 97% of the adverse health affects [*sic*] would be due to diesel particulate matter concentrations." *Id.*

The FTA makes no attempt to argue that it did anything even approaching the level of analysis conducted in the agency process underlying *Natural Resources Defense Council*. It also has not argued – with cases such as *Natural Resources Defense Council* in mind – why the fact that, under its analysis, there will only be temporary adverse impacts from NOx levels exceeding applicable thresholds, exempts it from having to engage in a more-significant discussion of public health impacts. The Court might ask the parties to address this question further at oral argument.

2. Methane Gas & Oil Wells

a. The City's Opening Argument

With respect to the threat of tunneling through an area rich in methane and oil wells, the City argues that the FTA violated NEPA in several ways. Part of its argument is that the FTA failed in its disclosure obligations; part is that it failed to analyze certain risks; and part is that it failed to respond to opposing views.

With respect to disclosure, the City contends that the FEIS contains no information about any risk of gases migrating to the surface or of gases accumulating in potentially dangerous concentrations under existing buildings, with a resulting risk of explosions. Nor does it disclose the related concern that the gas can move unpredictably through abandoned oil wells and seismic faults, as the City asserts occurred in connection with the Ross explosion in 1985. Nor does it disclose the potential environmental and public health consequences from a potential methane gas explosion. Nor does it disclose the environmental impacts if an unknown oil well was discovered beneath the High School or other buildings.

In its view, the FTA commissioned no new studies, compiled no additional information and made no further inquiry regarding the risk of gases migrating to the surface or accumulating under existing buildings with a resulting risk of explosion, notwithstanding the fact that the BHUSD had alerted the agencies to this risk of explosion to existing/older buildings. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030-31 (2d Cir. 1983) (holding that conclusions lacked a substantial basis in fact and that decisionmaker could not have fully considered and balanced environmental factors, noting that "after the DEIS was issued, the Project received critical comments regarding fisheries impact from [three sister agencies] to the effect that the fish life had been underestimated and that the information provided was inadequate. Although the FEIS purported to respond to these comments, no new studies were performed, no additional information was collected, no further inquiry was made; and the FEIS essentially reiterated or adopted the statements in the DEIS."); *compare Cal. Trout v. Schaefer*, 58 F.3d 469, 475 (9th Cir. 1995) ("As required, the Corps considered these agencies' initial concerns, addressed them, and 'explained why it found them unpersuasive.'") (quoting *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th

Cir. 1992)).

The City also points out that the Agencies did not check the length of the proposed route for most unmapped wells and, while they attempted to locate unmapped wells below certain open-space areas, they waited until after the Project had been approved before identifying unmapped wells beneath existing structures, such as the High School and residences. The City contends that information about the location of the wells was necessary before a decision regarding alignment was made, and because that information was not secured, the FTA was obligated to comply with 40 C.F.R. § 1502.22, which it did not do. That regulation states, in pertinent part, as follows:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> > (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, [*sic*] and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

40 C.F.R. § 1502.22; *see also Native Village of Point Hope v. Salazar*, 730 F.Supp.2d 1009, 1018 (D. Alaska 2010) (rejecting argument that plaintiffs have burden to

demonstrate that information claimed as missing meets both the "relevant" and "essential" prongs of § 1502.22, and concluding that defendant's failure to follow § 1502.22 was arbitrary and warranted remand).

All of this is bound up with the City's assertion that the FTA had the responsibility to examine potentially catastrophic, though perhaps less likely, occurrences (along with possessing disclosure and consideration obligations where there is incomplete or competing information and opinions), as outlined in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006). Because the FTA did not do so, the City contends there was no disclosure or analysis of the range of environmental risks.

In *San Luis Obispo Mothers for Peace*, the question was "whether the likely environmental consequences of a potential terrorist attack on a nuclear facility must be considered in an environmental review required under [NEPA]," with the agency in question asserting that it "need not be considered at all" because the possibility was "so remote and speculative." *Id.* at 1019; *see id.* at 1028 ("Here, the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks."). The Ninth Circuit determined that the contentions that a terrorist attack was "far too removed from the natural or expected consequences of agency action" and that NEPA "does not require a 'worst-case' analysis" were, among other things, insufficient reasons to categorically refuse to consider the environmental effects of a terrorist attack. *Id.* at 1028; *see also id.* at 1022, 1024. The court did not constrain the agency's consideration of the merits on remand, but held only that the "stated reasons for categorically refusing to consider the possibility of terrorist attacks" could not withstand appellate review. *See id.* at 1035.

Here, the City asserts that the FTA's failure equivalent to that involved in *San Luis Obispo Mothers for Peace* includes the decision to tunnel through an urban methane zone (in addition to tunneling through an area rich with known and unknown oil wells and seismic faults). The City faults the FTA for not disclosing or analyzing the range of environmental risks that would result if an accident occurs as the result of a realization of one of these risks.

Because of all this, the City believes the FTA acted based on incomplete

information. It believes that the FTA could not have weighed risks properly or considered whether any alternatives were feasible or if there were available mitigation measures until it provided this missing information.[67] Because the City believes the FTA acted on incomplete information, it also believes that the FTA had to comply with the requirements of 40 C.F.R. § 1502.22, but did not.

Finally, the City contends that the FTA violated NEPA by failing to timely discuss "all major points of view" regarding the risks of tunneling through methane and unmapped oil wells, notwithstanding the fact that they had dissenting scientific information in their files, both in the form of Exponent's report and in earlier studies included in the administrative record. The FTA only took up a discussion of this point *after* issuance of the FEIS.

Applicable regulations require such a discussion in the DEIS and FEIS. *See* 40 C.F.R. § 1502.9(a) ("The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."); *id.* § 1502.9(b) ("The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."); *see also Ctr. for Biological Diversity*, 349 F.3d at 1168 ("The applicable regulations require the Service to disclose and discuss the responsible opposing views in the final impact statement.") (referencing 40 C.F.R. § 1502.9(b)); *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 482 F.Supp.2d 1248, 1255 (W.D. Wash. 2007) ("[T]he agency must not only recite dissenting opinions, it must 'analyze,' 'respond to' and 'discuss' them.").

b. The FTA's Response

On the topic of methane deposits, the FTA argues that the FEIS discloses that subsurface gases can be encountered during construction of the subway but reaches a conclusion that tunneling could still be safely accomplished because of the technology available and the history of successful tunneling through the ground here before. In doing so, it contends, the agencies relied on both their experience and their studies, and

[67] In the end, the City believes this has resulted in the FTA choosing Constellation Station based (again) on incomplete information (discussed further below) about a *different* low-probability/serious consequence risk – the threat of active faulting at a possible Santa Monica Boulevard station.

are entitled to deference to their expert conclusions. *See Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *McNair*, 537 F.3d at 993 (noting that courts are "require[d]…to defer to an agency's determination in an area involving a 'high level of technical expertise,'" and that they "are to be 'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science'") (quoting *Selkirk Conservation Alliance*, 336 F.3dat 954 and *Forest Guardians*, 329 F.3d at 1099); *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012) ("Whether we agree that a centrifuge model was the best way to assess the threat of direct terrorist attack is not the inquiry before us. Under NEPA, we must refrain from acting as a type of omnipotent scientist, and instead must restrict ourselves to inquiring only whether an agency took a 'hard look' at the potential environmental impacts at issue. When reasonable scientists disagree on appropriate models for analysis, we *must* defer to agency experts.") (omitting internal citations).

The FTA rejects the argument that the conclusion was based on incomplete or missing information concerning the effects of methane explosions, because the Agencies concluded that explosions were not likely. They acknowledged the Ross explosion, and the FEIS details the numerous mitigation measures designed to avoid the risk, such as ventilation systems, gas-detection monitoring, permitting welding at only certain gas levels, automatic shutdowns of the power grid and evacuations at certain gas levels, and OSHA-notifications at certain gas levels. Given all of this, the Agencies concluded the risk of explosions was not significant.

Unlike *San Luis Obispo*, here there were no categorical conclusions, according to the FTA. Instead of concluding that NEPA would *never* require analysis of the risk of possible methane explosions, here the Agencies simply permissibly decided that they could do it safely, with mitigation measures. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1091 (9th Cir. 2004) ("[T]he Navy has made detailed study of the risk of an accidental explosion, and has determined this risk to be extremely remote. Upon this conclusion, which is well grounded in the record, NEPA requires no more."); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241 (10th Cir. 2004) (noting

that the four steps outlined in 40 C.F.R. § 1502.22(b) "are only required in regard to 'reasonably foreseeable significant adverse impacts'" and that, in case before it, U.S. Air Force "did not consider decreased land values a reasonably foreseeable significant adverse impact[, but concluded instead] that no measurable decrease in land values was likely to occur").

With respect to oil wells, the FTA argues that 40 C.F.R. § 1502.22 does not apply because knowing the location of every abandoned oil well is not essential to a reasoned choice amongst alternatives and the Agencies complied with 40 C.F.R. § 1502.22(a). *See Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999) ("Appellants simply fail to show how additional, site-specific lynx data is 'essential' to reasoned decision making; thus, we hold the Forest Service did not violate 40 C.F.R. § 1502.22(a) or [NEPA]."). This is so because Metro has successfully encountered them before. The Agencies acknowledged the risk of encountering them during tunneling, but Metro has plans for how to locate them and what to do with them if they are encountered. Because of these safeguards, and because Metro's experience is consistent with safely tunneling under these circumstances, the presence of wells is not considered a hazard for the design or operation of the subway.

Finally, the FTA also argues that there was no exhaustion of any argument that the FTA and Metro had to include and respond to Exponent's February 2012 report on methane in the March 2012 FEIS. It asserts that the City never raised this argument to the agency and provided that study too late in the game for the Agencies to have acted arbitrarily or capriciously in not discussing it in the FEIS. *See Idaho Sporting Congress*, 305 F.3d at 965 ("The [APA] requires that plaintiffs exhaust available administrative remedies before bringing their grievances to federal court…to avoid premature claims and to ensure that the agency possessed of the most expertise in an area be given first shot at resolving a claimant's difficulties."). It also argues that even if the Court were able to address this argument, notwithstanding the failure to exhaust, it would fail because the City did not provide the report during the scoping phase or during the DEIS comment period (in contrast with the City's citations to *Center for Biological Diversity* and *Pacific Coast Federation of Fishermen's Associations*) and there was, therefore, no realistic opportunity to respond to it in the FEIS. Instead, Metro responded as soon as it

could, on April 4, 2012. To rule otherwise, the FTA argues, the Court would allow parties to delay the FEIS by providing last-minute comments, well after the close of any comment period. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

c. The City's Reply

On the disclosure issue in particular, the City responds in its Reply that the FTA has only generally referred to the Agencies' study of how to protect underground tunnels and stations, not *existing buildings*. The failure to discuss that risk is what the City believes violates NEPA because it amounts to an entire failure to consider an important aspect of the problem, particularly here as it involves (according to the City) a low probability, catastrophic risk (though the City notes that some of the cases it relies upon pertain to a prior version of 40 C.F.R. § 1502.22 that required a "worst case" analysis[68]). *See Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1157, 1165 (9th Cir. 2006) ("We reverse under the arbitrary and capricious standard…if the agency…has entirely failed to consider an important aspect of the problem."); *see also S. Or. Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957, 973 (5th Cir. 1983); *Friends of the Earth v. Hall*, 693 F.Supp. 904, 915-16, 922-26 (W.D. Wash. 1988). With respect to such low-probability, catastrophic risks, the City argues that under *San Luis Obispo Mothers for Peace* an agency must confront any uncertainties with the range of environmental impacts likely to result from an occurrence of them, and to make the disclosures required by 40 C.F.R. §§ 1502.22 and 1502.9.

The City argues that the FTA cannot avoid *San Luis Obispo Mothers for Peace* simply because, unlike in that case, here the FTA did *not* explain why it categorically decided not to analyze the risk of gas accumulation under existing buildings. It also insists that a belief that Metro can tunnel through anything does not excuse non-compliance in this regard. *See Friends of the Earth*, 693 F.Supp. at 923 (noting that no disclosure had taken place "because the Corps displayed an unwavering certainty in CAD's ability to perform as predicted and total reliance on the WQC monitoring plan to

[68] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989) ("The amended regulation thus 'retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural worst case analysis.'") (omitting certain internal quotation marks).

avoid any environmental consequences in the unlikely event that the technology fails to perform as expected"). The City also differentiates this case from *Ground Zero Center* and *Lee* by asserting that the FTA undertook no analysis to determine whether the risk was remote or speculative. Finally, because there was no compliance with the disclosures required by section 1502.22 – a procedural requirement – and because there is no demonstration that any experts actually considered the relevant issue, the City argues no deference is due. *See Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2002) ("The court must defer to an agency conclusion that is 'fully informed and well-considered,' but need not rubber stamp a 'clear error of judgment.'") (quoting *Blue Mountains*, 161 F.3d at 1211).

As to the oil wells, the City notes that the FTA does not deny not knowing where all of them are and makes no argument that obtaining that information would be cost-prohibitive. As a result, the City contends that the FTA must, under 40 C.F.R. § 1502.22(a), obtain complete information about their locations so as to inform the public of the likelihood of surface impacts – such as subsidence and demolition of historic structures – and the availability of potential mitigation measures. The City acknowledges that the FTA has responded that the locations are unimportant to a reasoned choice among alternatives because of its conclusion that their existence does not pose a hazard. However, the mitigation measures the FTA has identified to support that conclusion do not address the possibility that removing a well will cause surface subsidence or removal or disturbance of historic or residential structures. As such, the City also believes this serves as a low probability, high impact risk that must be disclosed in the EIS. *See San Luis Obispo Mothers for Peace*, 449 F.3d at 1033-34; *Friends of the Earth*, 693 F.Supp. at 915-16, 922-26.

Because of the FTA's failures here, the City believes that the FTA had no ability to make a reasoned choice amongst alternatives that could have potentially avoided these risks by modifying the tunnel route before approval. *Colorado Environmental Coalition*, on the other hand, demonstrated awareness of the relevance of incomplete data to consideration of the project's impacts. There was a lack of awareness here, the City asserts, because the FTA failed to disclose how its lack of complete information could affect its evaluation of reasonably foreseeable significant adverse impacts under 40

C.F.R. § 1502.22(b)(1).

Finally, on the section 1502.9(b) issue, the City argues that it was not too late in raising the FTA's failure to analyze opposing scientific views because those views were contained within the same studies the FTA purported to rely upon, meaning that they were before the FTA while it was preparing the EIS. In addition, BHUSD raised the inadequacy of the methane analysis in its DEIS comments. Finally, the City contends that there is no requirement to cite the specific requirements of federal law to preserve an issue for litigation. *See Idaho Sporting Congress*, 305 F.3d at 965-66 (indicating that a plaintiff need not specifically cite to the particular Code of Federal Regulations requirements or "incant…magic words in order to leave the courtroom door open").

d. The FTA's Reply

In its Reply, the FTA emphasizes that the Agencies considered both the Ross explosion and that Congress and Metro had determined in 2007 that Metro would be able to tunnel safely in the area. It also considered and rejected the possibility of an explosion because of the planned use of advanced tunneling technology that would capture the gas and bring it safely to the surface. In contrast, the FTA characterizes *Friends of the Earth* as involving an unwavering certainty in an experimental model and plan, not an experienced approach such as here.

The FTA rejects the idea that the regulations require a worst-case scenario analysis; instead, they require analysis only of "reasonably foreseeable significant environmental consequence[s]." *Robertson*, 490 U.S. at 354; *Ground Zero*, 383 F.3d at 1090-91. As a result, it dismisses reliance on old cases based on what it believes is an obsolete regulation. Here, the FTA asserts (relying on a case that does not involve section 1502.22, *see Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181-82 (9th Cir. 1990)) that it is not reasonably foreseeable where something could conceivably occur, but is at least as likely never to occur. This is the conclusion the Agencies reached here, which the FTA argues satisfies NEPA.

With respect to oil wells, the FTA argues that the City simply misunderstands the Agencies' intentions and expectations. Metro does not intend to significantly alter the alignment so as to avoid oil wells because it believes that it can safely remove them along any alignment. It asserts that the Agencies obtained information on known abandoned oil

wells, the likelihood of unknown wells, and Metro's experience in re-abandoning them. It further emphasizes that Metro has experienced nothing unexpected when it has encountered them, other tunnels have been created without incident, and that tunneling engineers have safely removed and re-abandoned them in the past. The conclusion that they can remove them safely if encountered is all that the FTA believes NEPA requires. *See Tinicum Tp., Pa. v. U.S. Dep't of Transp.*, 685 F.3d 288, 296 (3d Cir. 2012) ("While additional data might enable a more detailed environmental analysis, NEPA does not require maximum detail. Rather, it requires agencies to make a series of line-drawing decisions based on the significance and usefulness of additional information."); *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 11 (1st Cir. 2008) ("To the extent the letters suggested the FAA wait until further data had been collected, it was not arbitrary and capricious for the FAA to conclude that it had enough data to make a reasoned decision. There will always be more data that could be gathered; agencies must have some discretion to decide when to draw the line and move forward with decisionmaking."); *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 531 (7th Cir. 2012) ("The particular facts of this case favor deference to the agency…. [T]his case does not involve disclosure of new information about how a project might harm a previously overlooked species; rather, it involves a revelation of additional information about a future project for which the agency had already made assumptions and incorporated those assumptions into its analysis.").

With respect to the City's arguments concerning a need to reply to Exponent's February 2012 report, the FTA asserts that these arguments are raised for the first time in the City's Reply, fail to identify what "opposing views" the City means, and that BHUSD's vague comments about methane do not constitute a scientific disagreement as to which NEPA requires analysis in an FEIS.

e. The Court's Assessment

Beginning with the aspect of this topic that the Court believes is most straightforward, it rejects the City's argument that the FTA had to do, or disclose, more with respect to the location of oil wells. The FTA has explained in detail, and the administrative record supports, the conclusion that Metro can tunnel safely through areas with oil wells. As such, information regarding the existence of unknown oil wells was

not "essential to a reasoned choice among alternatives" because it would not play a role in the selection of alignment.

While it is true that the "essential to a reasoned choice among alternatives" characterization is only pertinent to the decision of whether an agency should proceed under 40 C.F.R. § 1502.22(a) or (b), and that an agency is still obligated under section 1502.22, generally, to "make clear that [incomplete or unavailable] information is lacking" when it "is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement," the FTA did just that. The FTA cites to AR38182 in support of its assertion that the Agencies "acknowledged the risks of encountering known and unknown, abandoned oil wells during tunneling." Docket No. 115-1, at 44:4-5. While page AR38182 is a page from the October 2011 Tunneling Report, the FTA also cites two pages from the FEIS itself – FEIS 4-374 and 8-46 – as discussing what Metro's contractor will do if it encounters an unknown oil well during construction (thereby contemplating the fact that there might *be* unknown oil wells during construction/tunneling). The Court therefore observes no violation of 40 C.F.R. §1502.22 in connection with the issue of unknown oil wells alone.

Turning next to the section 1502.9(b) issue, the Court agrees that the FTA was not obligated to address Exponent's report in the FEIS due to the report's issuance only weeks before issuance of the FEIS. *See L.A. Tucker Truck*, 344 U.S. at 37 ("[A]s a general rule…courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *Idaho Sporting Congress*, 305 F.3d at 965. Certainly the FTA did not act arbitrarily or capriciously in not addressing Exponent's report considering its late timing, as compared to the timing involved in *Center for Biological Diversity* and *Pacific Coast Federation of Fishermen's Associations*.

Notwithstanding the justification for not responding to Exponent's report in the FEIS, however, the Court believes that the FTA erred in not responding to the comments of BHUSD on the DEIS. BHUSD's comment was as follows:

> Of greatest concern is the potential that tunneling, in what the Draft EIS/EIR terms "gassy areas", could lead to an explosion and potential injuries on the surface…. The Draft EIR/EIS does not adequately analyze such potential impacts to sensitive areas such as [the

> High School.…[T]he risk of gas leaks and explosion…need[s] to be adequately presented and analyzed in the Draft EIS/EIR.

AR1983, 1988. Section 1502.9(b) requires a response to any "responsible opposing view." 40 C.F.R. § 1502.9(b); *see also Ctr. for Biological Diversity*, 349 F.3d at 1167 (indicating that section 1502.9(b)' "disclosure requirement obligates the agency to make available to the public high quality information, including accurate scientific analysis, expert agency comments and *public scrutiny*, before decisions are made and actions are taken") (emphasis added). Moreover, under *Idaho Sporting Congress*, a plaintiff need not "incant…magic words…in order to leave the courtroom door open." 305 F.3d at 966; *see also id.* at 965 ("[C]laimants who bring administrative appeals may try to resolve their difficulties by alerting the decision maker to the problem in general terms, rather than using precise legal formulations"). In this regard, then, the FTA would appear to have violated section 1502.9(b) and NEPA. *See WildWest Inst.*, 547 F.3d at 1171; *Ctr. for Biological Diversity*, 349 F.3d at 1167-68.

Even ignoring that, the FTA's argument in its Reply that the City had made "brand-new arguments" in its own Reply (and that the City had failed to identify what "opposing views" it was talking about) when, in explaining why there was no exhaustion/timeliness problem with the section 1502.9(b)-based argument, it stated that "these opposing views were contained with the very studies on which FTA purports to rely", *see* Docket No. 122, at 29:24-27 and Docket No. 116, at 9:16-17, appears to be inaccurate. *See* Docket No. 106, at 18:22-19:4. Failing that argument, it is unclear what other response the FTA has on this point and why it is not alone (and especially in combination with the failure to address BHUSD's comment) sufficient to demonstrate a section 1502.9(b) and NEPA violation.[69] *See WildWest Inst.*, 547 F.3d at 1171; *Ctr. for Biological Diversity*, 349 F.3d at 1167-68; *see also Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) ("[A]gencies have broad discretion in choosing how to

[69] *See also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) ("Because the commenters' evidence and opinions directly challenge the scientific basis upon which the Final EIS rests and which is central to it, we hold that Appellees were required to disclose and respond to such viewpoints *in the final impact statement itself*.") (emphasis added); *Pac. Coast. Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F.Supp.2d 1248, 1255 (W.D. Wash. 2007) ("Even if the scientists' opinions had been adequately and accurately stated and discussed, their relegation to the comment and response section of the appendix was improper under NEPA. Disclosures and discussions must be in the body of the EIS itself.").

respond to opposing scientific evidence.").

Finally, with respect to the lack of disclosure, under both *San Luis Obispo Mothers for Peace* and section 1502.22, of the risks of explosions (and the associated risks to existing buildings from gas moving through oil wells and seismic faults and to public health), the Court has some questions. *San Luis Obispo Mothers for Peace* involved the question of whether the agency in question could avoid preparing an EIS at all. *See* 449 F.3d at 1024, 1029. It instructed that "[i]f the risk of a terrorist attack is not insignificant, then NEPA obligates the [agency] to take a 'hard look' at the environmental consequences of that risk." *Id.* at 1032. It also notes that the current version and requirements of 40 C.F.R. § 1502.22 apply "to those events with potentially catastrophic consequences 'even if their probability of occurrence is low." *Id.* at 1033. But, as noted previously, the holding was limited to a conclusion that the agency's "stated reasons for categorically refusing to consider the possibility of terrorist attacks cannot withstand appellate review." *Id.* at 1035.

The FTA is unquestionably correct that there was no categorical refusal to consider the possibility of the risks the City identifies here. The FTA disclosed that subsurface gases could be encountered. It was well-aware of the Ross explosion and its causes as part of its analysis here. It was also well-aware of the explosive characteristics of methane and associated gases. It simply concluded that tunneling could be done safely, noting that others – including Congress, the TAP and the Independent Review Panel – had all reached the same conclusion, a conclusion that was consistent with Metro's tunneling history in Los Angeles.'

However, while the FTA is correct that it considered the possibilities of a methane explosion, the Court is still somewhat unclear why the FTA believes that it had no obligations under 40 C.F.R. § 1502.22 in connection with such an effect (if indeed that is its argument[70]). It appears as if the FTA believes that it had no obligations under section 1502.22 because it concluded that methane explosions were not likely or significant. But *San Luis Obispo Mothers for Peace* itself indicates that section 1502.22 applies "to those

[70] The exact nature of the FTA's argument on this point, and how it fits in with section 1502.22, is somewhat unclear. For instance, the Court is not clear whether, as with the question of unknown oil wells, the FTA is again arguing that the risk of methane explosions is not "essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22(a).

events with potentially catastrophic consequences 'even if their probability of occurrence is low." *Id.* at 1033. *Ground Zero* and *Lee* both pre-dated *San Luis Obispo Mothers for Peace*, so they had no opportunity to consider that concept, and the FTA's reliance on *Headwaters* – a case that did not involve section 1502.22 – for what is or is not reasonably foreseeable is somewhat questionable in light of *San Luis Obispo Mothers for Peace*'s discussion of that regulation's scope. Therefore, it would seem to be correct that methane explosions do need to be contemplated within the context of section 1502.22, and a failure to do so would appear to be a NEPA violation.

The Court does not disagree that the FTA is entitled to deference in its ultimate conclusion that it can safely tunnel through these methane- and oil-rich zones. The only question is whether the FTA sufficiently "crossed its t's and dotted its i's." At this point in time, the answer would appear to be that it has not, at least with respect to the City's section 1502.9(b) argument and its *San Luis Obispo Mothers for Peace*/section 1502.22 argument, as discussed above.

3. Choosing Between Alternative Approaches to Constellation Station

a. The City's Opening Arguments

The City also argues that the FTA violated NEPA by failing to examine viable, alternate routes to the eventually-selected Constellation Station, relying on the assertion that the analysis of alternatives is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14; *see also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995); 42 U.S.C. § 4332(E) (directing agencies, "to the fullest extent possible," to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). Specifically, it argues that the FTA failed to analyze any routes to Constellation Station that would avoid tunneling under the High School's facilities, despite earlier recognizing the possibility of doing so and despite the City's request, in commenting on the DEIS, that it do so. In the City's view, this violates NEPA irrespective of whether there was a "hard look" at faulting beneath Constellation Station because of the lack of a reasoned explanation for the rejection of an alternative. *See Southeast Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011) ("By failing to examine a viable and reasonable

alternative to the proposed project, and by not providing an adequate justification for its omission, the EIS issued by the FHWA violated NEPA.").

Because it felt that the FEIS had failed to examine alternatives, the City's experts proposed three that avoided tunneling beneath the High School. The City admits that these proposals were only completed shortly before Metro's final approval hearing, because it recognized the need to do so only after observing that the FEIS had not analyzed alternative routes. The FTA *itself* did not consider, address or respond to any of the alternatives. Thus, the City concludes that there is no demonstration that the FTA ever considered the alternatives at all, much less in the FEIS as required. *See* 40 C.F.R. § 1502.14(a) (instructing that in the alternatives section, an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned.") (omitting quotation marks and internal citations).

In the City's view, the rejection *Metro* proffered in connection with the City's proposed alternatives was a conclusory, *post-hoc* justification for the decision already made. Metro's rejection – founded upon the oral assertion at the final approval hearing that the proposals were unreasonable because of the required operating speed of the trains and resulting additional costs due to lower track levels – was not based on any studies or investigations of the proposals, but occurred only two days after the proposals were presented. In fact, the City argues that Metro's reasoning is belied by other record evidence concerning the speed the trains must reduce even under the adopted alignment. *See 'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1099-1100 (9th Cir. 2006) (rejecting alternatives rejection where argument was "undermined by the record"). Moreover, it contends that the record contains no evidence comparing the additional reduction in speed due to the City's proposed alternatives (or regarding additional costs).

