UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-00378 JAK (PLAx) LA CV13-00396 JAK (PLAx) LA CV13-00453 JAK (PLAx)	Date	May 29, 2014
Title	Today's IV, Inc. v. Federal Transit Administration, et al. Japanese Village, LLC v. Federal Transit Administration, et al. 515 555 Flower Associates, LLC v. Federal Transit Administration, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE
Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFFS' COMBINED MOTION FOR SUMMARY JUDGMENT**
LA CV13-00378 JAK (PLAx): Dkt. 83
LA CV13-00396 JAK (PLAx): Dkt. 56
LA CV13-00453 JAK (PLAx): Dkt. 64

DEFENDANTS' MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT
LA CV13-00378 JAK (PLAx): Dkt. 101, 103, 105
LA CV13-00396 JAK (PLAx): Dkt. 64, 66
LA CV13-00453 JAK (PLAx): Dkt. 75, 77

I. Introduction

These actions arise from the June 29, 2012 decision of the Federal Transit Administration ("FTA"), approving the Regional Connector Transit Corridor Project (the "Project"). The Project involves the construction of a new subway line in the City of Los Angeles that will connect certain existing stations. Plaintiffs own, or previously owned, certain real property that is near the planned subway route.[1]

[1] Plaintiffs are: 515/555 Flower Associates, LLC ("Flower Associates"); Japanese Village, LLC ("Japanese Village"); and Today's IV, Inc., doing business as Westin Bonaventure Hotel and Suites (the "Bonaventure") (collectively, "Plaintiffs"). Bonaventure and Japanese Village currently own property near the planned route.

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Plaintiffs contend that the FTA and the Los Angeles Metropolitan Transportation Authority ("Metro") acted arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA") in analyzing the environmental impact of the Project. Plaintiffs named several defendants.[2] They claim that Defendants failed to analyze a sufficient range of alternatives within the Project, failed properly to mitigate the impact of the Project, and otherwise acted arbitrarily and capriciously in analyzing its environmental impact. Plaintiffs contend that, as a result of these deficiencies, the FTA is barred from providing funding for the Project pursuant to 49 U.S.C. § 5309.[3] Plaintiffs also seek an injunction that would preclude Defendants from taking any steps to implement the Project unless and until they have complied with the requirements of NEPA.

In connection with these allegations, Plaintiffs brought a joint Motion for Summary Judgment ("Plaintiffs' Motion"). The Federal Defendants and the Metro Defendants filed separate Cross-Motions for Summary Judgment (the "Federal Defendants' Motion" and "Metro Defendants' Motion").

The Court conducted a hearing on the Motions on February 24, 2014, during which it ordered supplemental briefing with respect to whether Flower Associates has standing. 2:13-cv-00453, Dkt. 111. On February 28, March 5 and March 19, 2014, Flower Associates and Defendants filed the required supplemental briefs, and the matter was deemed submitted. 2:13-cv-00453, Dkt. 112, 113, 117. For the reasons stated in this Order, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion and GRANTS IN PART and DENIES IN PART Defendants' Motions.

Flower Associates "owned the City National Plaza and Towers properties at the J-2 Garage, located at 515, 555, and 400 Flower Street, respectively," at the time it filed its complaint. Dkt. 75 at 12; *see also* Dkt. 66-1 at 41. It is now a tenant in 515 Flower Street, but no longer has an ownership interest in any of the properties. Dkt. 66-1 at 41. Whether Flower Associates has standing to pursue this action is discussed in Section IV.B, *infra.*

[2] The defendants are: the FTA, Ray LaHood, who is the Secretary of the United States Department of Transportation, Peter Rogoff, who is the Administrator of the FTA, Leslie Rogers, who is the Regional Administrator of Region IX Office of the FTA (collectively, the "Federal Defendants"); and Metro and Arthur Leahy, who is the Chief Executive Officer of Metro (collectively the "Metro Defendants").

[3] The FTA awards financial grants and otherwise supports state and local agencies in the development and improvement of mass transit facilities. The FTA and local agency serve as "joint lead agenc[ies]" for purposes of NEPA compliance. 23 U.S.C. § 139(c)(3). Before the FTA can approve grant applications of local agencies, it must ensure that a project meets certain statutory requirements, including those of NEPA. *See* 49 C.F.R. § 622.101; 23 C.F.R. § 771.133.

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II. Overview of NEPA Process

NEPA requires that the responsible agency prepare an Environmental Impact Statement ("EIS") for "major Federal actions" that may "significantly affect the quality of the human environment." 42 U.S.C. § 4332(c). An EIS must include a detailed statement regarding, *inter alia*: (i) "the environmental impact of the proposed action"; (ii) "any adverse environmental effects which cannot be avoided should the proposal be implemented"; and (iii) "alternatives to the proposed action." *Id.*

Once an agency determines that an EIS is required, it must prepare a draft EIS ("DEIS"). The agency then releases the DEIS to the public and to other agencies for comment. 40 C.F.R. § 1503.1(a). After the public comment period has ended, the agency prepares a final EIS ("FEIS"), in which it must respond to comments made during the DEIS comment period. *Id.* § 1502.9(b). After the FEIS is released, the agency may request comments before it makes a final decision. *Id*. § 1503.1. At any time during this process, the agency must prepare a supplement to a DEIS or FEIS if: (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. *Id.* § 1502.9(c). The agency may prepare a supplement to a DEIS or FEIS any time it "determines that the purposes of the Act will be furthered by doing so." *Id.* The agency ultimately produces a record of decision ("ROD") in which it explains the decision of the agency, including its rationale. *Id.* § 1505.2.

In this matter, the DEIS was completed on August 25, 2010. Administrative Record ("AR") 68. On September 3, 2010, the FTA published a notice of availability of the DEIS. This marked the commencement of the period for public comment. 75 Fed. Reg. 54145-46. October 18, 2010 marked the end of the 45-day public comment period as to the DEIS. AR6872. On July 22, 2011, Defendants issued a supplemental environmental assessment ("SEA") and a notice of its availability. AR5653, 19130. On September 6, 2011, the 45-day comment period for the SEA ended. AR8081. On January 11, 2012, Defendants issued the FEIS. AR6014. On January 20, 2012, the FTA issued the notice of availability of the FEIS. 77 Fed. Reg. 2979. On February 21, 2012, the review period for the FEIS closed. FTAR 14400. On June 29, 2012, the FTA issued the ROD. FTAR 14408.

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III. Factual Background

A. Overview of the Project

The subway line that is to be constructed as part of the Project would "directly link 7th Street/Metro Center Station (the Metro Blue Line terminus and Metro Expo Line terminus) located at 7th and Figueroa Streets, to the Metro Gold Line near Little Tokyo/Arts District Station at 1st and Alameda Streets." Final Environmental Impact Statement ("FEIS") ES-2, AR6021. At the present time, passengers must make two transfers for travel on the Blue Line, which links downtown Los Angeles and Long Beach, to the Gold Line, which links downtown to Pasadena and East Los Angeles. *See* FEIS 1-2, AR6075. Similarly, at present, a passenger travelling from Culver City to downtown Los Angeles on the Expo Line must transfer twice to use the Gold Line. *Id*. Metro and the FTA expect that connecting the Blue and Gold Lines as proposed in the Project will result in reduced congestion on existing subway lines and buses as well as reduced motor vehicle traffic on related roadways. For these reasons, Defendants contend that the Project will result in significantly better subway system service in the most highly-concentrated employment area in downtown Los Angeles. FEIS 1-28.

The Project includes the construction of the aforementioned subway line and three new stations. The subway route begins at 7th and Flower Street and then travels north on Flower Street to 2nd Street. It then continues east on 2nd Street to Central Avenue, where it turns north to intersect the Gold Line at 1st and Alameda Streets. FEIS 4-446, AR6673.