Finally, the City emphasizes that it was incumbent upon the FTA to perform its

own analysis of the EIS here, even if Metro had prepared it, but there is nothing to show that the FTA did so. *See* 23 U.S.C. § 139(c)(3) (defining FTA's role in "joint lead agency" relationship with local governmental entity, including independent evaluation obligation); 23 C.F.R. § 771.109(c)(2) (same). Without analysis in the record, the City summarizes, the FTA cannot hide behind Metro's post-FEIS assertions regarding the alignment proposals. The City believes that the FTA needed this information in order to make an informed choice between trade-offs. *See Block*, 690 F.2d at 767 ("[T]he touchstone for our inquiry [regarding consideration of alternatives] is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.").

b. The FTA's Response

The FTA insists that it analyzed a reasonable range of alternative routes to Constellation Station that avoided the High School. *See City of Carmel*, 123 F.3d at 1155 ("The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones."); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) ("An agency's consideration of alternatives is adequate 'if it considers an appropriate range of alternatives, even if it does not consider every available alternative.'") (quoting *Headwaters,* , 914 F.2d at 1180-81). It contends that it need not have considered alternatives that were unlikely to be implemented or those that are infeasible, ineffective or inconsistent with the agency's basic policy objectives. *See Res. Ltd., Inc.*, 35 F.3d at 1307. In the end, it argues that it only needs to consider reasonable alternatives until the range of alternatives is sufficient to permit a reasoned choice (and there is no need to discuss alternatives that are similar to other alternatives actually considered). *See Hells Canyon*, 227 F.3d at 1181 (upholding consideration of alternatives where they "provided a range of alternatives sufficient to permit a reasoned choice"); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 955 (9th Cir. 2008).

Here, the FTA points out that its analysis of alternatives *in general* considered more than 17 alignments, with a broad array of transportation modes. This included a "no action" option and options using buses, rail of various types, and a monorail. Because of the need for the anticipated passenger volume, the analysis was winnowed to

five "heavy rail" alternatives. In addition , after the DEIS Metro's Board designated an LPA alternative route including both Santa Monica Station and Constellation Station. In sum, the FTA believes that the breadth of this consideration was enough to permit a reasoned choice.

With respect to specific alternatives, the FTA explains that it rejected Olympic Boulevard (a route that would have avoided tunneling under the High School) as well as other Century City station route options because of screening based upon public comment, a further conceptual design review, and screening against the goals to address the purpose and the need. It ultimately chose the alignment to Constellation Station that required tunneling under the High School in order to minimize tunneling under the buildings to the east and west of Constellation Station. Finally, it rejected routes because they could not achieve the necessary train speeds.

The FTA emphasizes that the City's three new proposed alignments – all of which included sharp curves through Century City – were only proposed 19 months after the DEIS was issued and three months after the FEIS was issued. "An agency is not required by NEPA to consider new alternatives that come to light after issuance of the EIS absent 'substantial changes in the proposed action relevant to environmental concerns,' or 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'" *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008) (emphasis omitted); *see also L.A. Tucker*, 344 U.S. at 37 ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."). Because the City proposed no alternatives during the DEIS comment period, the FTA argues that the City waived any argument that NEPA required analysis of these *specific* alternatives in the FEIS. *See N. Idaho Cmty.*, 545 F.3d at 1156 n.2 ("[B]ecause the tunnel alternative was not raised and identified until June 2006, well after the notice and comment periods for the 1999 EIS and the 2005 EA closed, any objection to the failure to consider that alternative has been waived."). In its view, merely strongly requesting, during the DEIS comment period, alternatives that would avoid tunneling under the High School is insufficient to preserve any claim based on those three ultimately-proffered proposed

alignments. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978) ("[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"); *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) (rejecting attempt to require agency to have considered alternative where the complaining party "had not offered a specific, detailed counterproposal that had a chance of success"); *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 576 (9th Cir. 1998) (acknowledging that agency "has the responsibility to 'study, develop, and describe appropriate alternatives,'" but that parties challenging EIS "bear a responsibility 'to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions'") (quoting 42 U.S.C. § 4332(2)(E) and *City of Angoon*, 803 F.2d at 1022).

If the Court concludes that such a claim is *not* waived, the FTA points out that Metro explained that multiple features of the proposed alternative alignments made them infeasible, and emphasizes its belief that there is significant administrative discretion in feasibility determinations. Here, Metro concluded that the alternatives were too narrow, employed sharp curves which would have required too much slowing, required passing under the footings of high-rise buildings, and/or would require lowering of the Constellation station at an added cost of $30 million. Finally, citing to the Ninth Circuit's statement in *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006), that "NEPA does not require [an agency] to explicitly consider every possible alternative to a proposed action," the FTA argues that, even if the record demonstrates that only Metro, not the FTA, considered the post-FEIS alternatives the City proposed, there is no need to reject them explicitly. Here, the FEIS rejected every alignment to Constellation Station that would not pass under the High School, explaining that the alternatives would not allow the achievement of "maximum safe train speeds between stations." And by choosing the route it did, the ROD implicitly rejected the other alignments.

c. The City's Reply

In its Reply, the City asserts that the FTA has admitted that the DEIS failed to analyze any alternative route that would avoid tunneling under the High School, and has also admitted that both the City and the Metro Board requested that the FEIS analyze the possibility of moving the route so as to avoid impacting the High School. The City believes that the FTA has only offered excuses as to why it failed to propose any such routes and as to why it rejected the three proposals the City offered.[71] The City rejects any suggestion that it is arguing that the Agencies failed to produce *enough* alternatives, but instead that they precluded a reasoned choice by not evaluating any alternatives that would avoid or mitigate impacts to the High School. Thus, the City believes that the FEIS's alternatives analysis failed under *Block* and argues that the FTA has not even mentioned the City's on-point, controlling cases.

The City characterizes the Olympic Boulevard option as a "straw man," because it was rejected for full analysis in the EIS due to – among other things – the increased risks it would pose to a significant number of residential properties. Selecting unappealing alternatives simply to cast the preferred choice in a better light is a violation of NEPA in and of itself, the City contends (citing *Southeast Alaska Conservation Council*, 649 F.3d at 1053, 1058-59 and *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-51 (9th Cir. 2013).

It also argues that it did not waive the issue of the consideration of its own proposed alternatives because its comments in response to the DEIS were not "too general." In fact, the City points out that not only did it request additional alignments that would avoid all school buildings, but the Metro Board did too, putting the FTA on notice that the analysis thus far had not considered an adequate range of alternatives and that the FEIS must include a route to Constellation Station that avoided the school buildings.

Moreover, the City argues that the exhaustion requirement is to be interpreted broadly, requiring only sufficient notice for an opportunity to rectify the problem. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 ("'As

[71] The City points out that, unlike the FTA's citation to *HonoluluTraffic.com v. FTA*, 742 F.3d 1222, 1231 (9th Cir. 2014), the City's proposed alternatives were not considered or rejected in prior studies.

a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time.' However, we have repeatedly held that the exhaustion requirement should be interpreted broadly.") (quoting *Marathon Oil Co. v. United States*, 807 F.2d 759, 767-68 (9th Cir. 1986)). It rejects any suggestion that *Morongo Band* and *City of Angoon* set a higher standard when alternatives are involved, offering instead that they are only concerned with counterproposals once initial proposals are rejected. In any event, the City argues that it gave those counterproposals here when it realized that the FEIS had failed to include the analysis requested by the Metro Board.

The City also argues that exhaustion is not required where the flaws in question are so obvious that there is no need to point them out specifically, or where an agency has independent knowledge of the issues (like the Metro Board here). *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) ("The agency…bears the primary responsibility to ensure that it complies with NEPA and an EA's flaws 'might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.' This court has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners.") (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004)); *'Ilio'ulaokalani Coalition*, 464 F.3d at 1092-93 (finding "so obvious" standard met where "[t]he record in th[e] case [was] replete with evidence that the Army recognized the specific shortfall" raised by the plaintiffs, and that it "had independent knowledge of the very issue that concerns Plaintiffs in this case, such that 'there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action'") (quoting *Public Citizen*, 541 U.S. at 765).

Relying on cases – such as *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968 (9th Cir. 2006) and *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 848-49 (9th Cir. 2013) – dealing with the question of whether administrative remedies had been sufficiently exhausted, the City also believes that the comments it provided in response to the FEIS satisfied any exhaustion requirements. The City points out that, in responding to the FEIS, the City finished its proposals before the end of the comment period on the FEIS, and the FTA received those proposals. If the agency invites comments after an FEIS, the City believes that it cannot then ignore them (even if NEPA

itself does not require a post-FEIS comment period). *See L.A. Tucker*, 344 U.S. at 37 ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made *at the time appropriate under its practice*.") (emphasis added). It believes that *N. Idaho Community* does not protect the FTA here, because objections *were* raised during the comment periods, both with respect to the DEIS and FEIS. Furthermore, it rejects *Vermont Yankee*'s application here, because it presented three specific proposals after its and the Metro Board's concerns were ignored.

With respect to any concerns about the feasibility of the proposed alternatives, the City argues that it is the agency's burden, not the City's, to propose alternatives in response to the Metro Board's directive. Moreover, the City sees no suggestion that any feasibility analysis was actually conducted prior to issuance of the ROD.

Finally, the City believes that the FTA's "implicit rejection" theory is improper, because then an agency would never need to explain a decision to reject an alternative as infeasible. Instead, the City argues that the agency must explain the reasoning for an elimination of an alternative. *See N. Alaska Envtl.*, 457 F.3d at 978 ("An agency must…explain its reasoning for eliminating an alternative.").[72] To help prove its point, the City notes that the FTA has not cited any case where the public has presented a specific, potentially-feasible alternative and the agency has ignored that proposal (as well as the directive of a co-lead agency).

d. The FTA's Reply

In its Reply, the FTA contends that the "so obvious" exception to waiver that the City argues applies here is limited to where an agency has independent knowledge of the issues that concern the petitioners. *See Barnes*, 655 F.3d at 1132. Here, the Agencies

[72] And the City rejects any suggestion that this can be done by way of the *post hoc* infeasibility analysis by Metro, after Metro had already certified the FEIS. Moreover, it points out that there is nothing showing that the FTA was involved in or independently reviewed that determination, as the City asserts NEPA requires, citing *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1165 (10th Cir. 2002). Similarly, the City rejects any suggestion that the FTA can rely on the discretion afforded it by way of reliance on a rationale that was never mentioned until the onset of litigation challenging the decision. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1289 (1st Cir. 1996) (indicating that a "'post hoc rationalization of counsel' cannot overcome the agency's failure to consider and address in its FEIS the alternative proposed by commenters") (quoting *Motor Vehicle*, 463 U.S. at 50).

had no awareness of the three routes the City now says they should have considered because they were not even developed until after the FEIS. Such independent knowledge does not come from the Metro Board's direction to analyze the possibility of moving the tunnel alignment so as to avoid school buildings and future remodeling plans because this was not an instruction to avoid the campus entirely, but to seek routes that *would*, according to the FTA, tunnel under the campus while *avoiding* existing and proposed buildings. The FTA also asserts that the "so obvious" standard does not apply to new, proposed alternatives, and that, in order to preserve those alternatives, a plaintiff must have "raised and identified" them during the notice and comment periods. While the City "strongly requested" that Metro explore alternatives not involving tunneling under the High School or residences, it identified no specific alternative during those periods.

In addition, the FTA argues that *City of Angoon* makes clear that there is a requirement to offer, in response to a DEIS, a specific, detailed, counterproposal with a chance of success, and that this counterproposal must be a counterproposal to the *agencies'* proposal, not one of the plaintiff's own proposals. *See* 803 F.2d at 1022. Because this must be an alternative that is ascertainable and reasonably within reach when the EIS was prepared, the FTA observes that the City has not satisfied this here.

The FTA clarifies that it does not argue that the City failed to exhaust administrative remedies (which it concedes the City did with respect to the three alternatives), so that issue is beside the point. Though they exhausted their administrative remedies, they still presented the alternatives far too late – 17 months after the DEIS comment period closed – for them to be useful to the FTA and/or Metro or to preserve that argument for court. In other words, the City has a *waiver* problem, not an *exhaustion* problem.[73]

In any event, the FTA notes that it rejected the proposed alternatives as infeasible due to the maximum safe train speeds that are necessary to achieve between stations, and

[73] The FTA also rejects the City's position that a later attempt to do "more to bring the matter to the agencies' attention" is relevant here because, if it was, a party could always revive a waived claim after the expiration of a comment period. *See Vermont Yankee*, 435 U.S. at 553-54 ("Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'").

infeasible alternatives need not be analyzed or rejected in an FEIS. Although the City may not be happy with the quantum of proof used to reach that conclusion, the FTA argues that this does not undermine that the conclusions were reasoned, and that maximum detail is not a requirement. *See Tinicum Tp.*, 685 F.3d at 296 ("While additional data might enable a more detailed environmental analysis, NEPA does not require maximum detail.").

While the City may criticize the Olympic Boulevard alternative, the FTA points out that it was not obligated to investigate every possible route that would have avoided campus, but only a reasonable range of alternatives sufficient to permit a reasoned choice. Here, because the Agencies actually considered a route that avoided the High School (in addition to having considered many different transit options, multiple routes to two stations on Santa Monica Boulevard, and other routes to Constellation Station), the FTA argues that this case is unlike *Southeast Alaska Conservation* in terms of the range of alternatives considered.

Finally, with respect to whether it (as opposed to Metro) had a duty itself to explicitly consider the City's proposed routes, the FTA points out that *Utahns for Better Transportation* does not help the City. In that case, a regulation required the agency to respond to the applicant's cost estimates. In contrast, here 23 U.S.C. § 139(c)(3) makes the Agencies the joint lead agencies and delegates the analytical duties to the local agency, Metro. In any event, FTA indicates that it signed the FEIS, which directly rejected every route to Constellation Station that would have avoided the High School because of the effect of the curves on train speed. This is the same reason that Metro had rejected the City's alternatives.

The FTA ultimately characterizes what the City wants as further analysis of a minor alignment change to one heavy rail alternative among several heavy rail alternatives and among several different modes. It believes instead that it had a sufficient range of information to make a reasoned choice. The FTA therefore believes its decision regarding alternatives was not arbitrary or capricious and should be upheld.

e. The Court's Assessment

On this issue, the Court sides with the FTA. First, the Court agrees with the FTA that it had no obligation to analyze, or respond to, the City's *specific* alternatives that

were proposed many months after issuance of the FEIS. *See N. Idaho Cmty.*, 545 F.3d at 1155; *id.* at 1156 n.2; *see also Vermont Yankee*, 435 U.S. at 553-54; *L.A. Tucker Truck*, 344 U.S. at 37; *City of Angoon*, 803 F.2d at 1021-22. Those three specific alternatives, offered, as they were, *after* issuance of the FEIS, could not possibly bring the City within the "so obvious" exception as to them specifically. There is thus no need to consider the sufficiency of the explanation for why the Agencies rejected those three alternatives in particular.

Beyond that, in an EIS agencies are to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). "Judicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.'" *Block*, 690 F.2d at 767; *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). "Under the rule of reason, the EIS 'need not consider an infinite range of alternatives, only reasonable or feasible ones.'" *Westlands Water Dist.*, 376 F.3d at 868 (quoting *City of Carmel*, 123 F.3d at 1155). "The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." *Block*, 690 F.2d at 767.

Here, in addition to the numerous *general* alternatives that the Agencies considered, they considered multiple alignments to multiple Century City station locations. "[T]here was a thorough public debate about" the many different options. *See Westlands Water*, 376 F.3d at 872. As to Constellation Station itself, the Agencies considered both alignments that involved tunneling under the High School and ones that would avoid the High School altogether, such as an alignment along Olympic Boulevard.[74] *See* AR20437-40; DEIS S-26; FEIS 8-42. Moreover, as the FTA points out, it is not at all clear that the Metro Board had requested alternatives that would avoid

[74] The Court has reviewed *Southeast Alaska Conservation Council*, 649 F.3d at 1053, 1058-59 and *Western Watersheds*, 719 F.3d at 1050-51, which the City asserts establish the rule that selection of unappealing alternatives simply to cast the preferred choice in a better light is a violation of NEPA in and of itself. The Court concludes that the City has read more into those decisions than they warrant in that regard.

the school altogether, as opposed to an alignment alternative that would just avoid the High School's present and future buildings. *See* AR23176; Docket No. 111-7, at 17.

Finally, as the FTA points out, after serving with Metro as joint lead agencies, the FTA signed the FEIS, and the FEIS explained that "[t]here is no reasonable tunnel alignment that does not pass under structures within the school campus," taking into account the need "to achieve maximum safe train speeds between stations (by minimizing curves and grade differentials)." FEIS 8-42. There is, therefore, no need for the FTA to rely upon any "implicit rejection" theory.

In short, the Court concludes that the FTA engaged in informed decision-making with respect to the assessment of alternatives relating to the approach to Constellation Station.

4. BHUSD's Challenge to the Subway Station Siting as "Predetermined"

a. BHUSD's Opening Argument

Like the City, BHUSD takes issue with the decision to choose Constellation Station over a location on Santa Monica Boulevard. BHUSD shares the City's conclusion that the FTA failed to take a "hard look" before reaching its decision,[75] and violated NEPA in doing so, but BHUSD focuses its argument on its belief that the Agencies used the environmental analysis to rationalize a decision that had already been made and then compounded that pre-judgment error by refusing to supplement the DEIS to reflect new information. It argues that this pre-judgment and associated *post-hoc* rationalization precludes affording the Agencies' decision any deference and amounts to a failure to make a reasoned decision based on an evaluation of the evidence.

For years, BHUSD contends, the public understood that Santa Monica Station had been the preferred location of the Century City subway station, in order to avoid tunneling under the High School. In early 2010, however, BHUSD believes that Metro made a unilateral secret change of plans. In April of that year, BHUSD argues that Metro told the FTA – but not the public – that the alternative alignment to Constellation Station would be the focus, identifying it as the "currently favored" station location in the Ratings Template Metro prepared and submitted to the FTA. Yet, at that time, the

[75] The BHUSD notes that the FTA was required to oversee Metro's analysis and its conclusions, and to independently evaluate any results before approving the project. *See* 42 U.S.C. § 4332(D)(iii); 40 C.F.R. § 1506.5(a).

ridership and seismic analysis favored Santa Monica Station, BHUSD argues.

Notwithstanding the fact that the signs pointed toward Santa Monica Station, BHUSD highlights the decision to conduct a "readiness review" and risk assessment which included only the Constellation Station alignment. In a July 2010 risk assessment workshop, Metro advised PGH that the Constellation Station alternative was the preferred alternative, and it was adopted as the "baseline alignment." According to BHUSD, this then led to the understanding that if Constellation Station was not then adopted as the LPA, the overall environmental process would be delayed as would work towards entry into PE. In addition, when Parsons gave the FTA Metro's risk assessment report in August 2010, that report did not account for a Santa Monica Station alignment at all. BHUSD argues that this runs contrary to one of the primary purposes of the risk assessment process – identifying areas of uncertainty potentially impacting the schedule and/or budget. Consistent with the limited scope of what Parsons had done, when the FTA engaged Urban to review and assess Metro's PE proposal, Urban looked only to plans for the Constellation Station alignment, not Santa Monica Station.

Notwithstanding all this work that BHUSD argues was intended to favor Constellation Station, the September 2010 DEIS still listed Santa Monica Station as the "base" location, with no indication of any intention to proceed solely with the Constellation Station alignment. But BHUSD still sees favoritism towards Constellation Station in that document, insofar as it contains comments about the seismic risk at Santa Monica Station and a statement that Constellation Station would have a lower seismic risk.

BHUSD also sees favoritism towards Constellation Station following the public comment period subsequent to issuance of the DEIS. Though it asserts that the public view strongly favored a Santa Monica Station location, it characterizes comments at a Board Meeting as being focused on Constellation Station, with BHUSD emphasizing the fact that Los Angeles County Supervisor Zev Yaroslavsky contradicted the DEIS by stating that Constellation Station was the best location. Nevertheless, BHUSD admits as it must that Yaroslavsky still proposed carrying forward both alignments for further study, and at an October 28, 2010, Board Meeting, the Metro Board announced that it would investigate both Constellation Station *and* Santa Monica Station as the LPA.

However, BHUSD emphasizes that three days later Metro formally submitted a request for FTA funding for PE based solely on the Constellation Station alignment.

Furthermore, due to the Board's vote, the FTA initially said the risk assessment and readiness review materials – that had focused only on Constellation Station – were insufficient, but the FTA retracted its objection only days later. Then, in January 2011, the FTA approved New Starts funding for PE based on the risk assessment and readiness review. From all of this, BHUSD argues that the suggestions in October 2010 that both Santa Monica Station and Constellation Station alignments were still up for consideration was just a cover to pursue testing that would be designed to favor Constellation Station.

BHUSD also believes that studies performed to bolster the choice of Constellation Station were purposefully-slanted in that direction and revealed the pre-disposition in that direction. This includes 1) using inadequate data to exaggerate evidence of faults at Santa Monica Station and ignoring evidence of specific faults at Constellation Station and 2) "refining" ridership data to manipulate results to favor Constellation Station (over earlier ridership data favoring Santa Monica Station).[76] Specifically, BHUSD points to the Tunneling Report and Fault Report released in October 2011, revealing new information not included in the DEIS. BHUSD argues that the Tunneling Report and Fault Report inferred a fairly-broad SMFZ and reported the discovery of a new active fault zone, the WBHL. Though BHUSD asserts that, under this information, both the High School and residences (which would need to be tunneled under) would be within an active fault zone, the conclusion reached was that Constellation Station would be the only feasible station in Century City.

In response to the October 2011 reports, both Plaintiffs commissioned independent analyses. BHUSD emphasizes that those reports – which BHUSD asserts used the only acceptable methodologies for the precise determination of the existence and location of active faults, none of which Metro's studies performed – eventually called into question both the comprehensiveness and accuracy of Metro's analysis, concluding that the data was unreliable, had ignored evidence that both the SMFZ and WBHL were

[76] Impacting the outcome of these studies was the August 2011 announcement of a decision to move a Santa Monica Boulevard station one block east, away from the Westfield Mall, notwithstanding that this new location had been eliminated at an earlier stage for various reasons. BHUSD argues that there was no public comment and virtually no notice of this change, with the only publication of it being in the "FAQ" portion of Metro's website.

inactive, and that Metro had failed to adequately investigate Constellation Station based upon a gross disparity between testing performed at the Santa Monica Station and Constellation Station sites and based upon the use of more current data for Santa Monica Station but prior explorations for Constellation Station. Ultimately, seven expert reports completed between June 2012 and May 2013 affirmed the conclusions of BHUSD's expert, it highlights.

BHUSD further argues that the FTA itself initially believed that Metro's evaluation of seismic circumstances at Constellation Station was insufficient. Nonetheless, in January 2012 PGH concluded that sufficient testing had happened at Constellation Station. BHUSD asserts that though some FTA consultants still called for further study, nothing else was done. Moreover, in response to Leighton's study, Metro did not contest any of the accuracy of its data, but still did not perform the trenching BHUSD insists is required for accurate assessment of active faults. Rather than doing that, Metro simply moved the faults on its map.

The other testing that BHUSD feels was manipulated to favor Constellation Station over a Santa Monica Boulevard station was the ridership testing. In August 2010, a ½-mile walkshed was used, and it favored Santa Monica Station. After the decision to move the Santa Monica Boulevard station one block east to the Century Park East Station – away from the Westfield Mall – new ridership analysis in a September 8, 2011 report using 2010 data, rather than projected 2035 data that the original report had used, and concluding that 600 feet and ¼-mile walksheds were critical, favored Constellation Station. Yet, BHUSD points out that in evaluating other stations along Alignment 2E, the agencies had relied on ½-mile walksheds, not 600 feet.

In the end, BHUSD argues that a process that serves only to rationalize a decision already made violates NEPA. *See Metcalf*, 214 F.3d at 1142; 40 C.F.R. § 1502.2(g). This is true, it believes, no matter how voluminous a subsequent study or analysis is, where a pre-commitment is demonstrated by the record. It asserts that such a firm pre-commitment can consist of a commitment of resources to only one alternative, statements in favor of only one alternative, or any other indicia demonstrating *post hoc* rationalization. With respect to a firm commitment of resources, BHUSD points to *Metcalf*; *Thomas v. Peterson*, 753 F.2d 754, 760-61 (9th Cir. 1985), *overruling on other*

grounds recognized in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015); *Davis v. Mineta*, 302 F.3d 1104, 1112-13, 1126 (10th Cir. 2002); and *Hirt v. Richardson*, 127 F.Supp.2d 833, 841 (W.D. Mich. 1999).

Here, BHUSD directs attention to the risk assessment based solely on a Constellation Station alignment, the FTA's decision to approve the New Starts application excluding Santa Monica Station even though the Metro Board had carried forward both the Constellation Station and Santa Monica Station alignments as the LPA, and what BHUSD characterizes as an "admission" by the FTA that Constellation Station was a foreordained selection in the form of a January 3, 2012 email concerning a NEPA conference call in which one attendee asked how "you elevate ridership as one of the reasons for the station selection," with another attendee responding that Metro "was originally going to depend on ridership until the geotechnical reports came out overwhelmingly in favor of Constellation." BHUSD further asserts that the FTA told Metro that the Metro Board's decision to carry forward both the Santa Monica Station and Constellation Station options undermined the adequacy of Metro's previous risk assessment submissions, but that the FTA ultimately withdrew its earlier request for additional information for all potential alignments because it understood that there was no real need to account for Santa Monica Station, evidencing the pre-commitment.

BHUSD believes that once the FTA approved a risk assessment that solely analyzed the Constellation Station alignment, there was no going back, and the subsequent seismic and ridership studies were slanted in favor of that location. Specifically, BHUSD analogizes this situation to those present in *Thomas*, *Metcalf* and *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp.2d 1249, 1264 (D. Wyo. 2004) because – it asserts – all of this made it far less likely that there would be any reversion to a Santa Monica Station alignment because Metro wanted, more than anything else, to avoid delay.

BHUSD also characterizes the inadequate testing at Santa Monica Station and Constellation Station[77] as a complete failure to analyze the impacts of a critical piece of the project, and thus a failure to take a "hard look," warranting a remand for adequate

[77] It emphasizes again that even the FTA was concerned about inadequate testing being performed at Constellation Station (but ultimately did no further testing before issuing the ROD).

seismic testing at Constellation Station, likening this case to *Western Watersheds v. Rosenkrance*, No. 4:09-CV-298 EJL, 2011 WL 39651, *7-8 (D. Id. Jan. 5, 2011), a case where the Bureau of Land Management erroneously stated that there were no bull trout in a key area effected by the project in question, and therefore never studied them but instead studied another similar type of trout. Because BHUSD believes that the FTA failed to confront or address Plaintiffs' seismic studies, which BHUSD believes showed gaps or weaknesses in the Agencies' analysis, it argues that this is also a violation of NEPA under *Sierra Club v. Bosworth*, No. C 05-00397 CRB, 2005 WL 2204986, *9 (N.D. Cal. Sept. 9, 2005) ("*Sierra/Bosworth*"). Specifically, BHUSD asserts that these studies demonstrated that Metro had not used the best available technology or methodologies for analyzing what it asserted were active faults. It notes that Metro did not dispute the data obtained by Leighton, but did nothing more (other than, without explanation, redrawing the fault map) after receiving those findings.[78] The failure to give a reasoned explanation for why they chose not to employ the methodologies applied by Plaintiffs serves as another NEPA violation, according to BHUSD. With respect to the switch in the groundrules for the ridership studies, BHUSD argues that this equates to reliance on faulty methodologies, and thereby also amounts to a failure to take a hard look under *Native Ecosystems*, 599 F.3d at 937, and *Northern Plains Research Council*, 668 F.3d at 1079.