Metro proposes a variety of construction methods for the Project. Much of the construction activities will be undertaken below ground using a closed-face Tunnel Boring Machine ("TBM"). This device is designed to minimize noise, dust, and other impact at the surface level during construction. AR6673; AR10154. Other construction activities will be at ground level. Thus, an open trench method called "Cut and Cover" ("C/C") is planned for the construction of the subway line that will be placed below South Flower Street between 4th to 7th Streets (the "Lower Flower Segment"). AR19692, Exh. 4; AR19166, Exh. 5; Dkt. 66-1 at 22; Dkt. 56-1 at 10-11.[4] The C/C method involves digging a trench from the surface and then covering most of it with concrete decking. Dkt. 66-1 at 22; AR10148. The Flower Associates and Bonaventure properties are located on the Lower Flower Segment. The proposed subway route travels north from 2nd street to Central and Alameda streets in Little Tokyo, where it would be beneath the Japanese Village. A station is planned at the intersection of 1st Street and Central Avenue; this location is across the street from the Japanese Village parking garage.

[4] For consistency, throughout this Order, citations to briefs of the parties are to the docket numbers used in *Japanese Village LLC v. Federal Transit Administration, et al.*, LA CV13-00396 JAK (PLAx),

B. The Draft Environmental Impact Statement

On April 25, 2010, pursuant to NEPA, Metro and the FTA issued a DEIS that analyzed alternatives to the Project. AR68. The DEIS reflects that Metro initially analyzed various alternative routes, elevations,[5] and mode of transit alternatives for connecting the Gold Line and the Expo and Blue Lines. In the DEIS, Metro addressed five alternatives: (i) the required "No Build Alternative"; (ii) rapid bus lines between the stations (the "Transportation System Management Alternative"); (iii) a light rail primarily operating above ground (the "At-Grade Emphasis Alternative"); (iv) a light rail that was primarily underground (the "Underground Emphasis Alternative"); (v) and an underground subway (the "Fully Underground Alternative"). *See* AR91-96.

Prior to the public comment period, Defendants established a Little Tokyo Working Group whose purpose was to discuss the impact of the Project on that community. Members of that community expressed the concern that the At-Grade Emphasis Alternative and the Underground Emphasis Alternative may "split the community geographically," FEIS 7-20, AR6863, by "divid[ing] the community with a physical barrier, and creat[ing] new safety concerns." *Id.* at 7-21, AR6864. The Little Tokyo Working Group requested a list of possible mitigation measures, including: (i) tunnel boring to reduce haul truck traffic and other impacts on Little Tokyo businesses; (ii) mitigation of lost off-street parking; and (iii) curtailing surface-level construction during Little Tokyo festivals. DEIS 4-311 to -318, AR572-79.

The DEIS public comment period commenced on September 3, 2010 and ended October 18, 2010. *See* 75 Fed. Reg. 54145; AR6872. At the end of the comment period, Metro designated the Fully Underground Alternative as the Locally Preferred Alternative. AR5657. The Fully Underground Alternative in the DEIS initially proposed the use of C/C construction along all of Flower Street, parts of 2nd Street, and at a point west of Central Avenue in Little Tokyo. It also proposed that the planned route for the Project would continue east near 2nd Street to Central Avenue, where it would turn north to meet the Gold Line. This plan is shown on the following map:

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[5] In this context, "elevation" refers to the height or depth of the proposed rail line. For example, an "at-grade elevation" refers to a rail line built at ground level. The DEIS and FEIS discuss possible rail lines "at-grade," primarily underground, and fully underground.

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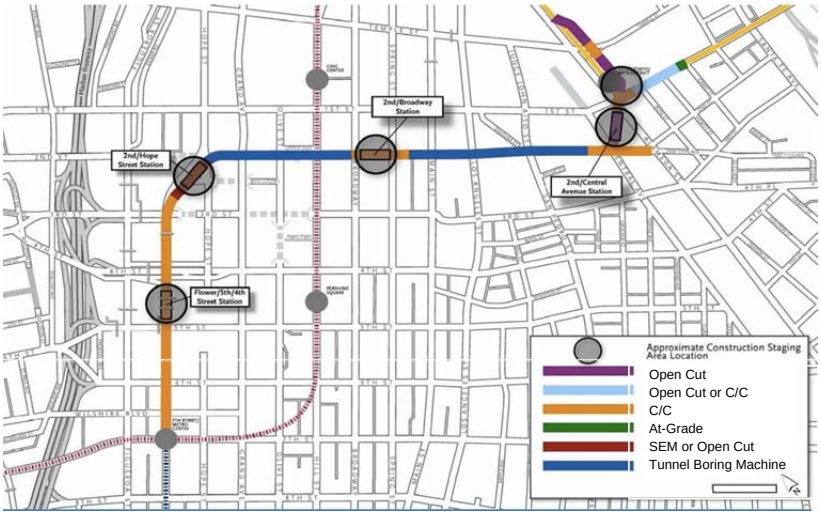


DEIS 2-38, AR178.

The DEIS noted that the C/C construction would have a significant impact on traffic circulation and regional air quality. DEIS 3-338 to 340, AR599-601, 606. Thus, during the planned excavation of the C/C trench, Flower Street would be closed "until [the] top deck is in place." AR11112. This would require "2 to 3 months per 2 block segment." *Id.* The temporary concrete decking would allow traffic to pass above while excavation and construction continued below the deck. AR6676. Upon the completion of the construction inside the excavated area, the deck would be removed, the excavation backfilled, and the surface restored. *Id.* By contrast, TBM "creates a tunnel with little or no disruption at the surface." AR6150.

Defendants contend that C/C is preferable to TBM on the Lower Flower Segment. They point out that several of the properties adjacent to Flower Street have basements that were constructed with tieback systems and that the tiebacks remain in place. AR10149. "Steel tieback cables could pose a problem for [TBM]. The [C/C] method provides greater flexibility and the ability to overcome underground obstructions more easily than the TBM method." AR10149-50.

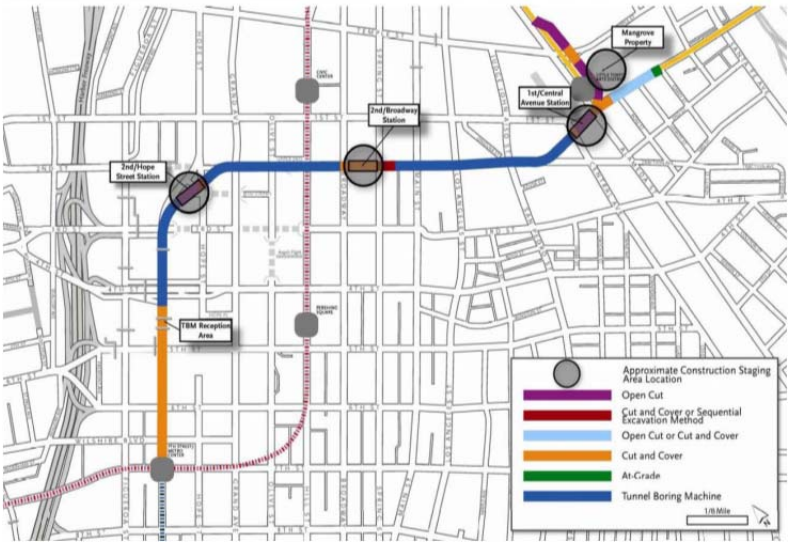
C. The Supplemental Environmental Assessment

On July 22, 2011, Defendants issued a Supplemental Environmental Assessment ("SEA") and invited public comment. AR5652, 19130. The SEA comment period closed on September 6, 2011. AR8081. The SEA reflected a re-alignment of the route through Little Tokyo. The new proposed route was below the Japanese Village Plaza and Central and Alameda Streets prior to intersecting the Gold Line. SEA

2-30, 2-33. This rerouting would permit the removal of bored material at a property northeast of 1st and Alameda Streets, thereby eliminating the need for C/C construction on 2nd Street in Little Tokyo. AR7731, 7622. The rerouting also required Metro to purchase an easement below Japanese Village. SEA 2-30, 4.2-23. When viewed from the surface, the planned easement would begin 15 vertical feet below the lowest point of the underground parking garage of Japanese Village. AR5921. The office of an interior designer is located in the Japanese Village above the proposed alignment of the route. FEIS 4-500, AR6727. Defendants concluded, however, that by using appropriate mitigation measures, the noise and vibration caused by the construction and later operation of the Project would not be significant. SEA 4.7-1.