BHUSD believes that the ROD must be set aside with respect to the Century City station and the question of its location remanded for further study consistent with NEPA.

b. The FTA's Response

On the issue of a pre-determined outcome, the FTA contends that BHUSD's argument rests on the Risk Assessment analysis, one email and one email string, and that this evidence does not come close to meeting the "high standard" necessary (a conclusion that the FTA contends the Court already reached in its November 7, 2013 order on two motions for limited discovery and supplementation of the administrative record, *see*

[78] In addition, BHUSD points out that whereas with respect to Santa Monica Boulevard station locations Metro presumed in the absence of conclusive data that there *was* active faulting, with respect to Constellation Station it presumed just the opposite – *no* active faulting – when again confronted with a lack of conclusive data.

Docket No. 61).[79] *See Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) ("*Forest/Fish*") ("A petitioner must meet a high standard to prove predetermination…. [P]redetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis – which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action."). Similarly, the FTA contends that this is not enough to demonstrate a "pre-determination" violation of NEPA if all it shows is that the planning or negotiations seriously contemplated or took into account the possibility that a particular environmental outcome would result from the NEPA review. *See Forest Guardians*, 611 F.3d at 714 ("[P]redetermination is different in kind from mere 'subjective impartiality' – which does not undermine an agency's ability to engage in the requisite hard look at environmental consequences – even though subjective impartiality may under certain circumstances involve something resembling predetermination and lead an agency down the road to predetermination…. We would not hold…that predetermination was present simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the possibility that a particular environmental outcome would be the result of its NEPA review of environmental effects.").

First, the FTA explains that the Risk Assessment only considered the alignment variation to Constellation Station because that alignment represented a broader number of project options being carried forward into PE design. It asserts that the route was the most "conservative" route because it was longer and more expensive than others, meaning that if Metro was able to fund that route, it would be able to fund a shorter route.

With respect to the June 2010 email stating that Metro staff preferred Alternative 2E (the alignment variation to Constellation Station) and the November 2010 email string from PGH, the FTA argues that these materials do not demonstrate a problem under NEPA, which allows an agency to formulate a proposal or even to identify a preferred

[79] The FTA locates the origins of this high standard as emanating from the fact that there is a presumption of regularity in agency conduct. *See United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

course of action. *See Ass'n of Pub. Agency Customers*, 126 F.3d at 1185.[80] If identifying a preferred course established a predetermination claim, the FTA asserts, every EIS that identified a preferred alternative would constitute predetermination.

In addition, the FTA believes that BHUSD is unable to demonstrate pre-determination because the Agencies actually moved forward with both alternatives in October 2010. Moreover, after the risk assessment was completed, while Supervisor Yaroslavsky referenced Constellation Station as the preferred route, he still noted that Santa Monica Station might be the route ultimately chosen.

The FTA distinguishes *Metcalf* because there was no binding agreement or actual commitment here. It distinguishes *Thomas* by arguing that, unlike there, here there is no other final agency action that committed the FTA to any particular decision. It distinguishes *International Snowmobile* because no government official publicly committed to any course of action here[81] (while also arguing that the case did not satisfy the standards for a concrete commitment set forth in *Metcalf* or *Forest Guardians* anyway).

With respect to the sufficiency of the Agencies' seismic studies,[82] the FTA argues that the APA requires the Court to defer not only to its expert, technical conclusions, but also to methods that it deems reliable. *See Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find

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[80] As to the January 2012 email stating that Metro was "originally going to depend on ridership," the FTA contends that it only shows Metro staff responding to the results of ridership studies or, at most, formulating a position on a preferred alternative to recommend to the Metro Board and FTA, as CEQ regulations encourage. *See Metcalf*, 214 F.3d at 1145 (noting that CEQ "'regulations actually encourage identification of a preferred course of action during the NEPA process'") (quoting *Ass'n of Pub. Agency Customers*, 126 F.3d at 1184).

[81] As the FTA characterizes it Yaroslavsky's comment fully recognizes that analysis will have to be done before any route is picked.

[82] In addition to the studies Metro performed on the seismic issue, the FTA emphasizes the extent of the public participation process. This included (but is not limited to) a month of "early scoping" in October 2007, a 41-day period in which it allowed comments on its Alternatives Analysis, the publication of its DEIS for 45 days of public comments (in which it received approximately 2,000 comments), the disclosure of the Tunneling Report and Fault Report in October 2011, and then publication of the FEIS in April 2012, with comments thereon accepted up until issuance of the ROD on August 9, 2012. The FTA believes that all of this supports even further the deference that it believes is ordinarily owed under the APA on such topics. It argues that this includes both the conclusion that faults preclude Santa Monica Station, and that no fault zones likely preclude Constellation Station.

contrary views more persuasive."); *Laguna Greenbelt*, 42 F.3d at 526 ("NEPA does not require us to decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts."); *see also McNair*, 537 F.3d at 992 ("[W]e defer to the Forest Service as to what evidence is, or is not, necessary to support wildlife viability analyses."). Here, it emphasize that they relied on three sets of experts, with Parsons first preparing studies and explaining its methods, concluding that there was no fault-free section along Santa Monica Boulevard that would be large enough to accommodate a station. In addition to Parsons' work, the TAP analyzed and approved the studies, and an Independent Review Panel of distinguished scientists approved both the work done by the experts and the review by the TAP. Because the APA does not set up a "battle of the experts," the FTA argues that, in the end, it does not matter what Plaintiffs' consultants and reports say.

In any event, FTA emphasizes that Metro analyzed the work performed by Leighton and responded directly to Plaintiffs' studies, issuing a responsive report in which it used the additional data to make its analysis of the WBHL more precise and explaining why it disagreed that trenching was the best tool for analysis (a conclusion that it asserts the CGS shared). The FTA argues that this responsiveness does not show that the initial analysis was inadequate, but that the Agencies exhibited good faith and flexibility in response to new, developing, information. Ultimately, the conclusion remained the same even after reviewing Leighton's report – there was no safe location to establish a station on Santa Monica Boulevard in Century City.

With respect to Constellation Station in particular, the post-DEIS work developed two transects to create a profile of the station, concluding that it showed continuity of stratigraphy and an absence of faulting. While the S&W report criticized the thoroughness of the analysis of Constellation Station, it agreed with the ultimate conclusion that Constellation Station appeared more favorable because of the lack of faulting shown at that location. When it responded to S&W's report, Metro agreed that it had performed a more thorough analysis of stations on Santa Monica Boulevard, explaining that this was because it was trying hard to find a suitable location on Santa Monica Boulevard. In any event, the FTA believes that any conflict over the thoroughness of the examination at Constellation Station can be ascribed simply to a

difference in view or the product of agency expertise, protected from challenge under the APA. *See Motor Vehicle*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has…offered an explanation for its decision that…is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

On the topic of the ridership studies, the FTA argues that the FEIS confronts and explains the reason for switching to the Century Park East Station location, 700 feet away from Westfield and 1/3 of a mile east of Santa Monica Station, a decision that the FTA argues is protected under controlling law. *See Vermont Yankee*, 435 U.S. at 552-53 ("[T]he concept of 'alternatives' is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood."). The DEIS analyzed Santa Monica Station and noted it was compromised, which the FTA argues served as notice that the FEIS would not analyze that location. Moreover, because the Tunneling Report and Fault Report concluded that Santa Monica Station was infeasible, they believe no further analysis was required. *See Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 717 (9th Cir. 1993) ("The Service was not required to scrutinize alternatives that could not reasonably be considered feasible options.").

On the topic of the use of 2010 data instead of projected 2035 data and the change in "walksheds," the FTA indicates that the FEIS explained that many public comments favored Constellation Station because it would better serve the central core of office and residential land uses. The Agencies issued several reports due to conflicting information on this topic, however. Ultimately, because all three potential stations had similar employee and resident populations within a ½-mile walkshed, the Walk Study (which supplemented the Forecast Report) reviewed expert studies and concluded that the proportion of transit riders walking to transit is greatest within ¼-mile. The FTA also explains that the use of 2010 data in the Updated Direct Ridership Forecasting Report did not matter, because the Agencies actually relied on the Forecast Report and the Walk Study. It also argues that the Agencies should be given deference about the likely reliability of predictions about the future, which are necessarily speculative. *See Nat'l Parks & Conservation v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 (9th Cir. 2000) ("*Nat'l Parks & Conservation/DOT*") ("[W]here there is conflicting evidence in the record, the

FAA's determination is due deference – especially in areas of agency expertise such as aviation forecasting"); *id.* at 681 n.5 (noting that the Ninth Circuit had twice sustained the FAA's decisions to approve airport expansions based, in part, on the fact that "predictions about the future are, of necessity, speculative," and that, in reaching the conclusion, the court had "defer[red] in both cases to the agency's own determination about the likely reliability of those prognostications").

c. BHUSD's Reply

In its Reply, BHUSD takes the position that the FTA failed to refute the evidence of pre-determination and, in so doing, loses any otherwise-owed deference. *See Davis*, 302 F.3d at 1112 (commenting that prejudgment of "the NEPA issues…diminishes the deference owed to the federal defendants in our review of their decision to issue a FONSI rather than an EIS"); *Colo. Envtl.*, 875 F.Supp.2d 1233, 1245 (D. Colo. 2012) ("[I]f the record shows that the agency prejudged the issues, then deference to the agency's decision is diminished.") (citing *Davis*). Instead, where pre-determination is shown, BHUSD argues that environmental harm is presumed and a remand mandated.

BHUSD describes the Risk Assessment – which is required as part of the Readiness Review due to the total costs exceeding $1,000,000,000 – as designed to evaluate the project's scope, cost estimate, and schedule, with a special focus on elements of uncertainty that could negatively impact the budget and the timing. BHUSD rejects the FTA's attempt to offer a *post hoc* justification for why it withdrew its initial demand for a Risk Assessment that included Santa Monica Station. It also argues that the contention that this merely displays a permissible preference should be given no weight because of the evidence that the decision was foreordained.

BHUSD asserts that meeting notes display that – during the Summer of 2010 – Metro staffers repeatedly assured the FTA that they would recommend the Constellation Station alignment as Metro's LPA. Acknowledging that the DEIS listed Santa Monica Station as the "base" or "primary" location, BHUSD argues that Metro nevertheless used the DEIS to publicly float the idea that Constellation Station was the superior alternative. Because the response to that idea was negative, and because the seismic and ridership testing did not yet rule out Santa Monica Station or establish the superiority of Constellation Station, BHUSD argues that Metro had to abandon the plan to proceed with

Constellation Station as the LPA.

Instead, Metro carried forward a single LPA at the end of the DEIS process, with two different alignments to a Century City station (while other stations planned for the Project had no alignment variations), and Supervisor Yaroslavsky promised to thoroughly study both alignment options. FTA accordingly directed Metro to revise its Risk Assessment submission so that it included both alignments, an action BHUSD interprets as a concession that the analysis to that point had been inadequate.

BHUSD argues that the FTA was concerned about obligations under Federal New Starts statutes and its own guidance and best practices for transit projects. In addition, BHUSD asserts that the United States Department of Transportation can provide more money to New Starts projects when the actual project costs are not more than 10% higher than the cost estimated at the time the project was approved for PE, so FTA guidance requires that the FTA and its PMOCs understand areas of uncertainty (including uncertainty regarding which alignment would ultimately be chosen). Thus, BHUSD argues there is no chance that the Agencies would have proceeded to PE without having first done a Risk Assessment for Santa Monica Station if there was *any* possibility they actually intended to pursue that alignment. From all of this, BHUSD concludes that the decision had already been made, before the later seismic and ridership studies which were used to rule out Santa Monica Station.

The Agencies never carried out the promise to revise the Risk Assessment, BHUSD argues. The FTA withdrew its request for a revised Risk Assessment (and three days after Supervisor Yaroslavsky's promise Metro decided not to revise the Risk Assessment so as to include anything about the Santa Monica Station alignment), and BHUSD emphasizes that the only explanation for that withdrawal is by way of a letter drafted years later by FTA lawyers in response to BHUSD's counsel's letter. That explanation is that Constellation Station was the more "conservative" alignment because it would be longer and more expensive, but BHUSD argues that there is no record evidence supporting this position other than counsel's letter. Because BHUSD believes that letter does not serve as a contemporaneous explanation for the withdrawal decision and was written by the FTA's counsel, BHUSD argues that the Court cannot afford it much weight. *Cf. Citizens to Preserve Overton Park*, 401 U.S. at 420 (indicating that

explanations for agency action *after remand in litigation* "will, to some extent, be a 'post hoc rationalization' and thus must be viewed critically"); *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120-21 (9th Cir. 2010) ("While interpretations that are 'first articulated *in a legal brief* [are] not categorically unworthy of deference,' the BLM's argument is simply a 'post hoc rationalization advanced…to defend past agency action against attack.' 'The short-and-sufficient-answer' to the BLM's argument, therefore, 'is that the courts may not accept *appellate counsel's* post hoc rationalizations for agency action.' 'It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'") (emphases added) (omitting some internal quotation marks) (quoting *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 780 (9th Cir. 2006), and *Motor Vehicle*, 463 U.S. at 50); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) ("In considering whether the agency took a 'hard look,' we consider only the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalization concocted by *counsel in briefs or argument*.") (emphasis added); *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241, 1263 (E.D. Cal. 2006) ("It is established that the court is not permitted to accept post-hoc rationalizations."); *Nat. Res. Defense Council, Inc. v. Hodel*, 618 F.Supp. 848, 854-55 (E.D. Cal. 1985) ("'[P]ost hoc rationalizations by counsel for agency action are entitled to little deference' since it is the agency official and not its counsel 'who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.'") (quoting *Secs. Ind. Ass'n v. Bd. of Governors*, 468 U.S. 137, 143-44 (1984)).

Instead of this "more conservative" rationale, BHUSD argues that the FTA concluded that a later reversion to Santa Monica Station would delay the overall environmental process and Metro's work towards entry into PE. BHUSD asserts that the significant variation between the two alignments was not the sort of simple design variations that could be resolved in PE because – taking the agencies' analysis at face value – in order to prepare for a station at Santa Monica Station, Metro would have to engage in the complicated and expensive task of "safely" building a station next to an active fault.

BHUSD distinguishes the FTA's cases on the pre-determination issue and points

out that many of them did not involve NEPA at all, or an agency predetermination. Unlike *Spiller v. White*, 352 F.3d 235, 242 (5th Cir. 2003), where BHUSD asserts the plaintiffs did not provide *any* record-based evidence, BHUSD believes it has presented more than sufficient record evidence of predetermination. It argues that the nine month-long Risk Assessment process is not the same as the preliminary negotiations in *Association of Public Agency Customers*, but is instead a firm commitment because of the added delays and cost overruns that would result from a reversion to the Santa Monica Station alignment. It also contends that what happened here was not simply the consideration of a preferred course, unlike *Forest/Fish*, where the grant agreement was entered into *during* the NEPA environmental analysis. Here, the Risk Assessment was completed *before* the environmental analysis (which was *then* used to rule out the Santa Monica Station alignment – though BHUSD argues that predetermination can be established even without a showing that the resulting studies were actually or intentionally skewed). BHUSD also believes that *Wyoming v. USDA*, 661 F.3d 1209 (10th Cir. 2011), is inapposite as concerns the evolution of a project between a DEIS and an FEIS undermining pre-determination allegations because, in BHUSD's view, here the seismic and ridership studies did not provide additional data to justify a change in alternatives, but were instead just "window dressing" to rationalize a pre-ordained commitment.

BHUSD also rejects the suggestion that the Agencies were just formulating a position on a preferred alternative because of the FTA employee having written that Metro was "originally" going to depend on ridership until the geotechnical reports came out overwhelmingly in favor of Constellation Station. It believes that this demonstrates a position having been taken on alignments before either ridership or seismic studies were undertaken, and that it does not constitute mere "stray statements."

BHUSD believes that the FTA is simply too focused on the question of whether there was a commitment exactly like the one in *Metcalf*, involving a contract. BHUSD would instead have the Court focus on the issue of the harm that predetermination cases are designed to avoid, which it says actually occurred here. BHUSD characterizes the purpose of the jurisprudence in this area as avoiding the likelihood that a prior commitment may slant the environmental analysis and therefore prevent a true "hard

look." Thus, the question BHUSD thinks is central is whether the agencies made a firm commitment to one outcome which swung the balance decidedly in its favor, not just whether the agency in question was absolutely confined to its choice. And it emphasizes that, in answering that, no single type of evidence is required. The commitment does not have to be in the form of a contract, which even *Metcalf* (which ultimately did involve a contract) makes clear, *see* 214 F.3d at 1144. *See Thomas*, 753 F.2d at 760-61; *Davis*, 302 F.3d at 1112-13, 1126; *Int'l Snowmobile*, 340 F.Supp.2d at 1260-61; *Hirt*, 127 F.Supp.2d at 841.

BHUSD rejects the suggestion that *Thomas* is irrelevant, arguing that it is, in fact, directly on point. In that case, according to BHUSD, the Ninth Circuit ruled that it would be irrational for the agency not to sell the timber after building the road. *See* 753 F.2d at 760. Here, where the FTA argues that the Agencies still could have proceeded with the Santa Monica Station alignment – even though a Risk Assessment only had been completed for Constellation Station – because both had been carried forward in the LPA, BHUSD argues that it would have been irrational to proceed to PE because that differential was the biggest uncertainty for the Project and project funding was at stake. Even though it was not impossible for the FTA to switch alignments, BHUSD argues that the commitment here was no different than in those cases finding an improper pre-determination infecting the NEPA process.

Ultimately, BHUSD emphasizes that the FTA has not cited any evidence showing that Metro analyzed the risks and contingencies in proceeding with Santa Monica Station. Instead, the FTA relies on a draft report prepared by PGH that explicitly concedes that the LPA adopted by the Metro Board included alignment and station variations that were *not* analyzed during Risk Assessment. BHUSD believes that the FTA acquiesced in Metro's pre-determination, and that such behavior amounts to bad faith, which the FTA admits mandates relief under the APA and NEPA.[83] Because of that acquiescence, it does not matter that the FTA itself did not make a comment similar to Supervisor Yaroslavsky – BHUSD emphasizes that Supervisor Yaroslavsky indicated that the preference was for Constellation Station at a time when that conclusion was not

[83] BHUSD argues that *International Snowmobilers* is not inconsistent with a requirement for a concrete commitment because it is a bad faith case, citing 340 F.Supp. at 1260-61 for that proposition.

consistent with the DEIS studies – and it does not matter that Supervisor Yaroslavsky then promised a study of both routes.

Moreover, BHUSD contends that the FTA has not directed the Court to any evidence of any reasoned decision that no further seismic testing was required. While the FTA now argues that the last email in the January 2012 email string solves the concerns that had been expressed earlier (because of the amount of the borings drilled and recorded), BHUSD rejects the idea that a blanket statement at the end of an email about enough testing done for both locations because of the amount done at Santa Monica Station is sufficient, because adequate testing needed to be done for each site. From this, it concludes that there was no "hard look" at Constellation Station, no reasoned decision not to "look," and no scientific analysis to which deference could be afforded.

BHUSD also believes that the ridership studies are another example of a failure to make a reasoned decision based on available data and cannot contribute to a "hard look" conclusion because it believes those studies were manipulated, and that the means of analyzing the issue was therefore faulty. *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (criticizing use of a "nonexistent sage grouse…to assess the project's impact on all sagebrush species' diversity," and stating that this "flawed methodology in the complete absence of a sage grouse population does not constitute" a "hard look"); *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011). BHUSD believes that the methodologies were skewed so as to generate data that would allow it to "depend on ridership" in making the choice of Constellation Station. It rejects the suggestion that the FTA is simply entitled to deference. It also rejects the FTA's argument that the post-DEIS ridership studies were conducted in response to public comments regarding Constellation Station because, it asserts, the comments were split almost evenly. *See Int'l Snowmobile*, 340 F.Supp.2d at 1264 ("The NPS claims that the decision to change the preferred alternative to Revised Alternative G was based on public comments; however, there were an equal amount of public comments supporting a revised Alternative E, which would have continued snowmobile use in the Parks."). It also notes that the FTA never responded to criticism of the ridership studies offered by the City's expert at a May 2012 P.U.C. hearing.

Consequently, BHUSD argues that what the FTA is asking for is absolute

deference, which is at odds with the Court's obligation to perform a "searching and careful" review to assure the existence of a rational connection between the facts found and the conclusions reached. Only where a decision is fully-informed and well-considered is deference due, it contends.

d. FTA's Reply

In its Reply on the issue of pre-determination, the FTA first asserts that the March 2012 "conservative" route letter was, in fact, part of the decision-making process in issuing the ROD,[84] and it directly supports the view that the Risk Assessment's choice of alignments was not used to pre-judge. The FTA explains that BHUSD's cases involve litigation counsel's attempts at *post hoc* explanation or about new explanations offered after the final agency decision and after remand, whereas here the explanation came from FTA Regional Counsel in a pre-ROD statement.

In asserting that it would have been Santa Monica Station, not Constellation Station, that would have been the most "conservative" route to examine, the FTA offers that BHUSD is focused solely on the *environmental* risk, whereas New Starts considerations look to scope, schedule and cost risk. In that setting, the FTA explains, a contractor analyzes the project configuration that presents the greatest scope, schedule and costs risk so that the FTA can identify the full magnitude of those risks before deciding whether to advance a project for New Starts funding. Here, the FTA asserts that its Risk Assessment contractor did just that and determined that Constellation Station would be more expensive because of the increase in length in comparison to the two Santa Monica Boulevard station options. The DEIS confirmed this view, indicating that it would involve an increase in overall capital costs by $60.4 million.

The FTA explains its view that analyzing the riskiest route – using the New Starts

[84] The FTA argues that the Court must look to the information available to the decision-maker at the time of the final agency action, which was the ROD here. *See California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) ("The implication is that the United States is using the categorical exclusion as a post hoc rationalization when in fact it simply failed entirely to consider the potential environmental consequences of its decision *at the time the decision was made*.") (emphasis added). This is because agency decisions (and the grounds for those decisions) are freely changeable up to the point of announcement of them. *See Pan Am. World Airways, Inc. v. C.A.B.*, 684 F.2d 31, 36 n.12 (D.C. Cir. 1982) (indicating that review of agency action is normally done "by considering an agency's contemporaneous official explanation of its action," and commenting that "[u]p to the point of announcement, agency decisions are freely changeable, as are the bases of those decisions"). Thus, in the FTA's view, the letter does serve as contemporaneous analysis.

criteria – before advancing the subway to the next stage of the New Starts program did not prohibit the FTA from approving any route during the actual NEPA process. This is because the NEPA decision does not occur until *after* the ROD is issued, *see* 40 C.F.R. § 1505.2 ("At the time of its decision…each agency shall prepare a concise public record of decision."), and the FTA could have chosen any other alternative up until that point in time, including something other than heavy rail. For all of these reasons, the FTA argues that the Risk Assessment conducted here did not amount to a pre-determination.

Beyond even those points, the FTA emphasizes that it made no hard commitment before the ROD issued. In order for *Metcalf* and *Thomas* to apply here, it reasons, BHUSD would have to point to a binding FTA decision on one action that compelled the FTA to choose the route to Constellation Station over another alternative, and there is no such "other action" – in the form of a contract, another NEPA decision, or anything else – here. The outlays of time, energy and money in performing the Risk Assessment do not qualify, it argues, because NEPA allows agencies to complete work before issuing an ROD so long as it does not have an adverse environmental impact[85] or limit the choice of reasonable alternatives. *See* 40 C.F.R. § 1506.1(a) ("Until an agency issues a record of decision as provided in § 1505.2…, no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives."); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145 (2010) ("Even if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared."). Where the commitment is only of financial resources (as opposed to natural resources), it is irretrievable only where the agency has spent most or all of its limited budget on preparing for only one alternative. *See WildWest Inst.*, 547 F.3d at 1168 ("Before issuing its final decision, the Forest Service is prohibited from taking any action that 'limit[s its] choice of reasonable alternatives' identified in the decision-making process. Such prohibition extends to 'commit[ting] resources' which would prejudice the Forest Service's selection of alternatives. Construing a related regulation, we have held that a premature 'irreversible and irretrievable commitment of resources'

[85] The FTA distinguishes *Hirt*, in particular, by arguing that nothing was done to affect the physical environment here.

violates NEPA." (omitting internal citations) (quoting 40 C.F.R. § 1506.1(a)(2), 40 C.F.R. § 1502.2(f) and *Metcalf*, 214 F.3d at 1143); *id.* at 1169 ("WildWest is correct that a financial commitment can, in some instances, constitute an irretrievable commitment. For example, if an agency spent most or all of its limited budget on preparations useful for only one alternative, it may well have taken action '[l]imit[ing] the choice of reasonable alternatives.'") (quoting 40 C.F.R. § 1506.1(a)).

The FTA also rejects the suggestion that Supervisor Yaroslavsky's comment indicates a sufficient commitment for pre-determination, because the Metro Board is not the NEPA decision-making body and, even if it were, there are *thirteen* voting members. *See* Cal. Pub. Utils. Code § 130051. Even then, Supervisor Yaroslavsky admitted that the Board might decide Santa Monica Station is the better option. With respect to *International Snowmobile*, the FTA argues that that district court case is inconsistent with *United States v. Morgan*, 313 U.S. 409, 421 (1941), which it asserts stands for the proposition that even a *decision-maker's* vocal statements of preference do not establish biased decision-making.

On the issue of ridership, the FTA asserts that the notion that comments were split about favoring Constellation Station or Santa Monica Station has no merit under the APA. It argues, instead, that it is always predictable that an agency will collect new data during any comment periods in an effort to give a decision a more-accurate foundation, and that there is no problem in doing more, more-detailed studies to resolve any inconsistency between public comments and the results of early ridership studies. *Cf. BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644-45 (1st Cir. 1979) ("It is perfectly predictable that new data will come in during the comment period, either submitted by the public with comments or collected by the agency in a continuing effort to give the regulations a more accurate foundation. The agency should be encouraged to use such information in its final calculations without thereby risking the requirement of a new comment period."). Finally, the FTA notes that it did respond to BHUSD's comments in the ROD, rejecting those comments because of the outcome of the updated ridership study.

Summing up its position, the FTA states that the Agencies here analyzed both routes through Century City in the FEIS, and that without a strong showing of bad faith

or predetermination based on clear evidence (instead of pure speculation), this action does not amount to mere "window dressing" to rationalize a pre-ordained commitment.

e. The Court's Assessment

BHUSD has directed the Court to a considerable amount of evidence demonstrating that, at a relatively early stage in the process, the Agencies' analysis was focused upon Constellation Station for a Century City subway station and Metro expressed a preference for such a location, despite the fact that Santa Monica Station was understood by the public to be the likely site of such a station. Though the LPA designated after the DEIS was issued indicated that the Agencies would continue to study and analyze Santa Monica Station as a potential site, within days it became relatively clear that Metro had no actual intention of doing so when Metro submitted its request for funding for PE based only on the Constellation Station Risk Assessment and the FTA withdrew its objection to the limited scope of the Risk Assessment performed to that point and soon thereafter approved New Starts funding. In BHUSD's view, Metro's later Tunneling Report, Fault Report, and ridership studies were all crafted so as to favor that conclusion, ignoring valid questions and criticisms in the process. The question the Court must consider is whether this amounts to an improper determination of the outcome prior to performing the necessary environmental analysis (thereby precluding a "hard look" determination) or whether, instead, it constitutes permissible partiality, formulation of a proposal or identification of a preferred course of action. *See Metcalf*, 214 F.3d at 1142-43; *Ass'n of Pub. Agency Customers*, 126 F.3d at 1184-85; *Forest/Fish*, 611 F.3d at 712-13.