D. The Final Environmental Impact Statement

Defendants issued the FEIS on January 11, 2012. AR6014. The period for responsive public comments began on January 20, 2012, and ended on February 21, 2012. *See* 77 Fed. Reg. 2979; FTAR14400. In the FEIS, Metro eliminated C/C construction on 2nd Street in Little Tokyo and in the Financial District on Flower Street between 3rd and 4th Streets. AR6670. Metro also eliminated the proposed Flower/4th/5th Street Station. AR5657. The FEIS also proposed to use TBM under the Japanese Village parking garage. The following map reflects the proposed route and construction methods in the FEIS:



FEIS 4-446, AR6673.

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Notwithstanding the changes, several business and property owners objected to the use of C/C method along the Lower Flower Segment. AR18827. Metro responded that the use of TBM, instead of C/C, "south of 4th Street would not be practicable due to the need to remove tie-backs ahead of the [TBM]." AR8164.

During the comment period, at least one property owner noted that "open-face tunneling" could be used to cut through tiebacks. AR18410-24. This comment referred to a journal article explaining how open-face tunneling had been used in Seattle to tunnel through tiebacks in a downtown area. AR18410-24, 27728-36. Two open-face tunneling methods that could potentially be used through tiebacks were identified as the Sequential Excavation Method ("SEM") and the "Open-Face Shield" method. MSAR15815-16; AR38730-42. A member of Metro's Tunnel Advisory Panel ("TAP"), Harvey Parker, recognized the feasibility of these methods in December 2010, when he wrote:

> The project should not dismiss the possibility of using a [TBM] along Flower St without further study. If a TBM could be used through the existing soils and tiebacks, it might significantly reduce the construction impact to the public because the street would not have to be dug up . . . There is precedent for tunneling through numerous tiebacks. The Seattle Bus Tunnel was built in the 1980s by cutting some 500 or so tiebacks from within an Open shield. Reasonably good ground control was accomplished by extensive compaction grouting from the street and from the tail of the shield.

MSAR15815-16.

Similarly, in August 2011, Value Management Strategies, Inc. ("VMS"), an expert retained by Metro to conduct a value engineering study, concluded that, "[t]here is new, open-faced technology available for TBMs that could cut through tie-backs." MSAR16557. However, VMS noted that Metro "will not entertain Open Face TBM operations due to previous problems with such a construction method on the Red Line." MSAR16537. For this reason, underground tunneling was not adopted in place of C/C.

During the FEIS comment period, several property owners submitted additional objections to Metro about the FEIS; they claimed that it was inaccurate in several respects. Dkt. 56-1 at 24. Bonaventure criticized the FEIS because it assumed the presence of sub-surface tiebacks along the Lower Flower Segment. FTAR8801-02, 10701-02. Bonaventure provided copies of its original foundation plans as well as photographs of its Flower Street foundation to show that there were no tiebacks associated with its property. AR18427-31, 18432-33, 18443; FTAR11110-11. On February 21, 2012, the FEIS review period closed. FTAR 14400. However, the foregoing objections led to a series of meetings between Metro and affected property owners. These meetings were conducted between February and April 2012. FTAR27624. At these sessions, Metro acknowledged that TBM was technologically and

geologically possible as far as 100 feet south of 5th Street, which would be approximately 500 feet from the 7th Street Station. AR20184; AR20114; FTAR14274-75; FTAR19871-72.

On April 25, 2012, Plaintiff Flower Associates submitted an expert report by a structural engineer, Nabih Youseff ("Youseff"). This report stated that, "if used as described in the Final EIR and not implemented with substantial additional mitigation measures, [C/C] could pose a risk to the structural integrity of the buildings, as well as personal and economic losses to the owners, tenants, and visitors to the properties." AR19006-010 (Dkt. 56-1 at 24). Metro responded that studies would be conducted in the future to determine whether mitigation was necessary. AR8154, 8161, 8168.

Metro approved the Project on April 26, 2012, and adopted C/C as the construction method along the Lower Flower Segment. AR15676-82. On the same date, the Board approved an amendment to the Project to include the use of TBM under Flower Street between 4th and 5th Streets if it could be done within the existing budget. FTAR5941; FTAR12432.

On June 29, 2012, the FTA issued its ROD approving the Project and the FEIS. FTAR14399-408. The FTA stated, "with the execution of the MMRP [mitigation monitoring and reporting plan] in Attachment A, all reasonable steps are being taken to minimize the adverse environmental effects of the Project, and where adverse environmental effects remain, no feasible and prudent alternative to such effects exists." *Id.*

E. Summary of the Principal Dates

To facilitate the discussion in the later portions of this Order, a chronology of the key dates discussed above is helpful. Those dates are**:**

- Aug. 25, 2010: Defendants complete the DEIS. AR68.
- Sept. 3, 2010: The FTA publishes the DEIS notice of availability. 75 Fed. Reg. 54145-46.
- Oct. 18, 2010: The DEIS 45-day public comment period closes. AR6872.
- Feb. 1, 2011: Metro completes first draft study analyzing tunneling under Flower Street. AR17764.
- July 22, 2011: Defendants issue the SEA and a notice of availability. AR5653, 19130.
- Sept. 6, 2011: The SEA 45-day comment period closes. AR8081.
- Jan. 11, 2012: Defendants issue the FEIS. AR6014.
- Jan. 20, 2012: The FTA issues the FEIS notice of availability. 77 Fed. Reg. 2979.
- Feb. 21, 2012: The FEIS review period closes. FTAR 14400.
- Feb. to April 2012: Defendants meet with Flower Street Stakeholders nine times. *See* AR200070-20233.

- Apr. 26, 2012: Metro Board approves the Project. AR13823.
- June 29, 2012: The FTA issues the ROD. FTAR 14408.

IV. Analysis

A. Legal Standard

1. Summary Judgment Standard

A motion for summary judgment will be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In cases seeking review of a final agency determination under the APA, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In this context, "the court's review is limited to the administrative record," to which Plaintiffs and Defendants have stipulated. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Therefore, resolution of this matter does not require fact finding; summary judgment is the appropriate method by which the merits of the case can be decided. *Id*. The applicable standard of review of the administrative record is the arbitrary and capricious standard under the APA.

2. NEPA, 42 U.S.C. §§ 4321 et seq.

Judicial review to determine whether an agency has complied with NEPA is governed by the APA. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). Under the APA, an agency action may be set aside if a court finds that action to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5. U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, "the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute is judgment for that of the agency." *Id.*

In determining whether agency decision-making under NEPA is arbitrary and capricious, a court's task is limited to "ensur[ing] that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387

F.3d 989, 993 (9th Cir. 2004); *see also Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011). "While we afford deference to the judgment and expertise of the agency, the agency must, at a minimum, support its conclusions with studies that the agency deems reliable. . . . The agency must 'explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.'" *N. Plains Res. Council, Inc.*, 668 F.3d at 1075 (citations omitted).