On the facts before it, the Court believes that this is a very close question. Although the Court agrees with BHUSD that the analysis certainly appears to have been slanted in one direction, it is not prepared to conclude that it meets the standard necessary for a claim of improper pre-determination or bad faith. Though the Ninth Circuit has not adopted the Tenth Circuit's description of the necessary standard in *Forest/Fish*, *see* 611 F.3d at 714-15, certainly this would be the correct outcome if the Court were to apply that standard here. But even under the Ninth Circuit's decisions in this area, the Court believes this is the correct outcome. *See also id.* at 715 ("We observe that this clarification of our standard of proof for establishing predetermination puts us on a

similar path as the Ninth Circuit."); *Crenshaw Subway Coalition*, 2015 WL 6150847, at *18 ("As *Metcalf* suggests, however, evidence of predetermination must meet a high standard.") (citing *Forest/Fish*, 611 F.3d at 714).

This case lacks the necessary binding commitment or irreversible commitment of resources present in such cases as *Metcalf*, *Thomas, Davis*, or *Hirt*.[86] In *Metcalf*, this took the form of the federal defendants having signed two agreements binding them to support the Native American tribe's proposal. *See Metcalf*, 214 F.3d at 1142-45. In *Thomas*, it was the decision to build a road necessary for timber sales before preparing an Environmental Assessment ("EA") or EIS to analyze the environmental impact of the timber sales. *See Thomas*, 753 F.2d at 756-57, 760-61. In *Davis*, the contractor hired by the agency to prepare a draft EA was contractually obligated to prepare a Finding of No Significant Impact, and to have it approved, signed and distributed to the agency by a specific date. *See Davis*, 302 F.3d at 1112. *Hirt* involved a commitment of resources, *see Hirt*, 127 F.Supp.2d at 841, but as the FTA points out, a commitment of only financial resources is almost never a sufficient commitment for purposes of a pre-determination claim, *see WildWest Inst.*, 547 F.3d at 1169, and there is no evidence indicating satisfaction of that limited circumstance here. *See also Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of Navy*, No. 12-cv-5537, 2014 WL 64214, *10 (W.D. Wash. 2014) ("The Navy's pursuit of funding is not a commitment of the funds.").

There is no similar evidence of a binding commitment of any type involved here. To be clear this does not mean that the Court is not troubled by certain aspects of the Agencies' decision-making process. First, while the Court agrees with the FTA that it

[86] The Court also rejects BHUSD's attempts to draw a parallel between Supervisor Yaroslavsky's comments here and the "prejudged political conclusion" in *International Snowmobile*, even assuming that the court in that case reached the correct conclusion. *See* 340 F.Supp.2d at 1260-61; *compare Agdaagux Tribe of King Cove v. Jewell*, No. 3:14-cv-0110-HRH, 2015 WL 5257120, *14 (D. Alaska Sept. 8, 2015). As the FTA points out, Supervisor Yaroslavsky's voice is just one among thirteen that count on the Metro Board, and that even his inclination was contrary to the decision the Metro Board made. *See Forest/Fish*, 611 F.3d at 717-18 ("The relevant voices must be those who would be situated by virtue of their positions to effectuate an irreversible and irretrievable commitment of the agency regarding the matter at hand."); *id.* at 718 (acknowledging that the record revealed "some internal disagreement" amongst biologists on the issue in question and noting that "agency employees need not be afraid to conduct debates over e-mail because the agency will not be found to have conducted a biased NEPA analysis unless those communications fairly could be said to have the effect of binding the agency (as a whole) to an irreversible and irretrievable commitment to a course of conduct based upon a particular environmental outcome, thereby rendering any subsequent environmental analysis biased and flawed"). While that decision was relatively quickly neutered, there is no evidence that Supervisor Yaroslavsky had a hand in that, let alone controlled that decision.

can consider the March 8, 2012, letter from Renee Marler, Regional Counsel for the FTA, concerning the "more conservative" alignment explanation (and that the explanation makes some sense), it finds it curious, to say the least, that this is the only evidence in the record supporting this explanation for why Constellation Station, and not Santa Monica Station, was the focus of the risk assessment process. Second, the Court notes the seemingly odd decision to "refine" ridership studies in a way that differs in key respects not just from an original study that – at the time of the DEIS – favored ridership for Santa Monica Station, but from the ridership study of any other station involved in the Project. Third, the Court is of course by now very familiar with the relatively intense and sustained criticism of the seismic investigation Metro undertook, along with its changing explanations for why Santa Monica Station would be ruled out, the change in its fault map, and the conclusion that Constellation Station, a short distance away, was safer and a clear improvement over the Santa Monica Station site. Finally, while the Court acknowledges that the Metro Board decided, in October 2010, to carry forward both Constellation Station and Santa Monica Station as the LPA, the Court discounts the value of that evidence, as it relates to this question, considering Metro's and the FTA's actions immediately thereafter.

However, the Court also believes that BHUSD has engaged in a fair amount of speculation in reaching its conclusion regarding predetermination. First, BHUSD's assertion that the FTA had no choice but to abandon any demand for a further assessment of Santa Monica Station (or would have been "irrational" in not settling on Constellation Station) because, by that time, to go down that road would have impermissibly delayed the process and/or threatened funding approval, while perhaps a reasonable conclusion to draw, does not find clear support in the record (as opposed to being a creative, and perhaps ex post facto accurate, theory). Second, BHUSD repeatedly emphasizes a January 2012 email indicating that Metro was "originally" going to depend on ridership to justify selection of Constellation Station. Placing that type of emphasis on that email (written at that late stage in the Agencies' analysis) both runs afoul of *Forest/Fish*, *see* 611 F.3d at 717-18, and makes a relatively large inferential leap as to the meaning of the term "originally" as used therein. It is not at all clear that BHUSD's interpretation is correct.

In the end, the Court is simply not persuaded that the type of predetermination some courts have found to violate NEPA occurred here, notwithstanding evidence that a Constellation Station location was preferred early on and that subsequent analysis favored that preference in ways that some people and organizations found reason to criticize. As discussed in more detail herein, those criticisms, while perhaps legitimate, are not sufficient grounds under NEPA (at least under a predetermination theory) to reject the Agencies' competing views.

Turning, then, to BHUSD's contention that the FTA did not engage in a hard look because its inadequate testing contributed to a complete failure to analyze the impacts of a critical piece of the project, the Court easily dismisses that assertion. The Court cannot possibly characterize what the Agencies did here as a *complete failure* to analyze the impacts of the Century City station siting decision. The FTA has repeatedly explained in detail all the methods the Agencies employed in an effort to better understand the seismic conditions in the area in question. BHUSD may very well (and perhaps legitimately) disagree with and criticize aspects of the Tunneling Report, Fault Report and ridership studies, but the Agencies are entitled to discretion in reaching their conclusions on appropriate methodologies to employ in this area. *See Marsh*, 490 U.S. at 378; *McNair*, 537 F.3d at 992; *Laguna Greenbelt*, 42 F.3d at 526.

The Court also disagrees with the assertion that the FTA failed to take a "hard look" (as opposed to the question of the sufficiency of its disclosures, discussed further *infra*) by insufficiently justifying its selected methodologies. The FTA explained why it believed sufficient trenching could not be achieved and why, in the end, the exact location of active faulting was unnecessary to its conclusion – there was no question that station locations on Santa Monica Boulevard were in an area of active faulting, and the particular identity of the fault (or faults) in question would not change that conclusion and the associated conclusion that a station located there would be infeasible. It also acknowledged and explained why its post-DEIS analysis of Constellation Station was not as thorough as its analysis of Santa Monica Station – because it was attempting to locate a suitable location on Santa Monica Boulevard.

On the issue of the ridership studies' methodologies, the Court does not find BHUSD's references to *Native Ecosystems Council* and *Northern Plains Resource*

Council persuasive. Although the decisions to adjust the walksheds, change the base-year for supply of data, and to employ some of these changes only with respect to the Century City station may leave some questioning the decision(s), it/they do not come close to the "nonexistent sage grouse" used in *Native Ecosystems Council* as a "management indicator species." *See* 599 F.3d at 937. *Northern Plains Resource Council* does not help BHUSD because, as the FTA explains, the ridership studies used *both* 2010 and 2035 data (and predictions about the future – at that time almost 25 years into the future – are necessarily speculative and entitled to some measure of deference in terms of their reliability, *see Nat'l Parks & Conservation*, 222 F.3d at 682 n.5).

In sum, the Court rejects BHUSD's arguments about pre-determination and the associated "hard look" arguments directed at the deficiencies it perceives in the Agencies' seismic and ridership studies.

5. Seismic Risk

a. The City's Opening Argument[87]

The centerpiece of the City's NEPA challenge appears to be its contentions regarding the decision to relocate the planned subway stop from Santa Monica Station to Constellation Station. It notes that the decision process underlying this conclusion was that there was a low-probability risk of actual faulting at Santa Monica Station, but an absence of that risk one block away, at Constellation Station. However, the City asserts that the FEIS did not discuss the incompleteness of data that the Agencies relied upon in reaching this conclusion, or the scientific disputes concerning the accuracy of that conclusion.

This includes incomplete and shifting information about the existence and the specific location of the WBHL. The City argues that there was no actual evidence about the WBHL or whether it was an active fault at the time of the DEIS, and thus any conclusions drawn about it were based on speculation. Then, when the Agencies attempted to indirectly determine fault strands in the area, they performed no trenching or sampling, which the City asserts would have been necessary to date any fault strands found.

[87] BHUSD's discussion of this topic in its opening brief – presented there in the context of a predetermination argument – and the FTA's response thereto is discussed in the prior section and is not repeated here.

BHUSD informed the FTA of its belief that Metro's data was incomplete and that it – BHUSD – was doing the necessary trenching/sampling. As a result, both Plaintiffs encouraged the FTA to delay issuing the FEIS until information could be gathered and presented. But the FTA refused to wait, and the FEIS dismissed Santa Monica Station as a possibility. When the results of Plaintiffs' analyses came in, however, the Agencies did not dispute the trenching results Plaintiffs had procured showing no active fault under the High School. But instead of even then performing their own trenching or otherwise reconsidering their assumptions, Metro simply moved their map of the active fault zone just outside of the area BHUSD had trenched. Ultimately, the Agencies decided that it was a completely different fault that put Santa Monica Station at risk.

The City resists any suggestion that its argument is that NEPA requires the FTA to accept BHUSD's reports. It argues only that an EIS must provide both the agency and the public sufficient information to determine whether the information is weak or incomplete, and the consequences of proceeding anyway. *See Alliance for the Wild Rockies v. Bradford*, 720 F.Supp.2d 1193, 1222 (D. Mont. 2010) (noting that the Forest Service had "fail[ed] to disclose that some information 'is incomplete or unavailable' or discuss 'the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment'") (quoting 40 C.F.R. § 1502.22(b)(1), (2)); *Powell*, 395 F.3d at 1031 (holding that withholding of information regarding incompleteness of model's consideration of relevant variables violated NEPA, "which requires up-front disclosures of relevant shortcomings in the data or models") (citing 40 C.F.R. § 1502.22). Here, it argues, the FEIS did not disclose that the conclusions reached were based only on *indirect* seismic studies. In addition, the City argues that NEPA required – because of the need for a reasoned choice among alternatives, *see* 40 C.F.R. § 1502.22(a) – the FTA to disclose that they knew they were proceeding on incomplete information given the fact that Plaintiffs had studies on the issue outstanding. And if the FTA concluded that it could not await the outcome of those studies, it had to take the four steps required by 40 C.F.R. § 1502.22, whereas here it skipped the first three of those steps in eliminating Santa Monica Station. In the end, the City summarizes the FTA's effort as an improper rubber-stamping of Metro's plans. *See Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215,

236 (5th Cir. 2006) ("An agency may not…'reflexively rubber stamp' information prepared by others.").

b. The FTA's Response

The FTA contests the City's suggestion that information regarding faulting in the 2009 DEIS and 2012 FEIS was inadequate because of information uncovered through the post-ROD studies and that this later-discovered information means that the Agencies should have waited for more factual development before proceeding. It argues that the APA does not allow for an argument, based on hindsight, for improvement in information or data. *See Vermont Yankee*, 435 U.S. at 554-55 (indicating that arbitrary and capricious standard is to be applied to an agency's decision "in light of the facts then available"); *Cady v. Morton*, 527 F.2d 786, 797 (9th Cir. 1975) ("[A]lthough the EIS could be 'improved by hindsight,' it has satisfied the intent of the statute."). It also asserts that there is no support for any contention that an agency is required to obtain *complete* information on an environmental impact before acting, and that such a standard would not be realistic or viable. *See Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973) ("Neither [NEPA] § 102(2)(B) nor (C) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.").

In the FTA's view, the Agencies explained in the DEIS the limited information they had available concerning the WBHL, and after issuing the DEIS they conducted field work and issued their seismic studies. The FTA argues that they then reasonably relied on their experts in concluding that the active Newport-Inglewood fault zone's northern section manifested as the WBHL. *See Balt. Gas & Elec. Co. v. Nat. Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (indicating that a court examining an agency "making predictions, within its area of special expertise, at the frontiers of science…as opposed to simple findings of fact,…must generally be at its most deferential"). Because of their reasonable reliance on their experts, they believe that there was no missing information essential to a reasoned choice among alternatives within the meaning of 40 C.F.R. § 1502.22.

c. The City's Reply

In its Reply, the City emphasizes that it is not arguing that the FTA was required to choose Santa Monica Station and is not arguing that the FTA is precluded from relying on its own seismic experts, but only attempts to enforce the requirement that relevant information be made available to the public. As to this, the City believes that the FTA has not rebutted the showing that it failed to properly disclose the weaknesses and incompleteness in its seismic data. In other words, if the FEIS claims that the seismicity of the WBHL precludes Santa Monica Station, the City believes that the FTA was obligated to discuss the weak or incomplete data regarding that seismicity. The City believes the FTA knew of the weaknesses in its data and knew those weaknesses were being addressed by the studies initiated by Plaintiffs, but there was no mention of these studies or their implications until a response document was issued *after* the FEIS – a response document that simply re-drew the fault locations.

While the City acknowledges that an agency can proceed in the face of uncertainty, this is only true, it argues, where the public is made aware of the weak or incomplete information, as set forth in 40 C.F.R. § 1502.22. Here, instead of doing that, the City argues that the FEIS presents the seismic conclusions therein as if above reproach. Had the FTA disclosed this uncertainty, it would have required either grappling with the ongoing uncertainty in making a reasoned choice between the alternate routes or waiting on the decision until Plaintiffs' pending seismic studies could be completed. What is not allowed, the City argues, are post-hoc, constantly-shifting excuses outside of the NEPA process, which is what it asserts occurred here. *See Ctr. for Biological Diversity*, 349 F.3d at 1169 ("While the agency is not required to publish each individual comment in the final statement, the regulations clearly state that the agency must disclose responsible opposing scientific opinion and indicate its response in the text of the final statement itself. The mere presence of the information in the record alone does not cure the deficiency here.").

The City dismisses the FTA's reliance on *Jicarilla Apache* here, because it does not argue that *complete* information must be obtained before action is taken, only that the agencies must disclose the *existence* of *incomplete* information under 40 C.F.R. §1502.22. The City also contends that the FTA's cases do not support the assertion that

there is no disclosure requirement where the agency relies on experts, and say nothing about what happens when there is incomplete or unavailable information regarding reasonably foreseeable significant adverse effects.

d. BHUSD's Reply

In its own Reply on this point (which also relates to its pre-determination argument), BHUSD argues that this is not just a case of disagreement amongst experts, because the FTA failed to insist upon *adequate* testing. It therefore contends that the FTA has not made a reasoned decision based on its evaluation, but just relied on its consultants and did not demand further testing when it was confronted with the inaccuracy of its data based on CPT testing alone, knowing that it had sanctioned a deviation from a method CGS calls "essential." BHUSD contends, therefore, that the decision is arbitrary and capricious and there was no "hard look" at environmental impacts where the record shows objective errors in judgment, including the lack of any site-specific data at Constellation Station and a refusal to trench (which, BHUSD asserts, Metro understood and agrees – as supported by CGS – is the most-accurate seismic analysis method).

BHUSD emphasizes its belief that the only scientific data about fault strands at Constellation Station is inconclusive or non-existent, and that contemporaneous statements made in January 2012 confirm that the investigation undertaken was insufficient – a concern that it contends surfaced yet again in the Spring of 2012. BHUSD asserts that even if the Agencies were reasonable in accepting core borings alone (which BHUSD believes they were *not*), *none* of the borings they took intersected with *any* of the mapped faults. So there was no direct, reliable data upon which the Agencies could base their conclusion of active faults at Santa Monica Station. Furthermore, BHUSD rejects the idea that Metro's acceptance of BHUSD's trenching results cured the flaws, because Metro then used the same "predictive" methodology it had earlier adopted to simply assume the existence of faults in every location where BHUSD had *not* trenched, without any further testing.

BHUSD asserts that the FTA failed to respond to any of the cases BHUSD had cited where courts in this Circuit had found reliance on experts' inadequate data or assumptions to constitute a failure to engage in a "hard look." *Ctr. for Biological*

Diversity v. Provencio, No. CV 10-330 TUC AWT, 2012 WL 966031, *18-19 (D. Ariz. Jan. 23, 2012); *Sierra/Bosworth*, 2005 WL 2204986, *9 (characterizing a letter as "prepared on a rushed basis and lack[ing] the careful reasoning and scientific analysis that has been found to constitute a 'hard look' in other cases"). Because it insists it is not asking the Court to decide which experts are right, BHUSD also believes that the FTA's discussion of *American Electric Power Company, Inc. v. Connecticut*, 131 S.Ct. 2527 (2011), is inapposite. BHUSD also feels this case is unlike *Laguna Greenbelt*, because there the discussion of environmental impacts was "reasonably thorough," which BHUSD feels is not applicable here.

e. The FTA's Reply

The FTA argues that the City is simply wrong about the purported need to affirmatively present every uncertainty in an EIS, taking the position that the Ninth Circuit's *en banc* opinion in *McNair* did away with any such suggested rule. *See McNair*, 537 F.3d at 1001 ("[N]one of NEPA's statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS."). The FTA asserts that this necessarily defeats the City's reliance in this regard on 40 C.F.R. § 1502.22 and *Powell*. As such, the FTA contends that a reasonably thorough analysis of the underlying geology is sufficient, even if not every uncertainty is identified. In any event, the FTA further notes (citing FEIS 8-45) that the FEIS disclosed the inherent uncertainties in understanding subsurface geology, acknowledging that there was no conclusive proof of the locations and extent of nearby faults. Citing AR8024 and S-47 (the former of which it states is an FEIS Appendix, *see* Docket No. 122, at 23:18-21), it asserts that it explained the limitations of the Agencies' knowledge and indicated that Metro intended to complete a further exploration to refine the fault zone locations specific to the selected tunnel alignment.

The FTA rejects the suggestion that the Agencies knew of flaws in the Tunneling Report and Fault Report, pointing out (and specifically referencing FTAAR33975) that the only *pre*-FEIS letter the City cites concerning the Agencies' knowledge of the plaintiffs' additional testing indicated only that BHUS was conducting additional seismic studies, without identifying the scope thereof, and fails to "support any allegation that the agencies knew of any flaws in the" Tunneling Report and Fault Report. Docket No. 122,

at 22:15-19. Of course, Leighton's report then was not issued until 40 days *after* the Agencies issued the FEIS. Citing *Vermont Yankee* and *Cady*, the FTA takes the position that the possibility of improvement by hindsight does not provide a basis for finding an EIS deficient.

The FTA also renews its assertion that, under the APA, courts are not to act as omnipotent scientists, but instead are to be at their most deferential when confronting these types of questions. Thus, in its view, in this setting the Court can only overturn a decision that is based on an expert conclusion where it is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. This is because NEPA requires no particular method for analyzing environmental impacts and the APA gives agencies deference in their choice of analytical method, with no requirement for following any particular organization's guidance on the topic at hand.

With respect to understanding the seismology under Constellation Station, in particular, the FTA offers that the Agencies decided they had enough information, and had reviewed the issue in sufficient detail (with a listing of all of the information they had obtained on the issue), to conclude that there were no active faults under Constellation Station after acknowledging the suggestion for additional geotechnical and fault investigations as part of the next phase of design. The FTA believes this is sufficient to show a reasonably thorough analysis for purposes of choosing amongst alternatives, emphasizing again that there is no need for complete information before action is taken.

The FTA rejects BHUSD's reading of what it characterizes as Metro's "guidance" on the topic of trenching, asserting that the "guidance" in question concerns assessment of the width of *known*, *existing* faults, not about *finding* seismic faults in the first place. In addition, the FTA points out that BHUSD has simply picked out two recommended techniques, whereas it ignores the other recommendations that the Agencies' experts did, in fact, follow (and the comment that not all of the investigative methods would be necessary in a single investigation). Indeed, the FTA argues that even if it were true that it would be more thorough to trench, under cases such as *Laguna Greenbelt* there is no obligation to do so. Ultimately, the FTA contends that agencies must have the discretion to decide when to draw the line in terms of the collection of data. *See Town of Winthrop*, 535 F.3d at 11 ("To the extent the letters suggested that the FAA wait until further data

had been collected, it was not arbitrary and capricious for the FAA to conclude that it had enough data to make a reasoned decision. There will always be more data that could be gathered; agencies must have some discretion to decide when to draw the line and move forward with decisionmaking.").

f. The Court's Assessment

As with the pre-determination issue discussed above – and for the same reasons – the Court again rejects BHUSD's argument that the Agencies' investigation of seismic risks association with Santa Monica Station and Constellation Station were deficient and could not contribute to the necessary "hard look." Although Plaintiffs would have preferred a *more* thorough analysis, taking into consideration a different (at least in part) testing methodology, the Court does not conclude that the Agencies' efforts fall short in this regard under NEPA. It believes that the investigation and discussion of this issue were both "reasonably thorough," *see Montana Snowmobile Ass'n*, 790 F.3d at 924, especially considering courts' oft-noted deference due agency work in this regard. *See Marsh*, 490 U.S. at 378; *Balt. Gas & Elec.*, 462 U.S. at 103; *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 792; *Tri-Valley CAREs*, 671 F.3d at 1126; *McNair*, 537 F.3d at 993; *Nw. Ecosystem Alliance*, 475 F.3d at 1140; *Earth Island Inst.*, 351 F.3d at 1301; *Sierra/EPA*, 346 F.3d at 961; *Laguna Greenbelt*, 42 F.3d at 526; *Habitat Educ. Ctr.*, 673 F.3d at 531.

However, the Court cannot so easily dismiss the City's argument concerning the Agencies' failure to *disclose incomplete information* bearing upon the seismic analysis, which the Court views as a NEPA issue separate from whether they reasonably relied on their experts.[88] Contrary to the FTA's attempt to refashion (or avoid) the argument, the City (unlike BHUSD) is not asking for a hindsight-based improvement in information or data, nor a *complete* compilation of information before proceeding.

The record makes clear that seismic conditions were at the core of the Century City subway station choice. Yet, as best as it can discern, the FTA's only response to this point – in its Reply brief – is that Ninth Circuit law does not require presentation of *every* uncertainty in an EIS, and that so long as it completed a reasonably thorough analysis of underlying geology, it has not violated NEPA "even if [the Agencies] did not identify

[88] Certainly the FTA does not appear to have directed the Court to any case that stands for the proposition that a reasonable reliance on experts can eliminate incomplete information disclosure obligations no matter the obvious importance of the information to a choice amongst alternatives.

every uncertainty." Docket No. 122, at 21:15-22:8. The FTA is of course correct that an EIS need not disclose *every* uncertainty. But uncertainties surrounding seismic conditions would be *key* uncertainties with respect to the subway siting decision in Century City. In fact, the FTA clearly (and understandably) recognized the importance of this incomplete information because – by the FTA's own admission – the FEIS indicated that Metro intended to complete "further exploration to refine the fault zone locations specific to the selected tunnel alignment." *Id.* at 23:21-23 (citing FEIS S-47).

The FTA asserts that "the FEIS acknowledged that the FTA and Metro did not have conclusive proof of the locations and extents of the nearby faults." Docket No. 122, at 23:9-10 (citing FEIS 8-45). Here are the germane uncertainties FEIS 8-45 revealed: 1) that the WBHL was the "inferred" northern extension of the active Newport-Inglewood fault zone; and 2) "[d]uring subsequent design phases, explorations will continue to more precisely locate the fault zones with respect to the tunnel alignment selected." Contrast that with the statements on that page that: 1) "both the [SMFZ] and WBHL are active fault zones"; 2) Santa Monica Station "would be directly within the fault zone"; 3) Century Park East Station "would straddle the WBHL"; 4) "[n]o evidence of faulting was found on the…Constellation Station site"; 5) "there is clear evidence that the station locations on Santa Monica Boulevard…would be in active fault zones and are not viable options for station locations"; and 6) "[t]he [Constellation Station] would not be within an active fault zone and is a viable option for a station location.

Whether or not FEIS 8-45 was a sufficient disclosure of the fact that "the FTA and Metro did not have conclusive proof of the locations and extents of the nearby faults" – and the foregoing summary of that page should render that assertion questionable, at best[89] – the FTA argues that this uncertainty did not matter with respect to a station location on Santa Monica Boulevard because it believed there was "clear evidence" that active fault zones precluded any station at that location. *See id.* at 23:10-16. Of course, that says nothing at all about why such uncertainty – to the extent the FEIS disclosed any

[89] The Court would agree with the City that, at least in the locations the parties have cited, "the FEIS presents its seismic conclusions as though they were above reproach." Docket No. 116, at 11:23-12:1 (citing AR1029); AR1029 ("These investigations and studies provide fully sufficient data (1) to support a reasonable conclusion that the adverse environmental impacts and safety risks of the…Santa Monica Station render that alternative infeasible, and (2) to influence, if not determine, the selection of…Constellation Station.").

at all – would not impact the "all-clear" decision regarding Constellation Station.

While, at the time it issued the FEIS, the FTA may not have needed to address the uncertainties specifically highlighted by Plaintiffs' post-FEIS and post-ROD seismic studies, the Agencies certainly knew that additional seismic studies were in the pipeline and knew that the seismic conditions in the area were a key driver of the ultimate decision as to the proper station location. They also unquestionably knew both that they had to rely on indirect evidence of faults and that conclusions about the identification and location of those faults had changed between the time of the DEIS and FEIS. They also knew that there were substantial criticisms about the way that Metro's seismic studies had been conducted (including the lack of trenching) and (as BHUSD in particular highlights) whether they had included a sufficient investigation of Constellation Station in particular. *See, e.g.*, FTAAR33977. An agency "is under no obligation to conduct new studies in response to issues raised in the comments, nor is it duty-bound to resolve conflicts raised by opposing viewpoints." *Block*, 690 F.2d at 773. But it must provide a "good faith, reasoned analysis in response," *id.* (omitting internal quotation marks), yet the Agencies appear to have effectively disclosed none of this. *Compare Native Ecosystems Council*, 418 F.3d at 964 ("The Forest Service did not disclose in the Elkhorn project EIS that its hiding cover measurement was done over an improper…area."); *Alliance for the Wild Rockies*, 720 F.Supp.2d at 1221-22.