B. Whether the Bonaventure and Flower Associates Have Standing

1. Legal Standard

Standing under Article III of the Constitution is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). To establish standing, a plaintiff must first "allege[] (and ultimately prove[]) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 103. For claims brought under NEPA, the Ninth Circuit has "described this 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (citation omitted). "Accordingly, plaintiffs who use the area threatened by a proposed action or who own land near the site of a proposed action have little difficulty establishing a concrete interest." *Id.* Second, the plaintiff must show "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co., 523 U.S. at 102.* Third, "there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.*

"Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013). Thus, a plaintiff bears the burden of establishing standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Further, in an action under the APA, a plaintiff must "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883 (1990) (emphasis in original). The Ninth Circuit has held that the "zone of interests" protected by NEPA are environmental. *Ashley Creek Phosphate Co. v. Norton,* 420 F.3d 934, 939–40 (9th Cir. 2005). Thus, "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Id.* (quoting *Nev. Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir.1993).

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2. Application

Defendants contend that the Bonaventure and Flower Associates each has failed to present sufficient evidence to show that it has suffered an injury in fact. Dkt. 66-1 at 39-41. Whether each of these parties has standing is considered separately.

a) The Bonaventure

Defendants argue that the Bonaventure does not have standing because it failed to present any evidence sufficient to establish the basis for showing an injury in fact. Dkt. 66-1. The Bonaventure need only support its standing contentions with specific facts set forth by affidavit or "other evidence." *Lujan*, 504 U.S. at 561. Throughout its Motion, the Bonaventure refers to evidence in the Administrative Record establishing that there will be noise, dust, vibration, and other environmental impacts during C/C construction on the Lower Flower Segment. "As [an] adjacent landowner[]," the Bonaventure has "a 'sufficient geographic nexus to the site of the challenged project that [it] may be expected to suffer whatever environmental consequences' may result from implementation" of the Project. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1112 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv*., 630 F.3d 1173 (9th Cir. 2011). Furthermore, the Bonaventure filed the declaration of Michael Czarcinski, Managing Director of the Bonaventure, with its reply and opposition to Defendants' Motion. His declaration presents evidence that supports the claim that the Bonaventure will likely be directly affected by the claimed environmental harms that will result from the Project. Dkt. 75-1. Defendants do not dispute this evidence. *See* Fed. Defendants' Reply, Dkt. 79 at 15-21 (rebutting only Flower Associates' standing claims). For these reasons, the Bonaventure has established its standing.

b) Flower Associates

(1) Article III Standing

Flower Associates owned properties located at 515, 555, and 400 Flower Street (the "Flower Street Properties") at the time that it filed its complaint in this action. Dkt. 66-1 at 39; *see also* Dkt. 75 at 12. However, as of September 30, 2013, it no longer owned them. Declaration of Evan Grobecker ("Grobecker Decl.") ¶ 2, LA CV13-00453 Dkt. 85-1. As of that date, it became a tenant of 515 Flower Street. *Id.* Flower Associates does not clearly state the nature of its present business. However, the declarations of Grobecker and Thomas Ricci suggest that Flower Associates serves as the property manager for the properties it formerly owned. Ricci Decl. ¶ 3, LA CV13-00453 Dkt. 64-5 ("Petitioner currently provides jobs for about 230 people at the Properties. Workers include housekeepers, janitors, security personnel, parking attendants, building engineers, and . . . secretarial and management staff."); Grobecker Decl. ¶ 4 ("[O]ne of the primary missions of Flower Associates continues to be to protect the

interests of the Flower Street Property and the surrounding public spaces. . . . That purpose includes not only the aesthetics and working conditions in Flower Associates' office space at 515 South Flower Street, but also through its interaction with the new building owners and, in this case, governmental agencies, to seek to protect the aesthetics and safety of public areas in the vicinity of our office."). And, counsel for Flower Associates represented at the hearing that his client remains the property manager and that it is responsible for maintaining the building as well as leasing the space.

Flower Associates contends it has standing for several reasons. *First*, it argues that it had standing at the time the case was filed, and that this is sufficient. Dkt. 75 at 12. Under the standards previously stated, this is incorrect. *See Perry*, 133 S. Ct. at 2661 (a plaintiff must have standing at all successive stages of the litigation); *Lujan*, 504 U.S. at 561 (plaintiff bears the burden of establishing standing at all successive stages of the litigation).[6]

Second, Flower Associates relies on the doctrine of associational standing and claims that it may pursue this action on behalf of its members. Grobecker's declaration asserts that, among the goals of Flower Associates, is to "ensur[e] a safe and clean work environment for its current management personnel, members . . . and their officers." Grobecker Decl. ¶ 4. Grobecker's declaration then identifies various ways in which Grobecker himself will be injured if the Project proceeds under the present plan. Grobecker Decl. ¶¶ 5-16 (describing injuries he will suffer because construction will "seriously degrade" his "aesthetic and visual enjoyment of the current streetscape;" he will breathe "additional dust and diesel exhaust;" and construction will "increase[] safety risks"). Flower Associates' supplemental briefing also presents this argument. *See* Dkt. 117 at 2 (*citing Hunt v. Wash. State Apple Comm'n*, 432 U.S. 333 (1977)).

An association can have standing as a representative of its members if: (i) at least one of its members would have standing to sue on its own behalf; (ii) the interests the suit seeks to vindicate are germane to the purpose of the organization; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 553 (1996). In the environmental context, an association may have standing to sue on behalf of its members when such persons "aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183. Thus, in *Laidlaw*, the Court found that environmental

[6] Flower Associates contends that *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) [hereinafter *Laidlaw*], which was decided after *Lujan*, has limited its scope. Thus, it argues that sale of the properties by Flower Associates should be considered as part of an analysis of mootness, not standing. However, *Laidlaw* did not narrow *Lujan*. *Id.* at 183-84 (noting that its decision did not contradict *Lujan*, and explaining that plaintiffs in *Laidlaw*, unlike those in *Lujan*, had presented specific affidavits and testimony to establish standing). Moreover, *Perry* was decided after *Laidlaw*, and reiterated that standing must be established by a party throughout litigation.

associations adequately alleged injury in fact when their members declared that they hiked, picnicked, camped and drove near the affected area and were persons for whom the aesthetic and recreational values of the area would be diminished by the challenged activity. *Id.*

Flower Associates cannot establish associational standing. That form of standing is "reserved for organizations that 'express the[ ] collective views and protect the[ ] collective interests' of their members." *Fleck & Associates, Inc. v. Phoenix, City of, an Arizona Mun. Corp.*, 471 F.3d 1100, 1106 (9th Cir. 2006). Flower Associates states that its employees and certain corporate entities are its members, Grobecker Decl.¶¶ 2, 4. However, no evidence has been presented that Flower Associates was formed to express or protect the collective views of these persons. *See Fleck*, 471 F.3d at 1106 (plaintiff business failed to establish associational standing when its members were "merely customers" and the business did not "allege that its customers in any way have come together to form an organization for their mutual aid and benefit"). Rather, Flower Associates is a business entity that manages the property located at 515 South Flower Street. The Supreme Court has held that an organization that is not a traditional voluntary membership organization may establish associational standing. *Hunt*, 432 U.S. at 344. There, however, the state agency "for all practical purposes, perform[ed] the functions of a traditional trade association representing the Washington apple industry" and the apple growers and dealers "possess[ed] all indicia of membership in an organization," *i.e.*, the ability to elect the members of the commission. *Id*. at 344-45. Here, the employees of Flower Associates do not have this capacity, nor does Flower Associates perform the functions of a traditional association representing the interests of its employees. For all of these reasons, it cannot establish associational standing.

Third, Flower Associates argues that it has standing because it is a "long-term tenant" of 515 South Flower Street. Dkt. 75 at 13. Thus, its officers and management "still have a close physical connection to what is occurring on Flower Street," and Flower Associates "must assure the well-being of its management personnel, offices and surroundings." *Id.* Through these and other statements in the declarations submitted by Flower Associates, it has provided some evidence that it will be adversely affected by the outcome of this litigation. As a tenant adjacent to the Project, Flower Associates has "a 'sufficient geographic nexus to the site of the challenged project that [it] may be expected to suffer whatever environmental consequences' may result from implementation" of the Project. *Kootenai Tribe of Idaho*, 313 F.3d at 1112. And, although "geographic proximity does not, in and of itself, confer standing," *City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 267 (D.C. Cir. 2002), Flower Associates has presented evidence through the Grobecker declaration showing that it will be injured by the Project. Grobecker declares that Flower Associates will be directly affected by the Regional Connector Project in numerous ways. These include direct effects on: (i) the "safety and emergency evacuation protocols" for its management and visitors; (ii) its ability to provide its officers, visitors and consultants with a "clean, quiet, and safe work place"; and (iii) its mission to "maintain attractive, clean, and vibrant public spaces and streetscapes adjacent to and near the Flower Street Property." Grobecker Decl. ¶ 8.

Defendants argue that these injuries are not sufficiently concrete to establish the standing of Flower Associates because they are no more than "aesthetic injuries." And, Defendants contend that business entities may not rely on such alleged harm to establish standing. *See* Dkt. 113 at 4; Dkt. 79 at 19 (citing *United States v. W. Radio Servs. Co.*, 869 F. Supp. 2d 1282, 1286 n.2 (D. Or. 2012) ("[B]usiness entities generally do not have aesthetic or recreational interests, and they cannot support their standing by asserting the aesthetic or recreational interests of their employees or customers."); *Citizens Coordinating Comm. on Friendship Heights, Inc. v. Washington Metro. Transit Auth.*, 765 F.2d 1169, 1173 (D.C. Cir. 1985) ("Though a corporation is a person for some purposes, we would be most reluctant to hold that it has senses and so can be affronted by deteriorations in its environment. That is beyond the reach of legal fiction and belongs in the realm of poetic license.")).

At the hearing, counsel for Flower Associates argued that it could establish its economic interest because the Project will make it more difficult to lease space in the Flower Street properties. But, Flower Associates has not presented evidence that supports this claim. Notwithstanding this shortcoming, the interest of Flower Associates in the Flower Street properties plainly extends beyond "aesthetic interests." The Grobecker declaration establishes that it has interests as a tenant, property manager, and employer that will be adversely affected by the Project. *See* Grobecker Decl. ¶ 8. For all of the foregoing reasons, Flower Associates has established an injury sufficient to establish its standing under the requirements of Article III.[7]

(2) Prudential Standing

In its supplemental briefing, the FTA concedes that the claimed injuries of Flower Associates "originate from environmental impacts," and does not challenge its prudential standing. 2:13-cv-00453, Dkt. 113

[7] It is also noteworthy that Flower Associates is, in effect, representing the interests of the owner of the Flower Street properties in this litigation. At the hearing on the Motions, the Court expressed concern regarding whether a tenant could challenge a proposed project when the owner is not a party to the litigation. Flower Associates replied that that the current owner approved the litigation, but was not substituted in as a plaintiff because it did not participate in the administrative process, and could be subject to waiver defenses. At the Court's request, Flower Associates provided a supplemental declaration demonstrating that Flower Associates is comprised of two members: FSP- 515/555 Special Member LLC ("Special Member") and the former owner of the Flower Street properties. 2:13-cv-00453, Dkt. 112, Declaration of Michael Croft ("Croft Decl."), ¶¶ 2-6. Under Section 10(b) of Flower Associates' limited liability company agreement, Special Member has the sole and exclusive power to direct and conduct the instant litigation on behalf of Plaintiff. *Id.* ¶ 7. Special Member is wholly owned by Fifth Street Properties, LLC, which is the 100% owner of FSP-South Flower Street Associates, LLC ("SFSA"). *Id.* ¶¶5-6. SFSA is the current owner of the Flower Street properties. *Id.* ¶ 4. As in *Hunt*, "it would exalt form over substance" to differentiate between Flower Associates and its owner. 432 U.S. at 346.

at 3-4 n.1. Indeed, the stated purposes of Flower Associates include "protect[ing] the . . . aesthetics and working conditions in the Flower Associates' office space." Grobecker Decl. ¶ 4. The Ninth Circuit has held that injuries to such interests satisfy NEPA's zone of interests test. *Presidio Golf Club v. Nat'l Park Serv*., 155 F.3d 1153, 1158 (9th Cir. 1998) (golf club's stated purpose to "improve and maintain grounds and buildings for athletic purposes" was within NEPA's zone of interests even though defendant characterized the club's interest as purely economic).

C. Whether the FEIS Adequately Analyzes Reasonable Alternative Methods of Construction along the Lower Flower Segment

The analysis of alternative methods required by NEPA is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. It requires that agencies "[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." *Id.* However, "NEPA's requirement to assess alternatives . . . is a procedural and not a substantive requirement." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engineers*, 524 F.3d 938, 955 (9th Cir. 2008). Thus, under NEPA, "an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (quotations omitted). An agency "need not, therefore, discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area…." *Id*. (quotation marks and internal citations omitted). Nevertheless, "[t]he existence of a viable but unexamined alternative renders the environmental impact statement inadequate. An agency must look at every reasonable alternative . . . " *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

Applying these principles in *Northern Alaska Environmental Center v. Kempthorne*, the Ninth Circuit held that the agency's consideration of five alternatives satisfied NEPA, notwithstanding plaintiffs' contention that the agency failed to consider a "middle ground" alternative and failed to include another alternative, the "Audubon Alternative," in the EIS. The court stated that the Preferred Alternative in the EIS was a sufficient "middle ground" alternative, and that the agency's explanation that the "Audubon Alternative" was inconsistent with the project goals, "coupled with its willingness to incorporate several recommendations into the Preferred Alternative, constituted a sufficient explanation for its refusal to adopt the entire Audubon proposal." 457 F.3d at 978-79. Similarly, in *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997), the Ninth Circuit determined that defendants "properly concluded, in a separate report, against including" a specific recommendation among the alternatives in the EIS. *Id.* at 1159. There, the recommendation at issue offered "no new, substantive proposal" that had not been "previously considered and addressed" in the EIS. *Id.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-00378 JAK (PLAx) LA CV13-00396 JAK (PLAx) LA CV13-00453 JAK (PLAx)	Date	May 29, 2014
Title	Today's IV, Inc. v. Federal Transit Administration, et al. Japanese Village, LLC v. Federal Transit Administration, et al. 515 555 Flower Associates, LLC v. Federal Transit Administration, et al.		

1. Tunneling Alternatives

The FEIS analyzed the viability of closed-face TBM along the Lower Flower Segment. It did not, however, address Open-Face Shield, SEM, or any other tunneling method as an alternative to C/C for the Lower Flower Segment. AR10149-50. Plaintiffs argue that Defendants' failure to provide evidentiary support for the decision not to use TBM as well as the failure to analyze other feasible tunneling alternatives on the Lower Flower Segment constituted error in the FEIS. Dkt. 56-1 at 28.

Defendants respond that, in the course of developing the Project, they analyzed "eight transportation modes, a universe of routes, [and] five alternatives in detail." Dkt. 66-1 at 44. These alternatives involved considerations of both C/C and TBM on the Lower Flower Segment. For these reasons, they contend that the agencies analyzed a reasonable range of alternatives. *Id.*

a) Adequacy of Analysis of TBM on Lower Flower Segment

(1) Whether Rejecting TBM on the Lower Flower Segment was Arbitrary and Capricious

Plaintiffs contend that Metro's position that TBM was not feasible along the Lower Flower Segment is arbitrary and capricious because it "runs counter to the evidence before the agency." *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176-1177 (9th Cir. 2011). The Bonaventure provided evidence that the foundation of its building does not have tiebacks between 4th and 5th streets, FTAR11110-11, and that Metro itself did not expect to encounter many tiebacks at the Citigroup Center on the other side of Flower Street between 4th and 5th Streets. AR45692 (Metro's Draft Conceptual Engineering Design Report stating the "proposed tunnel is therefore not expected to encounter many temporary (abandoned) tie-back anchors at depth" at the Citigroup Center). Further, there are other areas along Flower and 2nd Street where the FEIS contemplates the use of TBM despite the presence of tiebacks. AR6034. For example, Metro anticipated encountering tiebacks at the Bank of America building on the south side of Flower Street between 3rd and 4th Streets, AR45693 ("City records show tie-back shoring around the perimeter of the entire block."), and at certain locations along 2nd Street. AR68914 (anticipating tiebacks at the Walt Disney Concert Hall, on 2nd between Hope and Grand Streets, and at a property on the south side of 2nd Street between Olive and Hill Streets).