NEPA "requires up-front disclosures of relevant shortcomings." *Powell*, 395 F.3d at 1031. "If there is incomplete or unavailable relevant data, the [EIS] must disclose this fact." *Id.* at 1031. In failing to make the necessary disclosures and perform the associated analysis required by 40 C.F.R. § 1502.22, the FTA violated NEPA. *See also Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) ("Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA.") (internal quotation marks omitted), *amended by* 867 F.2d 1244 (9th Cir. 1989).

6. Re-Opening the NEPA Process

a. The City's Opening Arguments

Finally, the City believes that NEPA required the FTA to re-open the NEPA process given the new seismic studies that were produced after the FEIS was published. Without re-opening the NEPA process, the City asserts that those studies were never released for public comment and were not incorporated into the Agencies' environmental analysis, frustrating the purpose of NEPA. The City emphasizes that these new studies directly address the decision to change the site of the station due to the belief – painted by the City as a *mistaken* belief – concerning active faulting. The City argues that assumptions about the activity of the WBHL fundamentally shaped the EIS and the presenting of a single option for reaching Constellation Station by way of tunneling under the High School. Nevertheless, despite the fact (under the City's theory) that the studies showed the Agencies' assumptions to be incorrect, the FTA elected not to do an EA or issue an SEIS. *See* 40 C.F.R. § 1502.9(c)(1) ("Agencies…[s]hall prepare supplements to…final environmental impact statements if…[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns[] or…[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."); *see also League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("Connaughton"); *Alaska Wilderness*, 67 F.3d at 727-31.

Moreover, Metro – without performing any new studies or analysis – simply re-drew its fault map to relocate the faults away from the trenching performed by Plaintiffs' consultants' studies, and only then did this in a memo that was not part of the record before the public but instead produced in this litigation. *Cf. Or. Natural Desert Ass'n*, 625 F.3d at 1120 (indicating that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself," not by way of "'appellate counsel's *post hoc* rationalizations for agency action'") (quoting *Motor Vehicle*, 463 U.S. at 50). Instead of confronting environmental trade-offs between alternatives head on, the City argues that Metro thereby simply created a new hypothesis to justify the conclusion reached in the FEIS and that the Agencies simply swept problems under the rug. This is all notwithstanding that at the time they did so, construction was still years away. In these respects, the City believes that the FTA did not take a "hard look" at the new data, nor did it attempt to reconcile it with conflicting information contained in the EIS.

b. BHUSD's Opening Arguments

In addition to the City's argument that an SFEIS should have been prepared, BHUSD contends that a SDEIS was warranted as well, pointing out that the supplementation requirement applies both to a DEIS and to an FEIS. *See* 40 C.F.R. §1502.9(c); 23 C.F.R. § 771.130(a). It emphasizes that there is no deference accorded a decision not to supplement unless a court is satisfied that the agency made a reasoned decision based on an evaluation of the significance or lack of significance of any new information. *See Marsh*, 490 U.S. at 378 ("[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information."). BHUSD asserts that the Tunneling Report and Fault Report, along with the new ridership reports, contained significant new information that had not been included in the DEIS, and that the Agencies relied upon that new information but never supplemented the DEIS. In fact, BHUSD points out that the FTA denied repeated requests both to prepare a SDEIS to address the information and allow for public comment and to delay issuing the FEIS to allow for completion of Plaintiffs' seismic investigations.[90]

Here, BHUSD contends that the DEIS contained no information about active faulting at Santa Monica Station, and the Tunneling Report and Fault Report supporting the conclusion that there *was* active faulting at that location only came about a year after the DEIS's public comment period had ended. Because this information left only Constellation Station and Alignment 2E as viable Century City options, and those options meant significant new impacts on construction (requiring tunneling under the High School and residences, crossing a purportedly-active WBHL), BHUSD argues that an SDEIS with this new information was required. In the absence of such an SDEIS and a refusal to wait for the results of Plaintiffs' seismic studies, the public never had an

[90] BHUSD asked the Agencies to delay approving the FEIS until the studies were released, but on April 26, 2012, Metro certified the FEIS. Subsequently, on May 24, 2012, Metro approved Phases 2 and 3 of the Project, designating Constellation Station as the Century City station. BHUSD then again asked for a delay with respect to the issuance of the ROD, but the FTA went ahead and issued it in August 2012, even though BHUSD argues that Phase 2 – involving Century City – would not begin, under the best of circumstances, until 2017.

opportunity to comment on the new information before the FEIS was issued. They believe this violates NEPA, relying on *Block*, 690 F.2d at 772, 40 C.F.R. § 1502.9, and *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596, 603 (4th Cir. 2012) ("The very purpose of public issuance of an environmental impact statement is to 'provid[e] a springboard for public comment.'") (quoting *Public Citizen*, 541 U.S. at 768).

c. The FTA's Response

As for whether an SDEIS or SFEIS were/are required, the FTA begins by arguing (citing *Marsh*, 490 U.S. at 374 and 40 C.F.R. § 1502.9(c)(1)(ii)) that NEPA only requires one where there remains a major Federal action to occur and new information shows that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. Here, the FTA concluded that the information in question was either not new, not significant, or neither new or significant.

With respect to an SDEIS in particular, the FTA argues that information about the possibility of tunneling across an active fault was already in the DEIS, so there was nothing new when it was concluded that the WBHL was an active fault. The DEIS specifically disclosed that it had not yet (at that time) been confirmed, but that there was a possibility that the WBHL was a surface manifestation of an active fault. In addition, it referenced that Metro intended to evaluate the WBHL and any significance it had. The FTA asserts that BHUSD has simply ignored this discussion in the DEIS. In addition, that Alignment 2E – to Constellation Station – would require tunneling under the High School and residences was also disclosed by virtue of the map of property acquisitions for that Alignment (and comparison of the route to Santa Monica Station) that was included in the DEIS. Furthermore, the FTA rejects any attempt to compare this case to *Sierra Club v. U.S. Department of Transportation*, 245 F.Supp.2d 1109 (D. Nev. 2003), because the DEIS discusses both the seismic and geologic issues in Century City.

The FTA also argues that NEPA does not require repeating the public comment process when the proposed action – use of Century Park East Station instead of Santa Monica Station – is just a slightly-modified version of an alternative that was actually evaluated in the DEIS, meaning that the announcement of the change in the location of

station option on Santa Monica Boulevard by way of an "FAQ" on a website (referenced in the section on pre-determination, *supra*, Footnote 77) was non-problematic. *See Block*, 690 F.2d at 771 (rejecting the rule that "an agency [would have] to repeat the public comment process even when the Proposed Action is merely a slightly modified version of an alternative evaluated in the initial draft EIS"). It also argues that public notice of Century Park East Station as an option was sufficient because the DEIS explained in the Alternatives Analysis why the Agencies had rejected that station location, meaning – to the FTA – that that station was within the range of alternatives on which the public could have commented. *See Laguna Greenbelt*, 42 F.3d at 527 ("The non-disclosure here did not frustrate NEPA's goal of ensuring that relevant information is available to the wider audience participating in agency decision-making. It is clear that members of the public had sufficient information regarding the tollroad's impact on the reserve to submit comments upon it…."). Even if this is not correct, the FTA still believes – citing *Block*, 690 F.2d at 772 and *Cal. ex. rel. Imperial Cnty.*, 767 F.3d at 795 ("[S]upplementation is not required when two requirements are satisfied: (1) the new alternative is a minor variation of one of the alternatives discussed in the draft EIS, and (2) the new alternative is qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]."") (omitting internal quotation marks) (quoting *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011)) – that analyzing Century Park East Station in detail in the FEIS instead of Santa Monica Station did not undermine the public notice requirements because the issue is whether the public had enough information to comment on *the alternative selected* (here, both the DEIS and FEIS included Constellation Station, leading to comments on that station), not one that is *not* selected.[91]

With respect to any suggestion that an SFEIS was/is warranted, the FTA argues that the new seismic studies presented by Plaintiffs did not present new, significant information. Metro rejected KGS's report of the possibility of faults projecting towards Constellation Station, so that information was not new and was not significant. Metro also reviewed the Feffer Report's trenching data. Parsons and the TAP both

[91] The FTA offers the same argument in connection with supplementation of the FEIS – that even if the post-ROD information presented by Plaintiffs was both new and significant, an SFEIS still would not have been required, because any new information involving a Century Park East Station concerned only a rejected alternative.

acknowledged the possibility that the WBHL may not pass through Century Park East Station, but they concluded that they could not ignore "clear evidence" of the presence of significant faults crossing Santa Monica Boulevard. Because it had evidence of three major active fault systems, Metro took a risk-averse approach: without direct evidence that an individual fault trace – within a complex area of known, active faulting – was *in*active, the accepted standard was to assume that the trace *is* active.

The FTA acknowledges that BHUSD's reports caused them to refine their analysis and conclusions, including by recognizing that the WBHL may not have caused the geologic data they identified. But, it argues, such refinements do not alter the environmental impacts of the Subway or make the FTA's ultimate decision arbitrary or capricious. Even if Metro had identified the wrong source of the fault at the Century Park East Station, the FTA asserts that there was no reason to reconsider a Santa Monica Boulevard option because the seismic risks remained. The FTA notes that PGH agreed with Metro after it reviewed the Feffer Report and BHUSD's consultant's reports. PGH concluded that those reports did not collect data near the SMFZ, and thereby did not undermine Metro's conclusion that the fault zone could underlie both potential Santa Monica Boulevard station locations. Because a Century Park East Station was still infeasible, the FTA concluded that the post-ROD reports did not establish a new, significant environmental impact in that regard either.

Under these circumstances, the FTA argues that the preparation of an SFEIS was not, and is not, called for. *See Block*, 690 F.2d at 771 ("The main policy reason for soliciting public comment is to use public input in assessing a decision's environmental impact. To effectuate this purpose, agencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input. If an agency must file a supplemental draft EIS every time any modifications occur, agencies as a practical matter may become hostile to modifying the alternatives to be responsive to earlier public comment."). The FTA argues that it has the discretion to exercise its judgment in the absence of conclusive data by using the available facts and probabilities to conclude that building a subway station where the complex geology reveals a possibly-active fault zone is an infeasible alternative, and equally to conclude that the new information presented in the City's and BHUSD's seismic reports was not sufficiently significant. *See Motor*

Vehicle, 463 U.S. at 52 ("It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion."). The FTA asserts that, as there has been no identification of a newly-viable station, so there is no need to allow the public to comment on an SFEIS on such a phantom option. Similarly, the FTA asserts that because Constellation Station was within the range of alternatives considered in the DEIS and FEIS (and was open to public comment throughout the process), this is another reason why no SFEIS was required. *See Cal. ex rel. Imperial Cnty.*, 767 F.3d at 796 ("[A] supplemental EIS is unnecessary when an agency's final decision falls 'within the range of alternatives' considered in an EIS.").

d. Plaintiffs' Replies

The City believes that an SFEIS is required to allow public scrutiny of the untested hypothesis that the SMFZ precludes a station at the Century Park East location. It argues that even if an agency's refinement of its conclusions after reviewing post-FEIS studies could do away with any requirement of an SFEIS under some circumstances, here those revisions say nothing about how a previously-identified north-west fault, the WBHL, could suddenly shift 90 degrees and transform into an east-west fault, the SMFZ. The City also points out that the FTA's only review of the data was of a litigation memo prepared by Metro's outside counsel,[92] not based on any technical assessment. The City believes this issue is particularly ripe for an opportunity for public comment because assumptions about active faults have determined the outcome of the key environmental issue in this case (the siting of the Century City subway station), and every time the Agencies have asserted that active faults were located in a specific location, public comments have demonstrated those assumptions to be erroneous.

The City argues that the FTA has not cited any case permitting repeated changes to key assumptions without allowing for an opportunity for public scrutiny, and it argues that *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), *Alaska Wilderness* and Connaughton – all of which the FTA ignores, according to the City – all support the issuance of an SFEIS even though the information in question impacts a rejected

[92] The City notes in its Reply that an issue concerning its access to this litigation memo has been under submission since June 18, 2014. *See* Docket No. 103.

alternative. Here, a change in the assumptions about the viability of a station on Santa Monica Boulevard would change the comparative costs and benefits of Constellation Station, the selected alternative.

With respect to the question of a need for an SDEIS, BHUSD emphasizes that the argument is that it was the October 2011 findings that first indicated there was evidence of an active fault at Santa Monica Boulevard, whereas the DEIS only broached the *possibility* of faulting, stated that there was – as of that time – no confirmation that the WBHL was the surface manifestation of an active fault, and still listed Santa Monica Station as the primary location. In other words, the prospect of tunneling through an active fault was new information requiring an SDEIS, according to BHUSD. In fact, BHUSD argues that the FTA's authorities are consistent with this view in that they recognize that an SDEIS is required where there are significant new circumstances or where there is significant new information.

e. The FTA's Reply

In its Reply, the FTA argues that there was no need for an SDEIS because the DEIS already revealed that a Santa Monica Boulevard location faced problems due to close proximity to the SMFZ, and that there was no new information that changed that conclusion. It argues that there is no need for a supplementation when "new" information merely confirms an original analysis. *See Tinicum Twp.*, 685 F.3d at 298 ("Where new information merely confirms the agency's original analysis, no supplemental EIS is indicated."). The FTA also argues that the City is wrong to the extent it argues a supplementation is required even when there is only a significant change to a *rejected* alternative, such as the new information about the WBHL's relationship to the rejected Century Park East Station. Specifically, the FTA argues that *Watt* required only an analysis of the chosen alternative, *see* 716 F.2d at 948-49, and *Alaska Wilderness* also related only to the already-chosen alternative, *see* 67 F.3d at 725, 730-31. In *Connaughton*, the FTA posits that an SEIS was required only because the EIS had been unclear about the effects of the chosen alternative. *See* 752 F.3d at 761.

With respect to the need for an SFEIS, the FTA contends in its Reply that no supplementation is needed (with additional time for public comment) just because public comments raise new information or because an agency has adjusted its analysis in a way

that does not alter the conclusion. *See Marsh*, 490 U.S. at 373 ("[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."). Instead, the FTA asserts that the completion of new analyses in response to public comments is to be lauded because it advances the goals of NEPA (without also requiring a SEIS). *See Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1138 (9th Cir. 2006) ("[T]hroughout numerous years of study, the Corps did not simply stake out a position and attempt to defend it; consistent with the dictates of a 'hard look,' the Corps remained open to input from stakeholders and conducted new analyses to address their concerns.").

The conclusion had already been reached in the FEIS that the Century Park East Station was untenable because it would lie on a fault zone and building there would consequently be too dangerous. BHUSD's studies on the WBHL's location did not change the conclusion that the station would be too dangerous. The FTA believes that it was reasonable to therefore conclude that changed reasons for the same decision were not significant – what it believes to be a classic example of the resolution of a factual dispute implicating substantial agency expertise, and therefore owed deference.

In presenting its arguments, the FTA emphasizes the contents of the January 28, 2014 letter, *see* FTAAR88598-99, which concluded that the information in the post-ROD studies was not significant,[93] even if new (and also argues that a letter without opportunity for public comment is – at least with respect to *whether* to prepare an SEIS – sufficient for compliance with NEPA, citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) and 23 C.F.R. § 771.130). The FTA contrasts this with the City's citation to *Connaughton*, where – the FTA highlights – the agency in question had

[93] Specifically, the letter offered two sentences of "analysis":

> After considering all the information in the Letters and Reports, FTA finds that BHUSD and the City have not identified any new, significant environmental impact that the proposed Project would cause…. Further, FTA is not required to reconsider a Century City Station on Santa Monica Boulevard because FTA has already evaluated such alternative station location and resulting alignment in the EIS, that evaluation remains valid and, as discussed, nothing in the Letters or Reports identified a new, significant environmental impact that would be caused by the proposed Project.

FTAAR88599.

not reached an internal conclusion that no new, significant information had arisen. *Compare Connaughton*, 752 F.3d at 761 *with N. Idaho Cmty.*, 545 F.3d at 1154-55.

f. The Court's Assessment

"When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency's statements…, particularly to determine which portions of the agency's analysis rely on accurate and up-to-date information, and which portions are no longer relevant." *Connaughton*, 752 F.3d at 761. Moreover,

> [o]nly at the stage when the draft EIS is circulated can the public and outside agencies have the opportunity to analyze a proposal and submit comment. No such right exists upon issuance of a final EIS. By refusing to disclose its [p]roposed [a]ction until after all opportunity for comment has passed, an agency insulates its decision-making process from public scrutiny. Such a result renders NEPA's procedures meaningless.

Block, 690 F.2d at 771.

In aid of avoiding these roadblocks to the public participation process NEPA requires, "[a]gencies…shall prepare supplements to either draft or final environmental impact statements if…[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or…[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).[94] In addition, the Supreme Court has indicated that the decision whether to supplement is similar to the decision whether to prepare an EIS in the first place, such that "[i]f there remains 'major Federal action[n]' to occur, and if the

[94] 23 C.F.R. § 771.130 – a regulation specific to the FTA – contains a slight variation on the language in section 1502.9(c)(1). It provides that "[a]n EIS shall be supplemented whenever the [Federal Highway] Administration determines that: 1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a). While the FTA's January 28, 2014, letter – devoid as it is of details – tracks the language of section 771.130(a), it is not particularly reflective of section 1502.9(c)(1)'s language. The Court is not aware of any argument by the parties concerning how to resolve this conflict between the regulations if it determines that it is important to reaching a conclusion on the SFEIS issue. It would appear, from brief research into the question, that supplementation is required when *either* standard is met. *See Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1509-10 (9th Cir. 1997); *Today's IV, Inc. v. Fed. Transit Admin.*, No. LA CV 13-00378 JAK (PLAx), 2014 WL 3827489, *1, 33 (C.D. Cal. May 29, 2014) (relying upon section 1502.9(c)).

new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh*, 490 U.S. at 374 (quoting 42 U.S.C. § 4332(2)(C)). "When determining whether to issue a supplemental EIS, an agency must 'apply a rule of reason,' not supplementing 'every time new information comes to light' but continuing to maintain a 'hard look' at the impact of agency action." *Connaughton*, 752 F.3d at 760 (quoting *Marsh*, 490 U.S. at 373-74). "Application of the 'rule of reason'…turns on the value of the new information to the still pending decisionmaking process." *Marsh*, 490 U.S. at 374.

As an initial matter, the Court is persuaded by the FTA's arguments that changes in the Project's planning and analysis relevant to Century Park East Station, *by themselves*, did not require either an SDEIS or SFEIS. With respect to the suggested need to prepare an SDEIS because of the shift in focus to Century Park East Station following issuance of the DEIS, the Court notes the Ninth Circuit's statement in *Block* that NEPA "does not impose" the burden of "repeat[ing] the public comment process even when the [p]roposed [a]ction is merely a slightly modified version of an alternative evaluated in the initial" DEIS and agrees with that decision's observation that "requiring agencies to repeat the public comment process when only minor modifications are made promises to prolong endlessly the NEPA review process." *Block*, 690 F.2d at 771. Putting aside the fact that the Century Park East Station did not turn out to be the proposed action at all – and was never in line to be so – the Court agrees that it is "merely a slightly modified version" of Santa Monica Station. In addition, the DEIS did discuss the Century Park East Station, so the public could not have been surprised that such a station was within the realm of consideration. *See Laguna Greenbelt*, 42 F.3d at 527.

With respect to the call for an SFEIS due to the changes in analysis impacting Century Park East Station as the result of the post-FEIS and post-ROD seismic studies, the Agencies determined that any alteration in the thinking about *which particular fault* was responsible for making that station infeasible was not "significant" because the determination was that, due to its presence (along with Santa Monica Station) in a complex area of known, active faulting, Century Park East Station was simply infeasible. The identification of the particular fault responsible for that conclusion was unimportant

to that conclusion. Under the applicable "rule of reason," the Court likely[95] should agree with that determination and that supplementation was therefore not required under section 1502.9(c)(1) *on that basis alone*.[96]

The Court sees the change to identifying Constellation Station as the location for the Century City subway station differently. At the time of the DEIS, Santa Monica Station was identified as the base/preferred alignment. Although the DEIS disclosed that Santa Monica Station might be compromised (and indicated that "[f]urther evaluation of the [WBHL] and its significance to the Project would be performed during design level investigations for the Project"), *see* DEIS 4-149, it did not uncover what it believed to be *confirming* evidence of that possibility until well after the public comment period on the DEIS had passed. In addition, numerous ridership studies conducted *after* the DEIS fundamentally changed conclusions on that topic as well, whereas ridership information as of the time of the DEIS favored Santa Monica Station.

Of course all of *that* information was new,[97] and it was so *significant* that, as a result of that analysis, the decision was made to shift the Century City subway station to Constellation Station. This would all have the consequence, under the alignment selected, of requiring tunneling beneath the High School (as well as residences). While that information – that Constellation Station, were it selected, would require such tunneling – may not have been new, the circumstances leading to the selection of Constellation Station certainly were. As *Block* recognizes, the public had no right to

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[95] If the Agencies were incorrect about either of the Santa Monica Boulevard station locations being located on top of a fault (and their shifting explanations and discussions in that regard suggest at least that they were still unsure of this point as a result of Plaintiffs' post-FEIS studies), they had taken the position that tunneling *across* faults would be both unavoidable and possible. *See* DEIS 4-161. In other words, if simply *crossing* faults was at issue, confidence in the FTA's conclusions might be withdrawn.

[96] Under this approach, the Court has no need to resolve the FTA's argument that no supplementation is required where only something other than the chosen alternative has been impacted. The Court does find some general level of appeal in that contention though, at the same time, it observes that section 1502.9(c)(1) speaks in terms of "new circumstances or information…*bearing on* the proposed action." (emphasis added). Certainly the plain language of that regulation would appear to support an argument that new circumstances or information impacting a non-chosen alternative cannot be automatically excluded from consideration of whether or not to prepare a supplement.

[97] While the DEIS may have discussed the *possibility* of tunneling across an active fault, the revelation that there *was* – in Metro's view – an active fault at Santa Monica Station was not made until after the DEIS and its comment period. This certainly was not new information that merely *confirmed* an original *analysis*, as was the case in *Tinicum Twp.*, 685 F.3d at 298. There was no original analysis on this point, just the belief that Santa Monica Station *might* be compromised.

comment on that conclusion, stated as it was in the FEIS.[98]

Metro's seismic studies changed the lay of the land (or at least the presentation of the lay of the land). Under a rule-of-reason standard, the Court cannot agree with the FTA that the seismic studies did not constitute "significant new…information relevant to environmental concerns and bearing on the proposed action or its impacts." While the FTA argues that it was not "new" because the possibility that Santa Monica Station – then identified as the base/preferred alignment – was compromised was disclosed in the DEIS, these studies purported to *confirm* that possibility, causing a shift of station location that threatened impacts upon an entirely new set of interested parties.

In addition, once the Tunneling Report and Fault Report were concluded, the City and BHUSD were highly critical of not only the conclusions reached therein with respect to seismic conditions affecting a possible location for a subway station on Santa Monica Boulevard, but about the lack of similarly-comprehensive work done in connection with Constellation Station, a short distance away. Yet, the FTA presented the decision as clear: any location on Santa Monica Boulevard was infeasible, but there was no problem with proceeding with Constellation Station.

As to Plaintiffs' post-FEIS and post-ROD studies, Metro did not contest the data produced by Leighton. Instead, it altered the fault map. But, again, the public never had an opportunity to address this information and its impacts.

It may have been acceptable under a rule of reason for the FTA to conclude that nothing in the post-FEIS/post-ROD studies had any impact on the conclusion that a Santa Monica Boulevard station was not going to work, but the public still should have been made aware of the willingness to shift analysis in ultimate aid of that conclusion in response to data that Metro did not contest, all the while holding firm on the conclusion that there was nothing at all, seismically-speaking, precluding Constellation Station. Moreover, the Court cannot understand how the Agencies can argue that a report indicating fault traces running towards Constellation Station was not significant, even if Metro rejected that report, given the decision to locate the subway at Constellation Station and the consistent approach to *assume* the activity of faults in the absence of

[98] While the FTA in fact took comments on the FEIS from at least the City and BHUSD, *see* 40 C.F.R. § 1503.1 ("An agency may request comments on a final environmental impact statement before the decision is finally made."), it is not clear that this is sufficient to offset that fact.

affirmative evidence that they are inactive.

The FTA erred in not issuing an SDEIS, and it erred in not issuing an SFEIS.

D. CAA

The City's fourth claim for relief is for violation of Section 176 of the CAA, 42 U.S.C. § 7506. "Congress enacted the Clean Air Act…to help protect and enhance the nation's air quality. The Act requires the Environmental Protection Agency…to establish [NAAQS] …for a variety of pollutants…. EPA then designates areas as 'attainment' or 'nonattainment' based on whether the areas meet the clean air standards for each particular pollutant." *Ass'n of Irritated Residents v. U.S. E.P.A.*, 686 F.3d 668, 671 (9th Cir. 2011) (omitting internal citations); *see also Natural Resources Defense Council*, 770 F.3d at 1264.

"The Act also contains 'conformity' requirements. Under these conformity provisions, the federal government may not approve, accept, or fund any transportation plan, program, or project unless it conforms to an approved [State Implementation Plan]." *Ass'n of Irritated Residents*, 686 F.3d at 671-72; *Natural Res. Defense Council*, 770 F.3d at 1264; 42 U.S.C. § 7506(c)(1).[99]. The CAA's conformity requirement is designed to

[99] Section 7506(c)(1) reads, in full, as follows:

> (c) Activities not conforming to approved or promulgated plans
>
> (1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means--
>
> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
>
> (B) that such activities will not--
>
> (i) cause or contribute to any new violation of any standard in any area;
>
> (ii) increase the frequency or severity of any existing violation of any standard in any area; or

protect a sub-state actor's interest in clean air. *See Cal. ex rel. Imperial Cnty.*, 767 F.3d at 790.

The City argues that the FTA violated the CAA's "conformity" requirements in examining whether construction of the Project would cause violations of applicable air quality standards. Although the City admits that the FTA made such a finding, *see* FTAAR43, the City argues that the finding was arbitrary and capricious and should be annulled. It reaches this conclusion because the conformity finding looked to the *operation* of the subway, and the FEIS did not include any air dispersion modeling or "hot-spot" analysis[100] for *construction* activities. Instead, the only construction-related analysis looked to SCAQMD thresholds, which dealt with regional, not local, air quality. The City thus concludes that there is no basis for any implicit finding that construction activities will not cause or contribute to localized violations of NAAQS, and no basis for a conformity determination.

1. Standing

The FTA argues that the City lacks Article III standing for its CAA claim. Citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819),[101] it asserts that this is so because the City has not identified a proprietary interest that air quality could impact and it has no physical existence. In other words, it would appear that the FTA argues that the City fails the "injury in fact" component of Article III standing.

> (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.
>
> The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

42 U.S.C. § 7506(c)(1).

[100] *See generally Natural Res. Defense Council, Inc. v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1264-65 (9th Cir. 2014); 40 C.F.R. §§ 93.116, 93.109(b), 93.123(a), 93.123(b)(1), 93.123(b)(4); 75 Fed. Reg. 79,370.

[101] Presumably the FTA directs the Court to that portion of the *Trustees of Dartmouth College* decision for the general truism that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Needless to say, this general concept does not appear to directly and plainly support – or at least not without further explanation – the FTA's position here regarding the City's lack of any interest that could possibly be injured by a CAA violation.