The decision by Defendants to use TBM on 2nd Street and on Flower between 3rd and 4th Streets, but not on the Lower Flower Segment, has not been shown to have been arbitrary and capricious. Rather, Defendants chose to use TBM where there were only a small number of tiebacks and where the location of those tiebacks was "fairly well known." Dkt. 66-1 at 49 (citing AR82420). By contrast,

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Defendants anticipated that during construction approximately 400 tiebacks would be encountered on the Lower Flower Segment. AR20089, 92. Plaintiffs' contention that Defendants failed to offer evidence of tiebacks on the Lower Flower Segment is unpersuasive; the administrative record contains substantial evidence about their presence at that location. *See, e.g.*, MSAR15958-59 (L.A. Central Library Underground Parking plans showing tiebacks); MSAR15974 (Citigroup Center plans showing tiebacks); AR52397 (Draft Conceptual Engineering Report documenting tiebacks at Flower between 4th and 6th Streets). Further, Defendants point out that their decision not to use TBM on the Lower Flower Segment was reasonable because TBM would have "create[d] some challenges" in the plan to preserve the potential for a future station on Flower Street between 4th and 5th Streets. AR8164 (responses to comments on the FEIS). For all of these reasons, there has been no showing that Defendants acted in an arbitrary and capricious manner when they rejected TBM for the Lower Flower Segment.

(2) Whether Later Admission of Feasibility Renders the FEIS Deficient

Plaintiffs argue that Metro admitted the feasibility of the use of TBM on the Lower Flower Segment after the FEIS had been completed. Dkt. 56-1 at 30-32. At a series of March 2012 meetings, Metro and key stakeholders discussed the possibility of extending the use of TBM south of 4th Street. *See* FTAR 19871-72, 12083, 14274, 10745. For example, on March 5, 2012, Metro stated its commitment to continue to review the potential use of TBM on the Lower Flower Segment. FTAR19871. Metro also advanced a possible means to extend the use of TBM beyond 4th Street by "deepening the vertical alignment to avoid the 4th Street piling system foundation; resulting in lowering the 2nd/Hope Street Station," and "continu[ing] the TBM configuration from 4th Street to just south of 5th Street, assuming no or minimum tie-back encountered." FTAR19871. At a March 9, 2012 meeting, Metro proposed options for possible extension of tunneling and "set aside the discussion of the tie-back for further investigation." FTAR12083.

In June 2012, Metro's Construction Committee released an internal report stating that "[i]t has . . . been concluded that a mitigation measure related to extending the tunnel using earth pressure balance machines (EBM) under Flower Street beyond the area between 4th and 5th Streets and up to the intersection of 5th and Flower Streets was technically feasible." FTAR12432. This would involve tunneling below the existing tiebacks instead of cutting through them. AR82425. The report went on to state that "the cost of incorporating this refinement [is] still being developed as value engineering continues." *Id.* Despite these statements about the possibility that TBM could be used on the Lower Flower Segment and the use of TBM in other areas where there were tiebacks, the FEIS did not address the technical feasibility of the extension of TBM south of 4th Street.

Defendants concede that Metro later "concluded that it could be technologically feasible to tunnel even to south of Fifth Street," but that it was considering whether the cost of this method would fit within the

"available $1.36 billion project funding." Dkt. 66-1 at 34, 37 (citing FTAR12431-32). However, Defendants maintain that, as of January 2012, when the FEIS was issued, Defendants had rejected TBM between 4th and 5th Streets. AR20106. Their later conclusion that TBM could extend beyond 4th Street was the product of extensive work with Flower Street Stakeholders after the FEIS issued. Defendants argue that NEPA encourages this result. As the Supreme Court recognized in *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519 (1978), the "concept of 'alternatives' is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood." *Id*. at 552-53. Defendants contend, therefore, that such responsiveness and flexibility is encouraged. Dkt. 79 at 40.

The FEIS includes the determination, which Defendants had made by the time when the FEIS was released, that TBM was not feasible. AR8164; AR2405; AR20108. Plaintiffs have not presented evidence showing that, prior to issuance of the FEIS, Defendants were aware of the feasibility of TBM on portions of the Lower Flower Segment. Therefore, under the standards discussed above, the discussion and consideration contained in the FEIS was procedurally sufficient and the resulting conclusion in the FEIS about this issue was not arbitrary and capricious. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) (brief discussion of rejected alternatives rejected as infeasible was sufficient).

That Defendants later may have reached a different substantive decision as to the potential feasibility of TBM does not show that the FEIS was procedurally deficient. *See Vermont Yankee*, 435 U.S. at 554-55 ("[T]he role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review."); *State of Cal. v. Block*, 690 F.2d 753, 771-72 (9th Cir. 1982) (determining when a supplemental EIS is required before a final EIS and noting that 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"). As in *Carmel-by-the-Sea*, Plaintiffs disagreement with the FEIS is a substantive one: They prefer the use of TBM south of 4th Street over C/C construction. However, these substantive concerns "are beyond the scope of our review." *Carmel-by-the-Sea*, 123 F.3d at 1159.

b) Lack of Analysis of Alternative Tunneling Methods on the Lower Flower Segment

If the public proposes a reasonable alternative, the agency must consider it in the EIS. *City of Sausalito v. O'Neill*, 38 F.3d 1186 (9th Cir. 2004); *Morongo Band v. Fed. Aviation Admin*., 161 F.3d 569, 575 (9th Cir. 1998). "For alternatives which were eliminated from detailed study, [the EIS must] briefly discuss the reasons for their having been eliminated." *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1200 (9th Cir. 2000) (quoting 40 C.F.R. 1502.14(a)). Plaintiffs contend that both property owners

and Metro raised the possibility of using SEM or Open-Face Shield tunneling prior to the release of the FEIS. Dkt. 56-1 at 33 (citing AR28755-73, 26615-19, 27728-36, 78296-351). However, they argue that the FEIS did not address either of these alternatives.[8] Defendants respond that Plaintiffs waived their arguments that the analysis of either of these alternatives was required under NEPA. They also contend that NEPA did not require a full analysis of SEM and Open-Face Shield tunneling as separate alternatives because Defendants concluded that neither was feasible.

(1) Waiver

To avoid the waiver of an objection, plaintiffs challenging an agency action are required to raise it with specificity "so that it alerts the agency to [their] position and contentions" during the NEPA comment period. *Vermont Yankee*, 435 U.S. at 553; *Barnes v. DOT*, 655 F.3d 1124, 1132-33 (9th Cir. 2011). However, the defects of an EIS "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." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004). The Ninth Circuit "has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners." *Barnes*, 655 F.3d at 1133 (citing *'Ilio'ulaokalani Coal. v. Rumsfeld,* 464 F.3d 1083, 1092 (9th Cir.2006)).