Moreover, according to the FTA, the City cannot rely upon third-party standing and, because it is only a municipality, it cannot take advantage of *parens patriae* standing. *See United States v. City of Pittsburg*, 661 F.2d 783, 786-87 (9th Cir. 1981) ("[O]nly the states and the federal government may sue as parens patriae."); *see also City of Oakland v. Lynch*, 798 F.3d 1159, 1163 n.2 (9th Cir. 2015); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) ("As a municipality, Sausalito may not simply assert the particularized injuries to the 'concrete interests' of its citizens on their behalf."); *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001) ("'Parens patriae' standing allows a sovereign to bring suit on behalf of its citizens when the sovereign 'allege[s] injury to a sufficiently substantial segment of its population,' 'articulate[s] an interest apart from the interests of particular private parties,' and 'express[es] a quasi-sovereign interest.'") (quoting *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

"Article III of the Constitution requires that a plaintiff have standing before a case may be adjudicated." *Covington v. Jefferson Cnty.*, 358 F.3d 626, 637 (9th Cir. 2004). "The Art[icle] III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action….'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). Thus, the City "generally must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Id.*

The 'irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These include that 1) the plaintiff have suffered an injury in fact, both concrete and particularized, as well as actual or imminent, 2) there is a causal connection between the injury and the conduct complained of, meaning that the injury is fairly traceable to the challenged action of the defendant, and 3) it is likely that a favorable decision would redress the injury identified. *See id.* at 560-61; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *WildEarth Guardians v. U.S. E.P.A.*, 759 F.3d 1064, 1070

(9th Cir. 2014). At the summary judgment stage, a plaintiff must identify "specific facts" establishing standing. *Clapper v. Amnesty Int'l USA*, __ U.S. __, 133 S.Ct. 1138, 1148-49 (2013); *Lujan*, 504 U.S. at 561; *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 789.

Article III standing is, of course, a threshold issue. *See Steel Co. v. Citizens for a Better Envmt.*, 523 U.S. 83, 94-95, 102 (1998). The City bears the burden of demonstrating its standing (including the necessary elements under *Lujan*) for each of its claims, including its CAA claim. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Ass'n of Irritated Residents*, 686 F.3d at 678; *Covington*, 358 F.3d at 638. Thus, even if the City has a proper basis to assert claims in this Court for certain real or perceived violations of the law, this does not necessarily mean that it can do so with respect to its CAA claim. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("As we have said, '[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'") (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

The City relies upon the Ninth Circuit's decision in *City of Sausalito* to support its claim for standing, and notes that the FTA failed even to mention this case in its initial opposition brief despite the City's reliance on it in its opening brief for the proposition that the City has standing to pursue its claims in general in this suit. *See* Docket No. 106, at 7 n.2 ("The City has standing because the Project would negatively impact it by increasing traffic congestion; degrading air quality; increasing noise; hindering emergency services; decreasing City revenue; increasing the need for street cleaning; increasing the demand for road maintenance; and harming City parks and recreational facilities.") (citing *City of Sausalito*, 386 F.3d at 1198). Harm to the City's natural (and recreational) resources, polluted air at its facilities, and reductions in its tax revenue support a standing determination, the City avers. In addition, it believes that land management practices which affect adjacent City-owned land (like Reeves Park) give it standing. Because of these protectable interests, the City has no need to – and does not – rely on any *parens patriae* theory, rendering the FTA's discussion of that topic – according to the City itself – irrelevant to the outcome on this issue.

City of Sausalito is not a CAA case, but did involve alleged violations of, among

other statutes, NEPA and the APA. *See* 386 F.3d at 1194. The plaintiff city in that case sought to enjoin the National Park Service from implementing its plans for the development and rehabilitation of Fort Baker, a former military base near Sausalito. *See id.* The Ninth Circuit affirmed in part and reversed in part the decision by the Magistrate Judge below granting summary judgment for the defendants, holding in part (in agreement with the district court) that the city had demonstrated Article III injury and therefore had standing to assert all of its claims.[102] *See id.* at 1194, 1198-99.

City of Sausalito has much to say with respect to the standing question the FTA raises here. First, with respect to the necessary injury in fact, it instructs that "[w]hether substantive or procedural injury is alleged, a plaintiff must show a 'concrete interest' that is threatened by the challenged action." *Id.* at 1197 (9th Cir. 2004). Second, it makes clear that this "concrete interest" can take the form of "an aesthetic or recreational interest." *Id.*; *see also Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). Third, it explains that a municipality's "proprietary" interests – those that it can sue to protect, even if they are congruent with the interests of its citizens – "are not confined to protection of its real and personal property," but "are as varied as a municipality's responsibilities, powers, and assets." *City of Sausalito*, 386 F.3d at 1197; *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("Municipalities may…'sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.'") (quoting *City of Pittsburg*, 661 F.2d at 787). These specifically include, *inter alia*, "its ability to enforce land-use and health regulations," "its powers of revenue collection and taxation," the protection of "its natural resources from harm," and "[city]-owned land" where land-management practices of adjacent federal land could affect it. *See City of Sausalito*, 386 F.3d at 1198 (citing or quoting *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), *Colorado River Indian Tribes*, 776 F.2d at 848-49, *Fireman's*

[102] The Magistrate Judge had determined that the city lacked standing with respect to its claims under the Coastal Zone Management Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the National Park Service Concessions Management Improvement Act, and the Omnibus Parks and Public Lands Management Act of 1996. *See City of Sausalito*, 386 F.3d at 1196. The Magistrate Judge reached the merits – again ruling in the defendants' favor – on claims under NEPA, the Endangered Species Act, the National Park Service Organic Act, and the Act creating the Golden Gate National Recreation Area. *See id.*

Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 944 (9th Cir. 2002), and *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995)); *cf. Cal. ex rel. Imperial Cnty.*, 767 F.3d at 791 ("A county's 'concrete interests' in its 'environment and in land management' can establish Article III standing.").

The Ninth Circuit found the city's standing showing in *City of Sausalito* sufficient, based upon a declaration provided by the plaintiff's city manager. It is useful to quote that declaration in full here:

> Sausalito expends millions of dollars annually on the *maintenance and management* of City lands, historic districts, streets, parking lots, sidewalks, marinas, libraries, meeting halls and other public facilities, and on the provision of public services including fire, police, shuttle bus, trash collection, parking and enforcement of land use plans and zoning regulations.
>
> Sausalito and its citizens and employees would be harmed by implementation of the Fort Baker Plan and the 2,700 daily visitors it would unleash in numerous significant respects including, but not limited to: *congested streets*, parks, parking lots, and sidewalks, increased crime, noise and trash, *impaired and impeded use of streets for fire, police and other emergency services* and for the City's natural gas shuttle bus service, *impaired air quality, particularly along major thoroughfares*, *lost property and sales tax revenue* due to impaired vehicular movement and commerce rendering Sausalito less attractive to business.
>
> The Fort Baker Plan will *harm Sausalito's tourism industry* because added traffic congestion and crowded streets will destroy the City's quiet, beauty, serenity and quaint and historic village character and attributes. *The City's tourism industry and dependent property and sales tax revenues* would also suffer because the City's marina, parks, trails and shoreline would be less attractive and ecologically healthy….
>
> ****
>
> A large proportion of tourist "traffic" into Sausalito arrives by ferry or bus. Due to its isolated location, hotel guests at the proposed Fort Baker conference center will access Sausalito by car and thereby *increase vehicular congestion* in the City's quiet streets.

Id. (emphasis added). Assessing that evidence, the Ninth Circuit was quite specific about what it found sufficient in the city's showing, with respect to harms to the city's "management, public safety, economic, aesthetic, and natural resource" "proprietary"

interests. *See id.* at 1198-99.

First, it agreed with the district court below that a "'detrimental increase in traffic and crowds in downtown Sausalito, affecting City-owned streets as well as municipal management and public safety functions'" sufficed. *Id.* at 1198-99 (quoting *City of Sausalito v. O'Neill*, 211 F.Supp.2d 1175, 1186 (N.D. Cal. 2002)). It then added that the asserted injury to the city's "aesthetic appeal in that the congestion accompanying the Plan 'will destroy the City's quiet, beauty, serenity and quaint and historic village character and attributes'" was "cognizable as both an aesthetic injury and – because the [c]ity alleges that the aesthetic damage will erode its tax revenue – as an economic injury." *Id.* at 1199; *see also City of Oakland*, 798 F.3d at 1164 ("Oakland's expected loss of tax revenue satisfies the requirements of Article III. In [*City of*] *Sausalito*, it was conceded that the NPS plan would 'result in an increase in local traffic, an increase in air pollutant emissions, and an incremental contribution to the cumulative noise environment.' Because Sausalito alleged 'that the aesthetic damage will erode its tax revenue,' we found economic injury that was actual or imminent, and not conjectural or hypothetical…. [O]ur precedent makes clear that the deprivation of revenue constitutes an injury under Article III.") (omitting internal citations). Finally, it found sufficient the asserted injury to the city's "natural resources," due to increased "noise and trash," "*impaired air quality*," and harm to its "marina, parks, trails and shoreline." *City of Sausalito*, 386 F.3d at 1199 (emphasis added); *see also Coalition for Clean Air v. VWR Int'l, LLC*, 922 F.Supp.2d 1089, 1100 (E.D. Cal. 2013) ("Being compelled to breathe air less pure than that which otherwise would be mandated by the CAA is a valid injury in fact for standing purposes."). All of these harms were sufficient to adequately claim Article III injury because the harms were "alleged" – again, both that case and this case were presented in the context of summary judgment with the support of evidence, so this characterization is probably not to be taken literally – in sufficient detail to state a "concrete and particularized injury," the injuries were "actual or imminent, not conjectural or hypothetical[,]" and "'fairly traceable' to the implementation of the Fort Baker Plan,"[103] and could be "redressed by a decision blocking implementation of the

[103] In reaching the conclusion about the injuries being "actual or imminent, not conjectural or hypothetical[,]" and "fairly traceable" to the implementation of the Fort Baker Plan, the Ninth Circuit

Plan." *City of Sausalito*, 386 F.3d at 1199.[104]

Here, to support its claim to standing, the City provides the Declaration of Jeff Kolin. *See* Docket No. 108. Kolin is the City's City Manager. *See* Kolin Decl. ¶ 1. The City directs the Court to paragraphs 20-22 of Kolin's Declaration. *See* Docket No. 106, at 7:24-28. Those paragraphs outline, in detail, the harm Kolin anticipates from the "potential traffic congestion, air quality, noise and other environmental impacts" associated with the planned construction phase, including the "hundreds of pounds of air pollution to be emitted into the air daily for a lengthy time period." Kolin Decl. ¶¶ 20-21. Kolin foresees harm to the City "and its residents and businesses" with respect to its provision of emergency services, its "emergency response plans to address methane and other risks," a "loss of significant revenue to the City, adversely affecting the City's ability to provide needed public services and causing blighted conditions," traffic management, air pollution, street cleaning, road maintenance, "harm to [the] City's efforts to maintain the City's aesthetic qualities," harm to the City's parks, and harm to the City's recreational facilities. *Id.* ¶ 22.

Specifically with respect to air pollution, the City and Kolin offer the following:

> The City is concerned about the air pollution from the construction traffic and construction activities. All City employees, residents and school children need to breathe the air in the City throughout the construction period in order to work, live and study. The FEIS states that among the adverse effects of construction are 'dust, noise and traffic disruption.' AR1177. I am concerned that the air pollution in Beverly Hills may adversely affect the City's employees, residents and school children and their ability to do their jobs and lead healthy lives. Also of concern is that the City recommended a number of specific mitigation

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observed that the National Park Service's Final Environmental Impact Statement both "acknowledge[d] that implementation of the Plan will result in an increase in local traffic, an increase in air pollutant emissions, and an incremental contribution to the cumulative noise environment," and "[found] that implementation of the Fort Baker Plan will result in known, predictable consequences that Sausalito identifies as concrete injury." *City of Sausalito*, 386 F.3d at 1199.

[104] The Ninth Circuit subsequently examined whether the city had *statutory* standing under each of the statutes at issue in that case. *See City of Sausalito*, 386 F.3d at 1199-1205. The FTA does not raise an issue of *statutory* standing here, or whether the City falls within the "zone of interests" protected by the CAA. *See id.* at 1200. In any event, at a minimum the City, "[a]s a municipal corporation…qualifies as a 'person' [with statutory standing to sue] under Section 10(a) of the APA." *Id.* The defendants in *City of Sausalito* argued that the city did not have statutory standing under five statutes involved in the case – not including NEPA – and the Ninth Circuit concluded that the city had sufficient standing under all of those five statutes. *See id.* at 1200-05.

> measures relating to air quality that were not adopted, or even discussed, in the FEIS or Record of Decision. AR035317-21.

Id. ¶ 22(e). Kolin also testified to the concern that "[t]he increase in dust from the construction activities may require additional street cleaning, burdening City resources." *Id.* ¶ 22(f). Further, he offers that "construction activities, construction staging and hauling will produce noise and air pollution to the detriment of the City further affecting the aesthetic sought and maintained at significant cost." *Id.* ¶ 22(h). He also believes that "[c]onstruction activities and the associated…diesel truck emissions…will make Beverly Hills a less attractive location for consumers and visitors during the years of subway construction," with "the potential to reduce sales tax, business tax and transient occupancy tax revenues by making the City a less attractive destination for consumers and visitors and therefore limiting consumer spending in the City." *Id.*

In addition, Kolin testifies that construction – which will include the demolition of Ace Gallery for use of that area (adjacent to Reeves Park) as a "staging area" – "will have significant negative noise and air quality impacts on the park," directly harming visitors' ability to enjoy the park during construction. *Id.* ¶ 22(i). He reflects a similar concern regarding air pollution associated with construction activities planned at Constellation Station and the lay-down areas close to the High School's athletic fields and other recreational facilities. *See id.* ¶ 22(j). The City has a cooperative use agreement with BHUSD to allow community use of the High School's recreational facilities, including its campus athletic fields, gymnasium and swimming pool. *See id.*

In its (eventual) response to the City's reliance on *City of Sausalito*, the FTA seemingly adjusts its target, moving from the "injury in fact" element that it addressed in its opening brief to the necessary "causal connection," by arguing that the City is unable to draw the necessary sufficiently-strong links in the chain of causation between government conduct and its purported injury/injuries. *See Allen v. Wright*, 468 U.S. 737, 739, 757-59 (1984) (concluding that weak demonstration of causation precluded plaintiffs from establishing Article III standing to challenge IRS's failure to adopt "sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools"), *overruled on other grounds in Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ U.S. __, 134 S.Ct. 1377 (2014). For the

City's CAA claim, the FTA asserts – citing *Lewis*, 518 U.S. at 358 n.6[105] – that this means the City must show a link between air pollution at hot spots and harm to the City's property, but it has not. The FTA differentiates (in its final brief, having not addressed it in its initial opposition) *City of Sausalito* by arguing that, in that case, there were links between the City of Sausalito's injuries and its specific NEPA challenges. In contrast, the FTA asserts that there are no links here for the City's air impact claims.

As an initial matter, unless the Court misunderstood the tenor of the FTA's opening argument on Article III standing,[106] the FTA's shift to a focus on causation in its Reply brief would mean that it could not possibly have satisfied its burden as the moving party on this issue and, even if that could be ignored because the motions in this case serve essentially as a substitute for a bench trial on the administrative record, it would run afoul of the principle that a party cannot wait until its Reply to raise an argument for the first time. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). Of course,

[105] The FTA's citation to *Lewis v. Casey*, 518 U.S. 343 (1996), on this point is somewhat curious. The portion of that decision cited dealt with the Supreme Court's rejection of the connection between the actual injury demonstrated and the scope of the injunctive relief awarded. *See Lewis*, 518 U.S. at 357-60. The FTA's argument here concerns the causal connection, not the scope of any relief. In Footnote 6 of the decision – the particular pin-cite the FTA offers – the Supreme Court rejected a perceived suggestion that "the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies" *id.* at 358 n.6, and further commented that a plaintiff "who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject," *id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)). But that is not an accurate description of what the City seeks to establish here; it looks only to demonstrate its standing on its CAA claim, and there is a sufficient causal connection between the FTA's activities and the harm to air quality in the City and the City's "aesthetic" interests. The FTA has not directed the Court to any case that comes close to applying *Lewis*'s footnoted musings in the granular manner the FTA advances is appropriate here.

[106] The FTA's opening brief appears quite clear that it is limited, in its Article III standing argument, to contesting the *first* of the three elements recognized as necessary in *Lujan*. *See* Docket No. 115-1, at 49:19-25 ("[T]he City lacks Article III Standing to bring [its NEPA and CAA air quality claims]. It has identified no proprietary interest that air quality could impact, and it has no physical existence, so it cannot suffer any personal harm from air quality impacts. Further, as a municipality, the City has no basis for third-party standing or to assert *parens patriae* rights on behalf of its citizens in a United States court.") (omitting internal citations); *id.* at 50:6-8 ("A plaintiff must establish standing by 'alleg[ing] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'") (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)); *id.* at 50:24-51:17 (discussing further whose interests the City may and may not represent in its suit). The only remote suggestion that the FTA might have been including the causal connection in its challenge comes in the sentence "The City has failed to establish that the Subway's air impacts will cause it any harm." *Id.* at 50:20-21. However, that sentence is followed immediately by two sentences redirecting the focus back to whether the City has any protectable interest: "Air quality will not impact the City's property and the City has no physical existence that can suffer from air quality impacts. The City can suffer no injury from air impacts." *Id.* at 50:21-23.

Article III standing limits "are jurisdictional [and] cannot be waived by any party." *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). "[T]here is no question that a court can, and indeed must, resolve any doubts about this constitutional issue sua sponte." *Id.*; *see also City of Oakland*, 798 F.3d at 1163 ("Because constitutional standing implicates jurisdiction, 'a challenge to constitutional standing is one which we are required to consider, even though raised for the first time on appeal.'") (quoting *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003) (omitting internal quotation marks); *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1152 (9th Cir. 2013) (noting district court's *sua sponte* request for briefing on Article III standing notwithstanding defendant's failure to include that issue amongst the four grounds on which it moved for summary judgment); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008); *cf. City of Oakland*, 798 F.3d at 1163 n.1 (declining to consider defendant's argument, raised for the first time on appeal, regarding prudential standing, "because 'a party waives objections to *nonconstitutional* standing not properly raised before the district court'") (emphasis added).

At a minimum, even if the Court is required to consider the causal connection element of Article III standing itself, the way the FTA has addressed the issue here has prevented the City from weighing in on the subject as the briefing presently stands. In any event, the Court is satisfied that both the injury in fact and causation elements of Article III standing are satisfied here with respect to the City's CAA claim.

With respect to injury-in-fact, the Court concludes that the City's showing on this motion is not meaningfully different from that put forth in *City of Sausalito* (and the FTA's shift to arguing causation in its Reply might be indicative of its recognition of that likely conclusion). Through Kolin, the City has evidenced its concerns regarding air pollution and air quality, and the impact those factors can have on both the City's "aesthetic qualities" and its tax revenues due to decreased interest in the City on the part of consumers and visitors. Included in the physical locations of concern is the City-owned Reeves Park.[107]

[107] While it is no doubt true that some of the evidence the City has proffered on this point concerns injuries not to the City itself, but to residents of the City and employees and schoolchildren who work and study

With respect to causation, the weakness in "[t]he links in the chain of causation" in *Allen*, 468 U.S. at 759, is not present here, or at least certainly not present to the same degree. That case involved a claim that the Internal Revenue Service had not "adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools," thereby harming the plaintiff "[p]arents of black public school children" and "interfer[ing] with the ability of their children to receive an education in desegregated public schools." *Id.* at 739-40; *see also id.* at 757 ("The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools."). In part, the decision built upon the Supreme Court's earlier tax-exemption-based Article III causation analysis in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). *See Allen*, 468 U.S. at 757-59. The *Allen* Court characterized the causal connection in that case as "depend[ing] on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action." *Id.* at 759.

In *Allen*, the Supreme Court concluded that the chain of causation was "attenuated at best," and even weaker than in *Simon* (which involved claim that indigents were being denied hospital services, but was brought against the Secretary of the Treasury and the Commission of Internal Revenue for "encouraging" hospitals to do so by way of an adoption of a particular Revenue Ruling, *see Simon*, 426 U.S. at 28, 40-43), because:

> [i]t involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

Id.; *cf. Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("In cases where a chain of causation 'involves numerous third parties' whose 'independent decisions' collectively have a 'significant effect' on plaintiffs' injuries, the Supreme Court and this court have found the causal chain too weak to support standing at the pleading stage.").

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there, the City has sworn off any attempt at *parens patriae* standing. Because of the above-mentioned evidentiary showing, the City's effort at demonstrating standing would be sufficient even ignoring all of its evidence of harm relating to those individuals.

That third-party element is missing here; instead, we have emissions resulting from construction activities permitted and planned by the FTA's decision to support the subway-building scheme envisioned by Metro. The FTA contemplated and knew exactly what conduct would result from its approval; the uncertainty and "free will" separating the tax exemptions and conduct impacting desegregation efforts present in *Allen*[108] are not present here.

Causation, for purposes of Article III standing, does not mean "proximate causation." *See Maya*, 658 F.3d at 1070. The causation must simply be "more than 'attenuated.'" *Id.* (quoting *Allen*, 468 U.S. at 757); *see also Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) ("[F]or Article III purposes [causation] requires a showing that [the plaintiff's] injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].'" *Id.* (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002));[109] *Mendia*, 768 F.3d at 1012 ("[T]he fact that 'the harm to [the plaintiff] may have resulted indirectly does not in itself preclude standing.'") (quoting *Warth*, 422 U.S. at 504). Thus, standing does not "require the defendant's action to be the sole source of the injury." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). Furthermore, there is "no requirement that the defendant's conduct comprise the last link in the chain." *Mendia*, 768 F.3d at 1012. Moreover, the

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[108] *Allen* gave examples of the issues preventing a sufficient causation allegation/demonstration in that case:

> [I]t is entirely speculative…whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

Allen v. Wright, 468 U.S. 737, 758 (1984).

[109] Though *Maya* involved a pleadings-based Article III standing challenge, there is no reason why the controlling standard governing an Article III causation showing – as opposed to the differences between what a plaintiff must allege and then demonstrate at, respectively, the pleadings and summary judgment stages – would differ.

City plainly need not demonstrate the *success* of their CAA claim in order to make out a sufficient causation showing. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) ("'[T]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits.'") (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000)).

The emissions associated with the subway's construction are a direct result of the analysis and plans for that construction undertaken by the Agencies, including the conformity determination. *See Wash. Envtl. Council*, 732 F.3d at 1142 ("Under *Lujan*'s causality prong, Plaintiffs must show that a causal connection exists between their asserted injuries and the conduct complained of – i.e., the Agencies' failure to set and apply [reasonably available control technology] standards."); *see also Sierra Club v. E.P.A.*, 129 F.3d 137, 139 (D.C. Cir. 1997) (holding that grace period in conformity requirement for transportation activities in designated nonattainment areas "will cause injury to Sierra Club members residing in newly designated nonattainment areas"); *cf. Alliance for the Wild Rockies v. U.S. Dep't of Agriculture*, 772 F.3d 592, 599 (9th Cir. 2014) ("There is a direct causal connection between these claims of procedural injury and the federal defendants' actions concerning the Management Plan. The federal defendants worked jointly with MDOL to develop the Management Plan, and ultimately authorized and approved the Management Plan after adopting a lengthy Record of Decision."). The FTA has not sufficiently demonstrated, or cited authority, for the proposition that the City must specifically tie the alleged emissions causing problems under the CAA with injury-in-fact at the specific location of those emissions, if that is the tenor of its argument.[110]

[110] Where the plaintiff has been an individual (or an organization representing its members), the Ninth Circuit had required – in a case the Supreme Court later reversed – a "geographical nexus" *in the context of examining injury-in-fact*. *See Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003) ("'In NEPA cases, we have described [the] concrete interest test as requiring a geographic nexus between the individual asserting the claim and the location suffering an environmental impact.' The same inquiry is appropriate in a CAA case, such as this, where a federal agency has allegedly failed to conduct a conformity determination.") (omitting certain internal quotation marks) (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)), *rev'd*, 541 U.S. 752 (2004); *see also City of Olmsted Falls v. F.A.A.*, 292 F.3d 261, 267 (D.C. Cir. 2002) ("[G]eographic proximity does not, in and of itself, confer standing on any entity under NEPA or any other statute. Rather, it is the concrete and particularized injury which has occurred or is imminent *due to* geographic proximity to the action challenged that gives rise to

In sum, the Court rejects the FTA's attempt to resolve the City's CAA claim on the basis of an Article III standing defect.

2. Statute of Limitations

Assuming Article III standing concerns are overcome, the FTA also argues that the City's CAA claim is barred by the 180-day statute of limitations set forth in 23 U.S.C. § 139(*l*).[111] *See Native Songbird Care & Conservation v. LaHood*, No. 13-cv-02265-JST, 2013 WL 3355657, *4 (N.D. Cal. July 2, 2013) ("The 'final agency action' Plaintiffs challenge is the ROD approving the Project. That claim is barred by the statute of limitations, since it was not brought within 180 days of the date of the ROD. 23 U.S.C. § 139(l)(1). The FEIS explicitly disclosed the exclusionary netting would be used in construction, and no suit was brought during the limitations period alleging that such an act would take migratory birds.") (omitting internal citations); *Citizens for Appropriate Rural Roads, Inc. v. LaHood*, No. 1:11-cv-01031-SEB-DML, 2012 WL 4339600, *4 (S.D. Ind. Sept. 19, 2012) (applying section 139(*l*) and determining that claims were barred in case not raising relation-back issue); *cf. Shenandoah Valley Network v. Capka*, 669 F.3d 194, 196 (4th Cir. 2012) ("After an agency approves a transportation project and notifies the public of its final action in the Federal Register, the limitations period for NEPA claims is 180 days."). For this conclusion, the FTA relies upon the fact that it

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Article III standing…. Thus,…geographic proximity might be necessary to show such an injury, but it is not sufficient.").

[111] Section 139(*l*) now imposes a *150*-day limit, but at the time the FTA issued its notice of the ROD (though *not* at the time the City filed its initial Complaint), a 180-day limit was in play. *See* Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, 126 Stat. 405, § 1308(1); *id.* § 3(a) (identifying October 1, 2012, as effective date). At that time, 23 U.S.C. § 139(*l*)(1) provided, in pertinent part, as follows:

> (*l*) Limitations on claims.—
>
> (1) In general.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed.

23 U.S.C. § 139(*l*)(1). The Court applies the 180 day limit here, but notes that even if the 150-day limit was the governing period, the analysis would be the same.

published its notice of the ROD on August 23, 2012, plainly stating that any claim would be barred if not filed on or before February 19, 2013,[112] *see* 77 Fed. Reg. 51106-01, and the ROD itself specifically referenced the conformity requirement with respect to PM_{10}, $PM_{2.5}$ and CO, *see* FTAAR43. Yet, the City did not include its CAA claim in its initial Complaint here, which it filed on February 15, 2013. *See* Case No. 13-1144, Docket No. 1. Instead, the City's CAA claim first made an appearance in the Amended Complaint the City filed on November 21, 2013. *See* Case No. 13-1144, Docket No. 30.

The City does not dispute that its November 21, 2013, CAA claim would be time-barred under a straightforward application of the section 139(*l*) limitations period. Instead, it responds that there is no statute of limitations problem because, under Federal Rule of Civil Procedure 15(c), its CAA claim relates back to the date the original Complaint was filed. The City cites *S.C. Wildlife Fed'n v. Limehouse*, No. 2:06-CV-2528-DCN, 2009 WL 2244210 (D.S.C. July 27, 2009), as a decision applying relation back in a similar context.

"An otherwise time-barred claim in an amended pleading is deemed timely if it relates back to the date of a timely original pleading." *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). "Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading 'relates back' to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 541 (2010). To that end, Rule 15(c)(1)(B)[113] of the Federal Rules of Civil Procedure provides that "[a]n

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[112] "By this notice, FTA is advising the public of final agency actions subject to Section 139(*l*) of Title 23, United States Code (U.S.C.). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation project will be barred unless the claim is filed on or before February 19, 2013." Limitation on Claims Against Proposed Public Transportation Projects, 77 Fed. Reg. 51106-01 (Aug. 23, 2012); *id.* ("This notice applies to all FTA decisions on the listed project as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to…the Clean Air Act [42 U.S.C. 7401-7671q]."); *id.* ("Final agency actions:…project-level air quality conformity; and Record of Decision (ROD) dated August 9, 2012.").

[113] There is no indication from the parties that they feel Federal Rule of Civil Procedure 15(c)(1)(A) – which allows relation back when "the law that provides the applicable statute of limitations allows relation back" – has any application here. *See also* Schwarzer, Tashima, et al., California Practice Guide: Federal Civil Procedure Before Trial (2013) § 8:1606, at 8-179 ("The effect [of Rule 15(c)(1)(A)] is to *defer* to more liberal state or federal laws on this point: 'Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.'") (quoting Advisory Comm. Note to 1991 Amendment to Fed. R. Civ. P.

amendment to a pleading relates back to the date of the original pleading when…the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).[114] "[T]he purpose of relation back [is to] balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 560 U.S. at 550.

"The relation back doctrine of Rule 15(c) is 'liberally applied.'" *ASARCO*, 765 F.3d at 1004 (quoting *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 n.29 (9th Cir. 1982)). But a liberal application – "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities" – is balanced against the respect that must be accorded the purpose of statutes of limitation and recognition of the concern that "[a]mendments that significantly alter the pleadings could require the opposing party to start over and prepare the case a second time." *ASARCO*, 765 F.3d at 1005 (quoting 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1471 (3d ed. 1998)). The "conduct, transaction, or occurrence" test set forth in Rule 15(c)(1)(B) balances these concerns. *See ASARCO*, 765 F.3d at 1005.

"Although…the relation back doctrine of Rule 15(c) is to be applied liberally, there must nonetheless be some basis for application of the doctrine." *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 980 (9th Cir. 1988). The Rule "relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005).

Thus, in performing the analysis Rule 15(c)(1)(B) requires, courts look to

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15(c)(1)(A)); *id.* § 8:1608, at 8-180. Rule 15(c)(1)(C) – which involves a change in parties, *see* Fed. R. Civ. P. 15(c)(1)(C) – clearly has no application.

[114] Rule 15(c) has been amended several times over the years, but the general principle allowing relation back where the same conduct, transaction, or occurrence is at issue in both the original and amended complaints has remained the same, at least with respect to the decisions the Court cites and relies upon herein. *See, e.g.*, *Butler v. Nat'l Cmty. Renaissance of Cal.*, 766 F.3d 1191, 1199 n.3 (9th Cir. 2014) (quoting pre-1991 amendment version of Rule 15(c)).

"whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question." *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325 (9th Cir. 1989); *see also ASARCO*, 765 F.3d at 1004; *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 n.9 (9th Cir. 2008) ("The requirement that the allegations in the amended complaint arise from the same conduct, transaction, or occurrence is meant to ensure that the original pleading provided adequate notice of the claims raised in the amended pleading."); *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000) ("[A]s a leading treatise explains, '[t]he rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitation requires.'") (quoting James Wm. Moore et al., Moore's Federal Practice § 15.19[1] (3d ed. 1999)); Schwarzer, Tashima, et al., California Practice Guide: Federal Civil Before Trial ("Schwarzer & Tashima") § 8:1620, at 8-180 ("The basic inquiry is whether the opposing party was on notice of the *nature* of the claim raised by the amended pleading."). "Fairness to the defendant demands that the defendant be able to anticipate claims that might follow from the facts alleged by the plaintiff." *Percy*, 841 F.2d at 979. "Rule 15 does not require that a pleading give notice of the exact scope of relief sought." *ASARCO*, 765 F.3d at 1006. "So long as a party is notified of litigation concerning a particular transaction or occurrence, that party has been given all the notice that Rule 15(c) requires." *ASARCO*, 765 F.3d at 1006; *Percy*, 841 F.2d at 979 ("[A]mendment of a complaint is proper if the original pleading put the defendant on notice of the 'particular transaction or set of facts' that the plaintiff believes to have caused the complained of injury.") (quoting *Santana*, 686 F.2d at 739).

In aid of the general focus on notice, "[w]hen a plaintiff seeks to amend a complaint to state a new claim against an original defendant…the court compares the original complaint with the amended complaint and decides whether the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading." *Percy*, 841 F.2d at 978 (quoting *Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir. 1966)); *see also ASARCO*, 765 F.3d at 1004; *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1112 (9th Cir. 2006) ("Because the allegations and type of evidence necessary for O'Donnell to succeed on her EPA claims are identical to what she alleged

in her second complaint, the December 1, 2003 amendment 'relates back' to the second complaint…") (omitting internal citation); *In re Dominguez*, 51 F.3d 1502, 1510 (9th Cir. 1995). Here, as the FTA points out, the details concerning the CAA conformity finding are present in the Amended Complaint (*see* Case No. 13-1144, Docket No. 30, ¶¶ 11, 19, 36, 58(d)(iii), 76-80, 82, 131-39, 150, 156-59, 199-202, 206(A), 214-16), but entirely absent from the original Complaint.

Instead, the original Complaint brought claims under NEPA, the Department of Transportation Act, the NHPA and the APA, and focused on the routing decisions (and associated tunneling) for the Subway extension, and the impacts and risks that resulted therefrom (such as seismic risks, methane gas risks, and potential harm to nearby structures – some of historic value – such as houses and the High School). The original Complaint does refer to generic terms such as "environmental impacts" and "the environment," *see, e.g.*, Case No. 13-1144, Docket No. 1, ¶¶ 1, 3, 12, 14, 50, 78(A), 78(C), 78(F), which such references are also made in the Amended Complaint, *see, e.g.*, Case No. 13-1144, Docket No. 30, ¶ 19, and the summary notion that the City was seeking "declaratory and injunctive relief requiring Defendants to comply with NEPA, Section 4(f), and the NHPA, *as well as related environmental statutes*, regulations, and executive orders…," *id.* ¶ 5 (emphasis added).[115] Beyond that, however, the closest it approaches to an air quality issue specifically is in paragraphs 44 and 78(A).

In paragraph 44, the Complaint alleges as follows:

> In addition, the Metro Board adopted an Addendum to the Final EIS/EIR, publicly distributed for the first time at the meeting, which purported to address the construction air quality impacts of Phases 2 and 3 of the Project. Without any supporting explanation, the Addendum changed the projected construction emissions from what was disclosed in the Final EIS/EIR.

Id. ¶ 44. In paragraph 78(A), part of the first claim for relief for violation of NEPA, the Complaint alleges that, in approving the Project, "Defendants failed to take the required hard look at the Project's environmental impacts including, but not limited to, the impacts

[115] The original Complaint also contains such generic catch-all references as the following sentence: "The Final EIS/EIR contained other changes in construction techniques and changes in station configuration that will result in new and greater significant impacts than those disclosed in the Draft EIS/EIR, and that have not been properly identified, disclosed, analyzed, or mitigated in the Final EIS/EIR or subjected to public comment, as required by NEPA." Case No. 13-1144, Docket No. 1, ¶ 32(G).

of constructing and operating the Constellation Station and the entire Project's geotechnical/seismic impacts; noise and vibration impacts; traffic/access impacts; air quality impacts; paleontological impacts; and economic and social impacts." *Id.* ¶ 78(A). But, as explained in detail earlier in this ruling, the "hard look" analysis is the central focus in analyzing a claim *under NEPA, see, e.g.*, *N. Plains Resource Council*, 668 F.3d at 1075, which, as mentioned above, was in fact the nature of the claim in which the City made that particular allegation.

In making its relation-back argument, the City does not specifically identify *any* of these references – most of which are open-ended and/or generic references – in the original Complaint as sufficiently providing the FTA with notice of its concerns that later developed into a CAA claim. The City's relation-back argument consists of a single paragraph, with not a single citation to the contents of the City's original Complaint. *See* Case No. 12-9861, Docket No. 116, at 26:1-10. The only sentence in that paragraph which purports to explain the City's basis for why it believes relation-back applies here is as follows: "Since FTA made its conformity determination in the ROD based on the FEIS, that determination concerns the same conduct, transaction, or occurrence as the City's NEPA claim, which FTA concedes was timely filed."

The parties have not directed the Court to any Circuit-level authority concerning how expansively the same "conduct, transaction, or occurrence" principle is examined in the context of a case like this. One potential view – seemingly the most-expansive – would be to say that the "conduct, transaction, or occurrence" at issue here is the proposed construction of the Purple Line subway extension, which of course is thoroughly discussed and at issue – in at least certain respects – in both the original and Amended Complaints. A second take on the issue – the one the City seemingly adopts, as set forth above – would be that the publication of the FEIS and the ROD approving it (again, clearly at issue – in at least certain respects – in both the original and Amended Complaints) serves as the "conduct, transaction, or occurrence," and any subject broached in those documents is fair game for later amendment. A third opinion on the proper scope would look more granularly to the many particular subjects and analyses covered by the FEIS and ROD instead of to the final analysis as a whole.

In the absence of authority discussing the proper application of relation-back

principles in this particular setting, the Court is left to discern what it can from Ninth Circuit decisions on the topic involving relatively different circumstances. Ninth Circuit relation-back law frequently uses *Martell* as a jumping-off point. In that case, the Ninth Circuit reversed the lower court, determining there was relation back because in the original complaint the plaintiff had alleged the same facts for every count against two defendants and "[t]he amended pleading essentially recaptured the facts formerly alleged, but brought causes of action against [the second defendant], which in the original complaint were asserted only against [the first defendant]." *Martell*, 872 F.2d at 325. That particular holding is not applicable here. However, in quoting from a Fifth Circuit decision, the Ninth Circuit described the scope of the relation back doctrine somewhat expansively (at least as potentially compared to the situation at hand here): "When a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement." *Id.* at 326 (quoting *Barthel v. Stamm*, 145 F.2d 487, 491 (5th Cir. 1944)); *see also ASARCO*, 765 F.3d at 1006; Schwarzer & Tashima § 8:1621, at 8-180 ("Filing of a lawsuit 'warns the defendant to collect and preserve his evidence in reference to…the *whole transaction* described in it…") (quoting *Martell*, 872 F.2d at 326) (emphasis added in Schwarzer & Tashima).

Of similar seeming generosity to plaintiffs, in *ASARCO* the Ninth Circuit observed that "[u]nder Rule 15(c)'s liberal standard, a plaintiff need only plead the general conduct, transaction, or occurrence to preserve its claims against a defendant." 765 F.3d at 1006. This extends to allowing a later amendment based on that same conduct, transaction or occurrence even where the plaintiff had, in its original complaint, initially *disclaimed* certain facts or relief. *See id.* at 1005-06. Again, that particular holding is not terribly germane in this case, but the Ninth Circuit reasoned that its conclusion makes sense because "[p]arties should not be discouraged from limiting their initial pleadings to claims and defenses that have evidentiary support. Nor should they fear that doing so will foreclose them from amending their pleadings if new facts come to light after further investigation and discovery." *Id.* at 1006. Yet, in this case, that principle does not help the City (at least in connection with its desired CAA claim). The

City did not need to wait for "evidentiary support" or "new facts [to] come to light after further investigation and discovery."

Limiting the available flexibility in the analysis somewhat more than the arguable *dicta* in *Martell* and *ASARCO*, in *Percy* the Ninth Circuit observed that where relation back has been allowed "the defendant was given adequate notice by the prior pleading *of the facts that caused the injury alleged* in the amended pleading." *Percy*, 841 F.2d at 980 (emphasis added).[116] Similarly, in *Dominguez*, the Ninth Circuit affirmed the Bankruptcy Appellate Panel's reversal of a bankruptcy court's decision to deny relation back where the defendant could not "claim surprise" because he "had every reason to marshal evidence to defend against" the later-filed adverse action. *See Dominguez*, 51 F.3d at 1510. Of similar import is *Williams*, 517 F.3d at 1133, where the Ninth Circuit found no relation back because the amended complaint "had to include additional facts to support" a newly-added compensation claim, where the original complaint included promotion discrimination, hostile work environment and retaliation claims, and the new claim would require "different statistical evidence and witnesses" and the new claim "is a new legal theory depending on different facts, not a new legal theory depending on the same facts." *Williams*, 517 F.3d at 1133

Here, there is nothing in the original Complaint about any conformity finding, or any defects in that finding or the process that led to it. The only "facts" alleged were generic references to "environmental impacts" and two brief remarks concerning "air quality impacts," one of which was made – as the FTA notes in its Reply – in the context of allegations concerning the FTA's failure to take a "hard look" under NEPA. The FTA argues that the NEPA claim in the initial Complaint arose from the process of adopting an Addendum to the FEIS. *See* AR 19303; the City's Complaint (Docket No. 1 in Case No. 2:13-cv-01144-GW-SS) ¶ 44. The City's CAA claim in the Amended Complaint, on the other hand, arises from the conformity determination made in the ROD, *see* FTAAR43-44, and is based upon the distinction between qualitative and quantitative hot-spot analyses.

[116] Like *Martell* and *ASARCO*, the actual holding in *Percy* is not terribly on-point here, because in that case the Ninth Circuit affirmed a refusal to allow relation back where the plaintiff's amended complaint "implicated an entirely new set of actors who are alleged to have injured Percy in a proceeding which occurred subsequent to, and independent of, the events on which Percy based his original Title VII discrimination claim." *Percy*, 841 F.2d at 980.

Given those observations, it is hard to conclude that this provided sufficient notice "of the facts that caused the injury alleged" in the CAA claim, or that the FTA "had every reason to marshal evidence to defend against" it. Instead, the CAA claim would appear to consist of "a new legal theory depending on different facts, not a new legal theory depending on the same facts." Remaining, of course, is the question of just what is the "whole transaction" – to use *Martell*'s phrasing – in this context. But if the City is correct, and *any* claim could later be added to its litigation so long as it has *some connection* to something the FTA said or did in the ROD or FEIS, the purpose of notice would hardly be served.

Oddly enough, perhaps the most useful cases for drawing analogies to the present situation are the cases that have developed the Rule 15 relation-back analysis in the *habeas* context. In that context, after the Supreme Court's decision in *Mayle* (which, in part, rejected the argument that "the trial itself is the 'transaction' or 'occurrence' that counts" with respect to habeas corpus petitions, *see* 545 U.S. at 660), "[i]t is not enough that the new argument pertains to the same trial, conviction, or sentence." *Hebner v. McGrath*, 543 F.3d 1133, 1134 (9th Cir. 2008). *Mayle* specifically rejected the Ninth Circuit's prior "boundless" construction, "because '[u]nder that comprehensive definition, virtually any new claim introduced in an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence.'" *Hebner*, 543 F.3d at 1138 (quoting *Mayle*, 545 U.S. at 656-57); *compare Mayle*, 545 U.S. at 659-60 (distinguishing *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945), because in that case "[t]here was but one episode-in-suit…, a worker's death attributed from the start to the railroad's failure to provide its employee with a reasonably safe place to work," so allowing relation back where widow added claim under different statute for a different alleged wrong was permissible "even though the amendment invoked a legal theory not suggested by the original complaint and relied on facts not originally asserted").[117]

[117] It is true that one of the reasons the *Mayle* court found that the Ninth Circuit had not applied relation back properly was because the new ground for relief in that case was "supported by facts that differ in both *time and type* from those the original pleading set forth." 545 U.S. at 650 (emphasis added); *see also id.* at 657. Here, of course, the new facts and new claim would differ in type, but not in time (though the Supreme Court's rejection of why the claims did not relate in "time" in *Mayle*, *see id.* at 656-57, 660-61, could conceivably be easily shifted from the habeas context to the APA's final agency action context). But

This is equally true in the context of a challenge to an administrative action. Every challenge of that nature under the APA must challenge a final agency action. *See Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). If the entirety of the final agency action were open to endless amendments otherwise in noncompliance with applicable statutes of limitation simply because a plaintiff had made *one* timely challenge to that final agency action, the same concern leading to the outcome in *Mayle* would be present in this context as well.

The only Ninth Circuit decision the Court was able to find addressing relation-back in the context of an action challenging administrative action (or inaction) was *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), but that case did not involve claims centered on the contents of an EIS or the process leading up to it (or its approval, through an ROD). In that case, the plaintiff challenged the Bureau of Land Management's practice of designating Placer mining operations as "Notice" mines, a challenge that the Ninth Circuit said could be construed as requiring either that each "Notice" mine have an EA before commencing operations or as a challenge to the regulation defining the different categorizations of Placer mines ("Plan," "Casual" and "Notice" mines) and its promulgation. *See id.* at 1309-10. It was the second type of potential challenge that ultimately became the focus of the relation-back discussion. *See id.* at 1310-11, 1315-16.

Reflecting many of the principles discussed above, the Ninth Circuit commented that "[t]he raison d'etre for relation back is that the opposing party is already on notice of the action and hence no prejudice results: [']Once the defendant is in court on a claim arising out of a particular transaction or set of facts, he is not prejudiced if another claim, arising out of the same facts, is added.[']" *Id.* at 1315 (quoting *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982)). "It is also the prevailing view that an amendment which changes the legal theory on which a [*sic*] action initially was brought is of no consequence to the question of relation back if the factual situation out of which the action arises remains the same and has been brought to the defendant's attention by the original pleading." *Id.* at 1316 (quoting *Santana*, 686 F.2d at 739). Nevertheless, the

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the City has not argued (nor cited any case law supporting the conclusion) that a new claim, and the facts it relies upon, *must* differ in *both* of those regards in order for relation back to be denied. *Mayle* itself only stands for the proposition that a new claim will not relate back *when* they differ in both, not that they *must* differ in both before a court may reach such a conclusion.

Ninth Circuit affirmed the district court's refusal to apply relation back, explaining as follows:

> The original challenge based on BLM's "policy and practice" requires evidence showing how BLM conducts Notice mine review. The new claim alleging invalidity of the Notice regulations requires evidence of the procedures used in adopting the regulations. The original claim was premised on a theory of unlawful application of the five-acre rule. The new procedural challenge Sierra Club attempted to add is based upon a theory of invalidity of the regulations as adopted. In short, the procedural challenge does not arise out of the same conduct or transaction. It arises out of BLM's conduct in adopting the regulations rather than BLM's "policy and practice" in Notice mine review. Because of this, BLM did not have notice of the substance of what was sought to be added by the amendment. Rule 15(c) does not and should not allow an amended complaint to relate back where the conduct, transaction or occurrence alleged is different.

Id. Because that case does not add anything new to the guiding principles already set forth above, and because the old and new claims in that case are not particularly analogous to the situation confronted here, the *Penfold* decision is not terribly useful in attempting to discern how to most faithfully apply relation-back here.

Returning to the sole case the City cited in support of its argument that relation-back applied here, *S.C. Wildlife* concerned the proposed construction of a large highway construction project ("the Connector"), and it *did* involve preparation and distribution of a FEIS and ROD and an argument that the FEIS was deficient and should not have been approved in the ROD such that the "claims in th[e] action center[ed] on the FEIS." 2009 WL 2244210, at *1. The district court determined that relation-back *did* apply because the desired new "Section 4(f) claim and the originally-filed NEPA claims ar[o]se out of the same 'conduct, transaction, or occurrence': the proposed construction of the Connector." *See* 2009 WL 2244210, at *3. It determined that the new and original claims:

> also rel[ied] on the same operative facts to show that approval of the Connector was unlawful, e.g., whether defendants used an impermissibly narrow statement of purpose and need to justify disregarding alternatives to the Connector, whether the Connector fulfills the project purpose by serving a demonstrated transportation need, and whether defendants considered or applied measures to minimize adverse impacts.

Id.

As noted *supra*, the City does not appear here to take the *broad* view adopted in *S.C. Wildlife* that it is the construction of the Subway extension here – as with construction of the Connector in *S.C. Wildlife* – *in general* that serves as the "conduct, transaction, or occurrence" in question. If it does not take that view, it is not at all clear that *S.C. Wildlife* necessarily works in its favor on the relation-back issue. Unlike that case – where the district court determined that "the same operative facts" were involved, "e.g., whether defendants used an impermissibly narrow statement of purpose and need to justify disregarding alternatives to the Connector, whether the Connector fulfills the project purpose by serving a demonstrated transportation need, and whether defendants considered or applied measures to minimize adverse impacts," *id.* – here, the facts concerning the conformity determination are *not* the same as the facts that gave rise to any of the City's claims in its original Complaint, even including that small aspect of the NEPA claim tied to "air quality impacts."

In sum, the Court does not believe that the City has a tenable relation-back argument here. As such, its CAA claim is time-barred.

E. Section 4(f)

Plaintiffs both argue that the FTA violated Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. That statute allows the Secretary of Transportation to:

> approve a transportation program or project…requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1227 (9th Cir. 2014); *see also Citizens to Preserve Overton Park*, 401 U.S. at 404-05, 411; *N. Idaho Cmty.*, 545 F.3d at 1158. At issue here is whether the FTA performed, or correctly performed, Section 4(f) analysis with respect to Reeves Park and the athletic facilities and historic buildings at the High School.

"'Use' is construed broadly, applying not only to areas physically taken, but also to those 'significantly, adversely affected by the project.'" *HonoluluTraffic.com*, 742 F.3d at 1227 (quoting *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982)); *see also Morongo Band*, 161 F.3d at 583; *Laguna Greenbelt*, 42 F.3d at 533; *Sierra Club v. Dep't of Transp.*, 948 F.2d 568, 73 (9th Cir. 1991) ("*Sierra/DOT*").[118] In other words, "[s]ection 4(f) applies to constructive use as well as actual use." *Laguna Greenbelt*, 42 F.3d at 533. But where there is no substantial impairment of the current features, activities and attributes of a resource covered by Section 4(f), there is no constructive "use" of it. *Laguna Greenbelt*, 42 F.3d at 533. Thus, Section 4(f) has no role to play if there is only a non-direct, "insignificant effect," on parkland. *Morongo Band*, 161 F.3d at 583 (quoting *Allison v. Dep't of Transp.*, 908 F.2d 1024, 1030 (D.C. Cir. 1990)).[119]

As noted previously, Section 4(f) determinations are subject to the arbitrary and capricious standard of review. *See Overton Park*, 401 U.S. at 416; *Stop H-3 Ass'n*, 740 F.2d at 1449. A Section 4(f) determination "is entitled to a presumption of regularity," but "a thorough, probing, in-depth review" is still called for. *Overton Park*, 401 U.S. at

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[118] In *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677 (9th Cir. 2000), the Ninth Circuit stated that "'use turns on whether the action 'substantially impair[s] the value of the site in terms of its prior significance and enjoyment.'" *Id.* at 682 (quoting *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982)). However, the *Adler* quotation that decision pulled from more closely mirrors the distinction observed in *HonluluTraffic.com*, *i.e.* that "use" is "*not limited to the concept of a physical taking*, but includes areas that are significantly, adversely affected by the project." *Adler*, 675 F.2d at 1092 (emphasis added). "*Even off-site activities* are governed by [§] 4(f) if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment." *Id.* (emphasis added). In other words, the "substantial impairment" analysis focuses on constructive, non-direct, uses.

[119] Although neither *Morongo Band* nor *Allison* include the designation "non-direct" that the Court employs here in the text sentence above, both cases involved alleged *constructive* uses, which implicate the "significant effect" standard. *See Morongo Band*, 161 F.3d at 572 (analyzing effect of planned new flight path for LAX, which would cross Reservation); *Allison*, 908 F.2d at 1026 (concerning impact on nearby state park and wildlife refuge of noise generated by new airport); *see also id.* at 1028 ("The 'use' of parklands within the meaning of section 4(f) includes not only actual, physical takings of such lands but also significant adverse indirect impacts as well…").

415. To make the necessary finding, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* But "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.*

"Section 4(f) itself does not require any formal findings," *HonoluluTraffic.com*, 742 F.3d at 1233, though "[section] 4(f) and its regulations require that the § 4(f) evaluation be completed before an agency issues its ROD." *N. Idaho Cmty.*, 545 F.3d at 1158.; *see also* 23 C.F.R. § 774.9(b) ("Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD."); *Overton Park*, 401 U.S. at 417 (noting that the Department of Transportation Act does not require formal findings). But "if the record fails to show a sufficient basis for the Secretary's decision, the 4(f) determination must be overturned." *Stop H-3 Ass'n*, 740 F.2d at 1450.

1. Reeves Park

A threshold issue with respect to Reeves Park is whether the City may challenge it in this action at all.

a. Waiver

The FTA argues that any Section 4(f) challenge involving Reeves Park was waived because it was not raised in the DEIS comment period, the FEIS review period, an August 2013 letter asking for an SEIS, in the original Complaint, the Amended Complaint, or even the Complaint raising the SEIS claim. The FTA argues that multiple waiver, or waiver-like, doctrines come into play here – administrative waiver, a failure to exhaust administrative remedies, and judicial waiver – citing *L.A. Tucker*, 344 U.S. at 37, *Idaho Sporting Cong.*, 305 F.3d at 965, *Heckler v. Ringer*, 466 U.S. 602, 619 n.12 (1984), *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (*en banc*) and *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). A discussion of those cases is worthwhile.

In *L.A. Tucker*, the appellee challenged a decision of the Interstate Commerce Commission to issue a certificate of public convenience and necessity authorizing

extension of an applicant's existing motor carrier route. *See* 344 U.S. at 34. An examiner originally recommended the issuance, followed by approval by a Division of the Interstate Commerce Commission, with later denials of the appellee's requests to have the full Commission reconsider the issue and for extraordinary relief. *See id.* On the day of the hearing by a three-judge court convened to consider the appellee's petition to set aside the certificate and order, the "appellee moved for leave to amend its petition to raise, for the first time, a contention that the Commission's action was invalid for want of jurisdiction," and the district court allowed the amendment and, upon that amendment, ruled in favor of the appellee on that issue, invalidating the order and certificate. *Id.* at 35.

The Supreme Court ruled that it was error to consider the appellee's objection raised, as it was, for the first time at that stage of the proceedings. *See id.*; *see also id.* at 36 ("The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice."). In so doing, it noted the "many opportunities during the administrative proceeding" that the appellee had to raise the jurisdictional objection. *Id.* at 35.

The Court continued on to explain that it had "recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *Id.* at 36-37. "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37; *see also Sims v. Apfel*, 530 U.S. 103, 109 (2000) ("As we further explained in *L.A. Tucker Truck Lines*, courts require administrative issue exhaustion 'as a general rule' because it is usually 'appropriate under [an agency's] practice' for 'contestants in an adversary proceeding' before it to develop fully all issues there.") (quoting *L.A. Tucker*, 344 U.S. at 36-37).

In *Idaho Sporting Congress*, the Ninth Circuit noted that "[t]he [APA] requires

that plaintiffs exhaust available administrative remedies before bringing their grievances to federal court." 305 F.3d at 965 (citing 5 U.S.C. §704). Similar to the explanation provided in *L.A. Tucker*, it explained that "[t]he rationale underlying the exhaustion requirement is to avoid premature claims and to ensure that the agency possessed of the most expertise in an area be given first shot at resolving a claimant's difficulties." *Id.*; *see also Heckler*, 466 U.S. at 619 n.12 ("[T]he purpose of the exhaustion requirement is to prevent 'premature interference with agency processes' and to give the agency a chance 'to compile a record which is adequate for judicial review.'") (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). "Claims must be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised," though there is no "bright-line standard" for when the requirement has been met. *Idaho Sporting Cong.*, 305 F.3d at 965; *see also id.* at 966 (refusing to require "magic words" to "leave the courtroom door open to a challenge"); *Marathon Oil*, 807 F.2d at 767 ("As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time."). Thus, where a plaintiff cannot point out in the record where they raised an issue before the agency, and a court is unable to locate any reference to the claim, a claim is not properly exhausted and not subject to judicial review because the agency has not been given notice of the claim sufficient to allow it to resolve the claim. *See id.* at 965.