Defendants argue that none of the comments about the DEIS or the SEA proposed open-face tunneling. Dkt. 66-1 at 45. Indeed, Bonaventure did not mention tunneling in its comments. AR8272-73.[9] Flower Associates requested that Defendants consider "[t]he feasibility of constructing the [Project] by [TBM]," AR8135, and complained that "the circulated studies have not adequately analyzed the alternative of using [TBM] for this segment of the work . . ." AR8143. These comments do not specifically discuss Open-Face or SEM tunneling. Nevertheless, Plaintiffs contend they were sufficient to put Defendants on notice that they should analyze an alternative of some type of "tunneling method" along the Lower Flower Segment. *Lands Council v. McNair*, 629 F.3d 1070, 107 (9th Cir. 2010) ("[A]lerting the agency in general terms to a particular issue" is "sufficient for exhaustion if the agency is given the opportunity to 'bring its expertise to bear to solve the claim.'").

Plaintiffs' comments regarding TBM were not sufficient to alert the Defendants of the need to analyze open-face tunneling methods. However, Metro had independent knowledge of the issue. *See* MSAR15815-16 (in 2010, Metro expert noted that an open-face method had been used to cut through

[8] The FEIS refers to SEM as a possible construction method (FEIS 4-452, AR6679), but does not analyze whether it could be used along the Lower Flower Segment. The FEIS does not mention Open-Face Shield tunneling.

[9] The Bonaventure raised SEM and Open-Face Shield tunneling on April 26, 2012, the same day Metro approved the Project. *See* AR19077, 5983, 13823. However, this was after the comment period had closed on February 21, 2012.

tiebacks and that such a method should be considered); AR15805 (1995 TAP report noting that "[m]ore than half of the urban tunnels in the U.S. are constructed with open face TBMs, often combined with ground conditioning"); FTAR30829 (October 2010 email from FTA expert noting that "with proper tunneling techniques, an open face should perform well"). Furthermore, the issue of the use of open-face methods was raised by other stakeholders during the FEIS comment period. *See* AR18412-16.[10] Thus, the issue was not waived. *See 'Ilio 'Ulaokalani*, 464 F.3d at 1092 (the Ninth Circuit "had declined to adopt 'a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision.").

(2) Analysis of SEM and Open Shield Tunneling

As noted above, an agency need not analyze every possible alternative to a proposed action. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (quotations omitted). Specifically, an agency need not "discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area[.]" *N. Alaska Envtl. Ctr.,* 457 F.3d at 978.

Defendants admit that the FEIS did not address SEM or Open-Face Shield tunneling. However, they contend that they were not required to address these alternatives in the FEIS because they determined that these methods would not be feasible. *See* AR17770 (Draft Alternative Study of Tunneling on Flower Street); AR20116 (Flower Stakeholders Meeting Minutes); AR20124 (Flower Draft Concept Design Power Point); AR82421 (Draft Evaluation of Tunnel Design); MSAR17249 (Draft Evaluation of Tunnel Design concluding Open Shield was unsuitable for the soil type on Flower Street).

[10] Several district courts have held that it is not required that the plaintiff have raised an issue that is the basis for a challenge brought by that party so long as the issue was raised by any person or the agency's own experts during the administrative process. Dkt. 75 at 30 (citing *Ctr. For Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 961 (N.D. Cal. 2010); *Pac. Coast Fed'n of Fishermen v. U.S. DOI*, 929 F. Supp. 2d 1039, 1046-47 (E.D. Cal. 2013 ("[C]omments submitted by third parties may form the basis of a NEPA lawsuit, so long as the comments brought sufficient attention to the issue."); *Wyo. Lodging & Rest. Ass'n*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005). During the FEIS comment period in January and February 2012, Hines, who is the owner of Citigroup Center that is also located on Flower Street, criticized the failure to consider tunneling on the Lower Flower Segment. AR18412-16. Hines refers to the aforementioned study documenting the successful use of open-face tunneling in Seattle, including through tiebacks. AR18414-15; AR18410-24.

(a) Whether Defendants may Rely on Studies not Disclosed to the Public in Determining Not to Include SEM and Open-Face Shield in the FEIS

Defendants cite to a series of draft studies providing support for their conclusion that Open-Face tunneling would not be feasible ("Draft Tunneling Studies").[11] These studies state that, because the soil underneath the Lower Flower Segment "consist[ed] primarily of interlayered silty clays, sandy silts, clayey sands, and silty sands with some sand layers containing variable gravel, and few cobbles," (AR82418), the ground would be "unstable and . . . subject to fast raveling, running, or flowing," (AR82421). Metro noted "[t]his is the classic scenario where a sinkhole at the ground surface can be expected," (AR17814), which would "shut down the entire street for an extended period of time." AR20116. To avoid this problem, engineers would have to improve the ground for open-face tunneling by "grouting from the ground surface." AR82421, 20138. In addition, "utilities would need to be relocated in order to avoid conflicts with the grouting pipes to be installed." AR20115. Ultimately, Metro concluded that, if all of these preparatory steps were taken, Open-Face tunneling "would have similar impacts to Flower Street as the [C/C] method," AR82420, and that Open-Face tunneling was "an unacceptable risk." AR20124.

Defendants also contend that, although they did not analyze SEM in the FEIS, they considered and evaluated this alternative. Dkt. 66-1 at 55. They concluded that, due to the soil conditions, SEM would be subject to the same constraints and would present the same risks of street closures and danger to workers as Open-Face Shield tunneling. FTAR19507; AR20116, 20137, 82421-22, MSAR17249. Through the Draft Tunneling Studies, Metro concluded SEM and Open-Face Shield tunneling were infeasible. Therefore, Defendants contend, they were not required to present them as alternatives in the FEIS. *See N. Alaska Envtl. Ctr.*, 457 F.3d at 978.

Plaintiffs reply that Defendants cannot rely on the Draft Tunneling Studies to support their decision not to address SEM or Open-Face Shield Method in the EIS because these studies were not referenced in the EIS and were not made available to the public. Dkt. 56-1 at 39-41;[12] Dkt. 75 at 20. In support of this position, Plaintiffs cite cases holding that an agency must make studies supporting an EIS "available

[11] These three studies are in the administrative record. AR17663-772; AR82410-27; MSAR17236-54. At least one was completed prior to the issuance of the FEIS. At the hearing, counsel for the Federal Defendants stated that one was published in February 2011, before the FEIS was released in January 2012, and the other two were completed after that date*, i.e.,* in April 2012 and June 2012, respectively.

[12] Although Plaintiffs contend that Defendants may not rely on these documents, Plaintiffs nonetheless rely on them to show that Defendants were aware that tunneling on the Lower Flower Segment was feasible. Dkt. 75 at 17 (citing *Suffolk Co. v. Sect'y of Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977) ("[A]llegations that an EIS has . . . failed adequately to discuss some reasonable alternative . . . raise issues sufficiently important to permit the introduction of new evidence in the district court.")).

and accessible." *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 782 (9th Cir. 1980); *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998).[13] In these cases an agency failed to collect data during the EIS process or relied on studies for conclusions in the EIS without citing them or making available the data or reasoning on which they were premised.

The present case presents a different factual setting. Here, Defendants did not discuss SEM or Open-Face Shield tunneling as an alternative in the FEIS because they had concluded, prior to preparing it, that neither was feasible.[14] The factual setting here is similar in certain respects to the one presented in *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997). There, the plaintiff argued that the FEIS failed properly to consider several alternatives, specifically those that had been suggested in a report (the "Smith Report") prepared by the engineering firm hired by the plaintiff. However, the Ninth Circuit held that defendants "properly concluded, in a separate report, against including this recommendation among the alternatives in the Final Environmental Impact Statement/Report on the grounds that it offered 'no new, substantive proposal for alternative alignment that has not been previously considered and addressed in the [Environmental Impact Statement].'" 123 F.3d at 1159. Thus, the Ninth Circuit allowed defendants to rely on a report that was not referred to in the FEIS to demonstrate why the agency chose not to include certain alternatives in the discussion in the EIS.