Turning to the question of waiver by judicial inaction, in *Navajo Nation*, an *en banc* decision of the Ninth Circuit, certain plaintiffs attempted to argue that an FEIS failed adequately to consider risks posed by human ingestion of artificial snow in connection with a project tied to a ski resort. *See* 535 F.3d at 1079. The Ninth Circuit observed that the plaintiffs' complaint had not included this particular NEPA claim "or the factual allegations upon which the claim rests." *Id.* In connection with the summary judgment briefing, the plaintiffs moved to amend their complaint to add a distinct claim on this topic, but the district court denied the motion. *See id.*

On appeal, the plaintiffs argued that the claim in question "was adequately presented to the district court because the claim 'was briefed at summary judgment by all parties and presented at oral argument [to the district court].'" *Id.* at 1080. Nevertheless, the Ninth Circuit observed that "our precedents make clear that where, as here, the

complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court." *Id.* *Wasco Products* is of similar effect. *See* 435 F.3d at 991-92 (holding that conspiracy-based justification for tolling statute of limitations must be included in pleadings, "even where the tolling argument is raised in opposition to summary judgment," because "'summary judgment is not a procedural second chance to flesh out inadequate pleadings'") (quoting *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990)).

The City responds to these cases by first arguing that where an agency has independent knowledge of an issue, there is no need for a commentator to point it out specifically, citing *'Ilio'ulaokalani Coalition* and *Barnes*. The City rejects reliance on *Idaho Sporting* and *Heckler*, and instead emphasizes *'Ilio'ulaokalani Coalition* and *Barnes*, because the FTA's own staff identified the issue and the FTA therefore had a "shot at resolving" the issue and to compile a record on the issue. But the FTA rejects the notion that the City has met the "independent knowledge" standard, asserting that at most there were only a couple of emails relating to noise and visual impacts. *See* FTAAR32359. At a minimum, the emails would not serve as independent knowledge of *air impacts*, the FTA offers.

'Ilio'ulaokalani bears on the question of administrative exhaustion, because the district court in that case had held that the plaintiffs "were barred from arguing the insufficiency of the alternatives considered in the PEIS because they had not submitted comments to the Army during the PEIS process." Speaking in the context of NEPA, the Ninth Circuit noted that in the Supreme Court's *Public Citizen* decision the Court had "remind[ed] us of the rule that the primary responsibility for NEPA compliance is with the agency: 'the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's or EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" *'Ilio'ulaokalani*, 464 F.3d at 1092 (quoting *Public Citizen*, 541 U.S. at 765). An agency's "independent knowledge of the issues that concerned" the plaintiffs satisfies this "so obvious" standard. *See id.* at 1092-93. *Barnes* stands for the same propositions as *'Ilio'ulaokalani* (and also for the proposition that arguments raised in

litigation-related filings *after* the closing of the administrative process are irrelevant to the administrative exhaustion question). *See* 655 F.3d at 1132-33 & n.8.[120]

In addition, the City asserts that its Amended Complaint referenced the use of a public park, prohibitions on constructive use, and that the FTA must make written determinations with respect to it. The FTA rejoins that the City's only reference to a park was its quotation from section 303(c), which includes the statutory language "public park." The FTA argues that this cannot possibly satisfy the requirements for fair notice under Rule 8 of the Federal Rules of Civil Procedure.

The FTA is correct in its characterization of the City's pleading efforts. Paragraph 186 of its Amended Complaint (Case No. 2:13-cv-01144-GW-SS, Docket No. 30) only refers to a "public park" when it quotes from the Section 4(f) statutory language. There is no mention of Reeves Park whatsoever.

While the City admits it did not specify Reeves Park, it believes that the Court may still adjudicate the issue because it would not cause a delay in the proceedings, would require no additional discovery, and would not prejudice the FTA. If the Court believes the Amended Complaint is still nevertheless deficient, the City asks that it deem it amended or that the City be given leave to amend to conform to this fully-briefed claim. The FTA responds that it is far too late for the City to seek leave to amend because of the interest in narrowing issues as a case progresses, and further argues the fact that the cases the City relies upon – *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (95th Cir. 2004), *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 n.8 (9th Cir. 1975), and *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445-46 n.2 (9th Cir. 1990) – involved amendments long before the summary judgment stage.

Indeed, in *Owens*, the district court permitted the defendant to amend its Answer to add an affirmative defense by way of a motion the defendant filed 10 days after the plaintiffs had moved to be allowed to file a second amended complaint. *See* 244 F.3d at 711. *Mayeaux* affirmed the *denial* of a motion for leave to amend a complaint (filed

[120] The "so obvious" exception appears to be the only exception the City relies upon to excuse its failure to raise Reeves Park as an issue during the administrative process. It does not appear to rely upon an "exceptional circumstances" exception. *See generally Marathon Oil Co. v. United States*, 807 F.2d 759, 768 (9th Cir. 1986).

within a thirty-day period allowed by the district court for such filings). *See* 376 F.3d at 425-28. *Scott* considered whether appellants should be allowed an opportunity to amend a claim *upon remand* from the Ninth Circuit's decision, when they had been denied that opportunity upon a successful motion to dismiss below. *See* 522 F.2d at 1116 & n.8. The FTA is incorrect about the timing of the amendment request in *Edwards* (the issue was broached in opposition to a motion for summary judgment), but in that case the only amendment at issue was to add the correct name of the defendant employer (and the summary judgment motion was limited to the issue of compliance with statute of limitations). *See* 892 F.2d at 1445 & n.2.

None of Plaintiff's cases were challenges to agency action based upon an administrative record. In contrast, the Ninth Circuit's *en banc* decision in *Navajo Nation* was, among other things, a NEPA case decided (except as to one claim) on cross-motions for summary judgment. *See* 535 F.3d at 1063, 1066. Moreover, the argument that an amendment should be permitted in an action such as this one, based as it is on an administrative record resolved by way of a court "trial" at the summary judgment stage, because of the lack of a need for any further discovery and the absence of a delay on the proceedings, would *always* counsel for permissive amendment because of the nature of the case and the type of review involved in such cases (*i.e.*, review based on an administrative record where supplemental discovery is rare, if allowed at all). Thus, irrespective of whether or not the Reeves Park issue should have been "so obvious" to the FTA, *Navajo Nation* indicates that the City's failure to raise the issue of that resource in factual allegations in its pleadings precludes its ability to argue the point at summary judgment. *See Navajo Nation*, 535 F.3d at 1080 n.27 (noting that proper administrative exhaustion does not suffice to preserve an issue that a party waives by not properly raising it in court, such as by failing to sufficiently present the issue to the district court). The City's attempt to change that outcome by requesting an opportunity to amend in its Reply brief on these motions comes too late.

The Court therefore is inclined to rule in favor of the FTA on the City's Section 4(f) challenge to the extent it is based on arguments relating to Reeves Park.

b. <u>The Merits of the Reeves Park Section 4(f) Analysis</u>

If the Court were instead persuaded to conclude that the City had, in fact,

preserved the issue of Section 4(f) compliance with respect to Reeves Park, both administratively and in this action, the following analysis would apply.

The City asserts that the FTA never evaluated whether there would be a "use" of the park. As such, the FTA necessarily never assessed whether there were any "prudent and feasible alternative[s]" to such use or, if not, whether all possible planning had been undertaken to minimize any harm to the park. *See Adler*, 675 F.2d at 1091 ("The labeling of property as 'used' or 'not used' is the prerequisite to further examination and to compliance with the provisions of [section] 4(f)."). The City also asserts that, despite the fact that the FTA was originally concerned about the extent of Metro's analysis (or lack thereof) respecting Reeves Park, *see* AR33936, 32359, 33924, it ultimately acquiesced to removing any analysis of it from the FEIS.

On the merits, the FTA argues that Section 4(f) does not apply to "temporary constructive" uses, but only to temporary occupancy *or* constructive use. The City responds that Section 4(f) does indeed apply to "temporary constructive" uses, citing *Adler* for the proposition that "[a] site is considered 'used'…whenever the proposed project has significant adverse…impacts on or around the site," 675 F.2d at 1092 (quoting from the FEIS/Section 4(f) statement in that case as "recit[ing] the standard applied here for determining use), *Valley Community Preservation Commission v. Mineta*, 373 F.3d 1078 (10th Cir. 2004), and *Falls Road Impact Committee Inc. v. Dole*, 581 F.Supp. 678 (E.D. Wis. 1984) for what it asserts are examples of application of Section 4(f) to temporary constructive uses. It asserts further that *HonoluluTraffic.com v. Federal Transit Administration*, Civ. No. 11-00307 AWT, 2012 WL 5386595 (D. Haw. Nov. 1, 2012), does not discuss application of Section 4(f) to constructive uses.

In *Valley Community*, the Tenth Circuit explained the limited circumstances in which *vibration* impacts from construction could be considered a "use," interpreting 23 C.F.R. § 771.135(p)(5)(ix), a Federal Highway Administration regulation. *See* 373 F.3d at 1092; *see also Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1429 n. 13 (9th Cir. 1983) (indicating an analysis of whether there was "use" of land "either by direct acquisition or through proximity impacts affecting the use of the land," including consideration of such factors as noise and air quality levels, and visual impacts). In *Falls Road*, the district court determined that temporary construction impacts – a limitation in

the direction from which a park could be approached for a period of 80-100 days – would *not* amount to a use of the park. *See* 581 F.Supp. at 694. How that latter decision would therefore support the City's position that temporary constructive uses *are* covered by Section 4(f) is somewhat unclear.

The district court decision in *HonoluluTraffic.com* recites the following standard: "A Section 4(f) site is 'used' when land is permanently incorporated into a transportation facility, when there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose, or when there is a constructive use of land." 2012 WL 5386595, * 7 (citing 23 C.F.R. § 774.17). That decision also provides examples of constructive use, none of which are temporary. *See id.* at *8. It is true, however, that the decision itself did not analyze or present any potential, temporary constructive uses. *See id.* at *8-13 (analyzing impact of finished elevated guideway rail transit project on views of/from historic tower, and integrity of, view to/from, and audible/atmospheric impacts on city parks).

The FTA argues that section 774.l7 – the regulation the district court decision in *HonoluluTraffic.com* relied upon[121] – makes clear that temporary "use" includes only temporary occupancies of land. With respect to the definition of "use," section 774.17 reads as follows:

> Except as set forth in §§ 774.11 and 774.13, a "use" of Section 4(f) property occurs:
>
> (1) When land is permanently incorporated into a transportation facility;
>
> (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in § 774.13(d); or
>
> (3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

23 C.F.R. § 774.17. From a reading of that language on its face alone, one can observe that the only mention of a "temporary" impact on a Section 4(f) resource is that of a "temporary *occupancy* of land" in subparagraph (2). There is no dispute that there will be no temporary occupancy of Reeves Park. Whether subparagraph (3) of section 774.17

[121] As the FTA observes, the cases the City relies upon for its temporary constructive use argument all pre-date section 774.17, so could not have interpreted or applied that regulation.

implicates temporary impacts could well be discerned, at least in part, by a review of just what is included in "the criteria in § 774.15."

Section 774.15(a) provides that:

> [a] constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

23 C.F.R. § 774.15(a). Section 774.15(d) provides how a constructive use determination will be made,[122] and section 774.15(e) and (f) list situations that the Federal Highway Administration has determined involve or do not involve a constructive use.[123] Those included as involving constructive uses are noise-level increases, impairment of aesthetic features, restriction of access, and ecological intrusions of wildlife and waterfowl refuges. *See id.* § 774.15(e)(1), (2), (3), (5). Crucially, however, they also include a "vibration impact from *construction* or operation of the project." *Id.* § 774.15(e)(4) (emphasis added). Yet, even that impact is described as a permanent impact, "such as projected vibration levels that are great enough to physically damage a historic building or

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[122] Specifically, it provides as follows:

> (d) When a constructive use determination is made, it will be based upon the following:
>
> (1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;
>
> (2) An analysis of the proximity impacts of the proposed project on the Section 4(f) property. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and
>
> (3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

23 C.F.R. § 774.15(d). There is nothing on the face of subsection 774.15(d) which indicates contemplation of a temporary constructive use.

[123] The Court might ask the parties for clarification as to why the debate centers on a Federal Highway Administration regulation.

substantially diminish the utility of the building." *Id.*

Amongst the list of situations that the Federal Highway Administration determined that a constructive use does *not* occur is when "[v]ibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property." *Id.* § 774.15(f)(8). This language is virtually the same as that which the Tenth Circuit assessed in *Valley Community*. Analyzed separately from the discussion of the type of vibration-related construction impact set forth in subsection 774.15(e) this language might suggest that a temporary constructive use is contemplated. But when the *permanent impact* from construction-related vibration set forth in subsection 774.15(e) is considered it is difficult to understand subsection 774.15(f)(8) as doing anything more than assessing whether vibration-related impacts cause a permanent, not temporary, impairment. Considering all of these subsections, there is no clear indication one way or the other whether a temporary constructive use is or is not to be considered a "use" within the meaning of Section 4(f). But it would certainly appear that a temporary constructive use is not consistent with the explication of "use" set forth in sections 774.17 and 774.15.

In its Reply brief, the FTA finds support for its reading of section 774.17 – that temporary effects are limited to temporary occupancies, not temporary constructive uses – in the Supreme Court's recent decision in *Loughrin v. United States*, 134 S.Ct. 2384 (2014). In *Loughrin*, the Supreme Court dealt with a federal bank fraud statute, 18 U.S.C. § 1344, which provided as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The defendant in that case was convicted under clause (2) of the bank fraud statute, but argued that the jury was improperly instructed because it was not instructed that he must have intended to defraud a financial institution. *See Loughrin*, 134 S.Ct. at 2388. Part of

the Supreme Court's reasoning in rejecting the defendant's argument rested on a review of the statutory section in its entirety. The first clause included the requirement that a defendant intend to "defraud a financial institution," it remarked. *See id.* at 2389-90. If the Court were to read the second clause as somehow repeating that requirement, even while using different words, it would "disregard what 'or' customarily means." *Id.* at 2390. The word's "'ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.'" *Id.* (quoting *United States v. Woods*, 571 U.S. __, __, 134 S.Ct. 557, 567 (2013)). To construe the statute as the defendant desired, the court concluded, would make the second clause "a mere subset of [the] first: If, that is, § 1344(2) implicitly required intent to defraud a bank, it would apply only to conduct already falling within § 1344(1). Loughrin's construction thus effectively reads 'or' to mean 'including' – a definition foreign to any dictionary we know of." *Id.* The Court further buttressed its analysis by noting that courts must give effect, if possible, to every clause and word of a statute, and that when Congress includes particular language in one section of a statute but omits it in another – "let alone in the very next provision" – courts presume that Congress intended a difference in meaning. *Id.*

Like *Loughrin*, the second and third subparagraphs of section 774.17 are separated by "or." Also like *Loughrin*, the second subparagraph contains an element, or at least a term, that is not included in the third subparagraph: "temporary." As the FTA argues, therefore, *Loughrin* certainly supports a conclusion that a "temporary" characteristic is not part of the calculus for constructive uses. But the still-open question is to what extent, if at all, the third subparagraph's reference to section 774.15 changes that outcome. As noted above, the Court's present assessment of the section 774.15 reference is that it provides no clarity on the question, suggesting again that the simplest approach, the method of statutory analysis advanced in *Loughrin*, provides the correct answer here.

In addition, the FTA believes that, under the APA, it is entitled to deference in its regulatory interpretation (assuming that the Court agrees that the regulatory interpretation is as set forth above), so long as it is a permissible construction of Section 4(f). In *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S.Ct. 817 (2013), for instance, the Supreme Court remarked that "[a] court lacks authority to undermine the [regulatory] regime

established by the Secretary [of Health and Human Services in implementing the Medicare Act] unless her regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 826 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Indeed, the Court "must uphold" the judgment reflected in sections 774.17 and 774.15 "as long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the absence of an agency regulation." *Id.*; *see also Sierra/DOT*, 948 F.2d at 572-73. The Court perceives nothing in section 774.17 making it "arbitrary, capricious, or manifestly contrary to" Section 4(f).

Therefore, even on the merits, the Section 4(f) challenge related to Reeves Park would come up short.

2. The High School

With respect to the recreational and athletic facilities at the High School, the City argues that the FTA again concluded that no Section 4(f) resources were implicated, so there was no consideration of whether any "use" could be avoided by a "prudent and feasible alternative" or whether there was any planning that could be done to minimize any harm. As to the High School, the FTA asserts that it did, in fact, analyze the campus as a recreation area. The FTA states that it only concluded that the major purpose[124] of the High School is school, but it did not indicate that the High School had no other uses. The FTA concluded that there was no *major* purpose for park or recreation activities. *See* AR6055.

However, the City points out, the cited page contains no analysis at all. BHUSD adds that residents of the City regularly use the High School's athletic/recreational facilities pursuant to an agreement between the City and BHUSD. Moreover, while the FTA asserted in the FEIS that park and recreation activities are not a major purpose of the High School's facilities, BHUSD notes that the FTA's own policy paper, adopted in the FEIS, states that recreational facilities associated with public schools constitute Section

[124] *See Stewart Park & Reserve Coalition, Inc. (SPARC) v. Slater*, 352 F.3d 545, 556 (2d Cir. 2003) (quoting a 1989 FHA Section 4(f) policy paper as providing that "Publicly owned land is considered to be a park, recreation area[], or wildlife and waterfowl refuge when the land has been officially designated as such or when the Federal, State, or local officials having jurisdiction over the land determine that one of its major purposes or functions is for park, recreation, or refuge purposes. [I]ncidental, secondary, occasional, or dispersed recreation activities do not constitute a major purpose.") (emphasis removed).

4(f) resources if they are regularly used as a park or recreational facility. *See Hamilton v. U.S. Dep't of Transp.*, No. CV-08-328-RHW, 2010 WL 889963, *7 (E.D. Wash. Mar. 8, 2010) (concluding that Section 4(f) was implicated because proposed project would use sports fields at school).

The City asserts that the High School's recreational and athletic facilities will clearly be "used" because the tunneling beneath the school will "permanently incorporate" land beneath the High School. The City also asserts that the staging areas that are adjacent to one of the High School's playing fields will cause air pollution and significant noise impacts. BHUSD adds that tunneling will limit the High School's ability to execute its Master Plan, which includes building underground. As such, BHUSD asserts that the FTA's shortcomings in this area include failing to minimize harm both to the current campus (for instance, by moving construction activities further away from the High School) and to the facilities contemplated by the High School's Master Plan.

Whether or not the FTA actually analyzed the High School and its facilities under Section 4(f), and whether or not the High School would fit within the designation of a "recreation area" within the meaning of that statute, the Court concludes, as set forth below, that the FTA has not sufficiently justified a conclusion that no "use" will occur at least with respect to the "historic site" aspects of the High School.

With respect to the impact of tunneling, the FTA states that it has interpreted Section 4(f) to exclude tunneling from the definition of "use," and argues that the APA entitles it to deference in that decision. It reasons that to include within that term tunneling passing over 55 feet below surface property would be absurd, because it will not affect *surface* parks/resources. The FTA believes that it is entitled to *Chevron* deference because it adopted this interpretation of Section 4(f) and section 774.17 via a notice-and-comment NEPA process, citing *Montana Wilderness Association v. McAllister*, 666 F.3d 549, 555, 557 (9th Cir. 2011) in support of this assertion. The FTA emphasizes that its view on tunneling – when interpreting its own Section 4(f) regulations – is entitled to deference unless plainly erroneous or inconsistent with the regulations, and again reasserts that the subway will not present any conflict at subsurface depths.

However, the only thing *Montana Wilderness* has to say on the point of deference

is that "cogent administrative interpretations of ambiguous statutes 'warrant respect,' even if they are not the product of any 'relatively formal administrative procedure,' such as notice-and-comment rulemaking." 666 F.3d at 557 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004) and *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)). It is unclear to this Court that a "warrant[s] respect" standard equates to full *Chevron* deference. In any event, the view the FTA advances now – but not in a regulation or any formal pronouncement – with respect to tunneling is inconsistent with the governing regulation, and does not even appear to gibe with Section 4(f) itself.

Responding on this point, the City argues that the plain language of the statute and regulatory definition do not require that a Section 4(f) resource be substantially affected by a direct use. The case law supports this view. *See HonoluluTraffic.com*, 742 F.3d at 1227; *Laguna Greenbelt*, 42 F.3d at 533; *Adler*, 675 F.2d at 1092. The City argues that, under 23 C.F.R. § 774.17, a direct use simply needs to "permanently incorporate" land to trigger Section 4(f)'s protections.

The City also contends that a Policy Paper cited by the FTA was not subject to notice-and-comment and is not a regulatory interpretation at all. In addition, the City characterizes the FTA's view as setting forth a position on *de minimis* tunneling impacts, whereas *de minimis* exceptions now require concurrence from the affected jurisdiction, meaning that the Policy Paper would be flatly inconsistent with that aspect of the regulation. The FTA responds that it did not rely on the Policy Paper directly, but only on its reasoning, in reaching its conclusions during the notice-and-comment NEPA process.

The FTA also believes that tunneling will not prevent future development of the High School campus because the top of the tunnel will be 55 to 70 feet below the ground surface, and would allow for construction of an underground structure over the tunnel. But, BHUSD responds, Metro completely ignored the April 27, 2011 Master Plan report, the agencies never acknowledge it in the FEIS, and consequently never consider alternatives to accommodate the High School's legitimate development needs. In addition, BHUSD emphasizes that the top of the tunnel will be only 10-15 feet below the future development. Furthermore, BHUSD believes that settlement or loss of ground will

cause significant damage to the High School's historic structures, and there is no record evidence of the FTA's consideration of substantial impairment in this regard.

As to this last point, the FTA responds that the City waived any argument regarding any effect of subsidence on the historic structures because the City did not raise the argument until its Reply brief. Moreover, it notes that it concluded that no measurable subsidence will occur because of the techniques that will be employed in tunneling. The Court agrees with the FTA's waiver argument. *See Zamani*, 491 F.3d at 997.

However, the Court also agrees with Plaintiffs that an interpretation that necessarily excludes tunneling from the definition of "use," when one of those definitions specifically indicates that "use" occurs "[w]hen land is permanently incorporated into a transportation facility," 23 C.F.R. § 774.17, is plainly at odds with regulatory guidance. As such, in reaching that conclusion here and in consequently failing to undertake the follow-on Section 4(f) analysis with respect to the impact on the High School – including its existing facilities and its Master Plan – of tunneling, the FTA acted arbitrarily and capriciously. The FTA's explanations for why it believes the tunneling will not have a significant impact or substantial effect on the High School and its future plans is irrelevant (except as to the question of whether "all possible planning to minimize harm" has occurred) because a direct impact will be present here – the FTA seemingly must undertake analysis of the two additional questions Section 4(f) presents when a "use" is present.

Finally, the FTA argues that there will be no *constructive* use of the High School campus because any noise and vibration will not cause significant effects, but will instead be less than the thresholds set. Likewise, there will be no constructive use of the High School lacrosse field because – again – of the FTA's conclusion that Section 4(f) does not apply to temporary, constructive use, and because the field is not adjacent to surface-disturbing construction areas.

Plaintiffs both respond that the lacrosse field is immediately adjacent to the construction laydown area. The City concludes from this that there will be a substantial impairment of it even if there is no "surface-disturbance" at the location: there will be seven years of emissions exceeding the SCAQMD threshold for NOx; noise impacts;

reductions in air quality from the removal of tunnel spoils; and traffic impacts and air pollution from the scores of truck trips a day emanating from the site. BHUSD emphasizes its belief that this will cause significant air quality and noise impacts, and that there is no evidence that the FTA analyzed whether these impacts would substantially impair the athletic fields.

But in Reply the FTA turns again to its position that there is no such thing as a temporary, constructive use recognized under Section 4(f), so for there to be a "use," the impacts must be "so severe" that lacrosse field activities "are substantially impaired." 23 C.F.R. § 774.15(a). But, as with Reeves Park, the noise impacts will be below-threshold. Moreover, the FTA asserts that the City has no Article III standing to raise air quality impact issues with respect to the lacrosse field, and BHUSD never raised the issue.

In any event, the FTA notes that the lacrosse field is over 1,100 feet from construction for the Constellation Station, and states that the laydown areas will not have open tunnels, but will only provide space for setting up, inserting, and extracting equipment and materials. It concludes that the City has failed to demonstrate that the Agencies acted arbitrarily and capriciously in concluding that the distance from the Constellation Station will prevent any air quality impacts at the High School's lacrosse field, much less any "substantial impairment" of any activities there.

As expressed earlier, the Court has concluded that it agrees with the FTA that temporary constructive uses are not governed by Section 4(f). It also concludes that Plaintiffs have not demonstrated that the FTA acted arbitrarily and capriciously in concluding that any constructive use impacts would not substantially impair any aspect of the High School. The Court therefore has no need to reach the question of the City's Article III standing to raise air quality impact issues concerning the High School's lacrosse field, or BHUSD's alleged failure to raise the issue.

However, for the reasons noted above, the Court believes that the FTA failed in its obligation to perform a sufficient Section 4(f) analysis concerning "use" of the High School due to the tunneling underneath it.

F. NHPA

The FTA argues that it is entitled to summary judgment on Plaintiffs' NHPA claims because they made no attempt to argue them in their motions (nor in their

responses to the FTA's cross-motion). The Court agrees and therefore rules in favor of the FTA on those claims.

III. Conclusion and Remedy

For the reasons set forth above, the Court grants in part and denies in part all three motions. The Court believes that the FTA acted in an arbitrary and capricious manner, and did not take the requisite "hard look" NEPA requires, in certain respects. Specifically, the Court concludes that the FTA failed its disclosure/discussion obligations under 40 C.F.R. §§ 1502.9(b) and 1502.22 (and under *San Luis Obispo Mothers for Peace*) in connection with BHUSD's comments concerning the effects of tunneling through gassy ground and the risk of explosions; that it failed its disclosure obligations regarding incomplete information concerning seismic issues; and that it should have issued both a SDEIS and a SFEIS. The Court also concludes that the FTA failed to properly assess "use" of the High School under Section 4(f) due to the planned tunneling.[125] In all other respects, the Court rules in favor of the FTA.

"[T]he normal course of action when the record fails to support an agency's decision 'is to remand to the agency for additional investigation or explanation.'" *Sierra/EPA*, 346 F.3d at 963 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); *see also Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) ("[A]gency action taken without observance of the procedure required by law will be set aside."). However, in a 2015 *en banc* decision the Ninth Circuit opined that "not every violation of the APA invalidates an agency action; rather, it is the burden of the opponent of the action to demonstrate that an error is prejudicial." *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (*en banc*), *petition for cert. filed*, 84 U.S.L.W. 3221 (U.S. Oct. 12, 2015) (No. 15-467). "But the required demonstration of prejudice is 'not…a particularly onerous requirement.'" *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009)).

The FTA requests that, if the Court is inclined to grant any part of Plaintiffs' motions, separate briefing be conducted on the question of a suitable remedy. The Court agrees that this is a wise next step.

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[125] The Court also has questions concerning the FTA's analysis of public health impacts in relation to emissions of NOx.