The Defendants offer the Draft Tunneling Studies to demonstrate that it was not necessary for them to have considered SEM or Open Face Shield tunneling as a separate alternative in the FEIS. However, unlike the actions of the defendants in *Carmel-by-the-Sea*, who considered and rejected in the FEIS similar alternatives to those mentioned in the Smith Report, the Defendants in the present action rejected the Open-Face Shield and SEM alternatives as infeasible, but did not discuss similar alternatives in the FEIS. Thus, the question here is not whether Defendants can now rely on the Draft Tunneling Studies to support their contention that Open-Face Shield and SEM are infeasible, but whether the FEIS contained an adequate analysis of these alternatives. Had Defendants addressed and rejected any form of open-face tunneling in the FEIS, they might later be able to rely on the Draft Tunneling Studies as part of an explanation for a failure to address SEM or Open-Face Shield tunneling

[13] Plaintiffs also cite to cases with respect to whether a reviewing court may consider "extra-record materials." *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703-04 (9th Cir. 1996). However, this rule applies to declarations and exhibits offered by a party in connection with the litigation that were not part of the administrative record. Here, the Draft Tunneling Studies are included in the administrative record.

[14] Plaintiffs also cite cases in which the Ninth Circuit refused to credit an agency attorney's "post-hoc rationalization" during litigation and stated "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Or. Natural Desert*, 625 F.3d at 1120. Defendants here are not relying on post-hoc rationalizations, but on agency conclusions regarding the feasibility of open-face tunneling. As noted above, they were not specifically disclosed to the public in the FEIS.

in detail in the FEIS. However, as discussed below, the Draft Tunneling Studies cannot cure the failure of the FEIS to address SEM or Open-Face Shield Tunneling. Neither of these alternatives nor other, similar open-face tunneling possibilities, were mentioned in the FEIS.

(b) Whether the EIS Sufficiently Discussed Open-Face Shield and SEM

In the FEIS, Defendants were required, "for alternatives which were eliminated from detailed study . . . briefly [to] discuss the reasons for their having been eliminated." *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 2000). In *Am. Rivers*, the identification of reasonable alternatives in the EIS was sufficient. 201 F.3d at 1200. The EIS at issue there noted that the alternative of removal of a dam was not reasonable because "[d]ams, and the reservoirs they create, usually serve a variety of non-power public purposes, such as flood control, irrigation, and recreation." 201 F.3d at 1201. The Ninth Circuit held that, although the EIS "never engaged in a lengthy evaluation of the dam removal alternative . . . its analysis comfortably meets the 'discuss briefly' standard of 40 C.F.R. § 1502.14(a)." *Id.* Likewise, in *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024 (2007), *aff'd in relevant part Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), the EIS justified the elimination of an alternative by reference to "logistical and economic considerations and water availability research' as well as 'environmental and political issues.'" 479 F.3d at 1056. The Ninth Circuit held that this discussion, albeit brief, was adequate under 40 C.F.R. § 1502.14(a). *Id.*

Here, the FEIS fails to address why neither Open-Face Shield nor SEM tunneling was considered for the Lower Flower Segment. Thus, the FEIS did not include any discussion, even a summary one, of "the reasons for their having been eliminated." *Am. Rivers*, 201 F.3d at 1200. And, unlike in *Carmel-by-the-Sea*, the FEIS did not address a similar alternative. SEM or Open-Face Shield Tunneling is materially different from the closed-face tunneling alternative that was briefly addressed and rejected in the FEIS. That alternative was rejected because of the inability of TBMs to cut through tiebacks, an issue that may be remedied by SEM or the Open-Face Shield Method. Therefore, a separate discussion of SEM or Open-Face Shield was required.

Defendants appear to contend that an EIS need not even mention alternatives that are "unlikely to be implemented" or which are "infeasible, ineffective, or inconsistent with the [agency's] basic policy objectives . . . ." *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993). Defendants are not required to consider, through a comprehensive alternative analysis, options that are neither feasible nor consistent with Project goals. However, they are required to explain in the FEIS, at least briefly, the reasons that such alternatives were rejected. Defendants failed to do so.[15] For these reasons, the FEIS

[15] Generally, "the absence of a more thorough discussion in [an] EIS of alternatives that were discussed in and rejected as a result of prior state studies does not violate NEPA." *Ctr. for Envtl. Law & Policy v. U.S. Bureau of*

is "not in accordance with the law" in this specific area. 5 U.S.C. § 706(2)(A).[16] Plaintiffs' Motion is GRANTED on this issue.

D. Whether the EIS Adequately Analyzes and Mitigates Project Impacts to the Lower Flower Segment

NEPA requires that an EIS contain "a reasonably complete discussion of possible mitigation measures." *Methow Valley Citizens*, 490 U.S. at 352. The mitigation must "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp*., 123 F.3d 1142, 1154 (9th Cir. 1997); *see also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (NEPA prohibits conclusory or perfunctory mitigation measures); *S. Fork Band of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (agency has duty "to discuss mitigation of reasonably likely impact at the outset"). However, courts "employ a rule of reason standard to determine whether [an] EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Navajo Nation v. U.S. Forest Serv*., 35 F.3d 1058, 1110 (9th Cir. 2008).

Reclamation, 655 F.3d 1000, 1012 (9th Cir. 2011) (quoting *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp*., 42 F.3d 517, 524 n.6 (9th Cir. 1994)). However, in *Center for Environmental Law and Policy*, the federal agency briefly discussed certain alternatives and explained that it rejected them based on a prior supplemental EIS. 655 F.3d at 1012. Here, by contrast, the FEIS fails to discuss the possibility of using SEM or Open-Face Shield tunneling, and the Draft Tunneling Studies were not publicly available.

[16] Plaintiffs contend Metro's own experts concluded that open-face tunneling was feasible. Dkt. 75 at 21-24 (citing MSAR15815-16 (November 2010 statement by TAP member suggesting open shield may be feasible); MSAR16558 (Metro expert noting "there is new open-faced technology available for TBMs that could cut through tiebacks."); FTAR30829-30 (October 2010 statement by member of FTA's Project Management Oversight Committee noting that "an open face machine wouldn't have issues with tiebacks"); AR17767, 17811 (February 2011 Tunneling Study noting open face tunneling should be considered but that "use of an open face TBM is known to be unacceptable to Metro."). Defendants reply that, although the Draft Tunneling Studies recognize that open-face tunneling was technically possible, Metro nevertheless concluded that it was infeasible due to the risks associated with removing water from the soil, the potential for uncontrolled ground loss, and the construction impacts of jet grouting. Dkt. 79 at 35-37. Metro's decisions on these matters are entitled to deference. *See Sierra Club v. U.S. EPA*, 346 F.3d 955, 961 (9th Cir. 2003) ("[W]here analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the reasonable federal agencies.").

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-00378 JAK (PLAx) LA CV13-00396 JAK (PLAx) LA CV13-00453 JAK (PLAx)	Date	May 29, 2014
Title	Today's IV, Inc. v. Federal Transit Administration, et al. Japanese Village, LLC v. Federal Transit Administration, et al. 515 555 Flower Associates, LLC v. Federal Transit Administration, et al.		

1. Geotechnical Impacts

Plaintiffs notified Metro about potential geotechnical risks associated with the Project. In September 2011, in a comment made in response to the DEIS, Bonaventure stated that it had experienced "shifting" during a prior excavation and construction on the corner of 5th and Flower Streets. AR8272. In April 2012, after the FEIS comment period closed, Flower Associates submitted expert comments from structural engineer Nabih Youseff. He stated:

> [I]t is my professional opinion that cut and cover construction techniques, if used as described in the Final EIR and not implemented with substantial additional mitigation measures, could pose a risk to the structural integrity of the buildings . . . . In my opinion, it is essential that Metro provide supplemental and substantive information concerning mitigation for cut and cover construction, particularly in the event of a major earthquake during construction.

AR19006; *see also* AR8135, 8141, 8146. In the FEIS, Metro responded to these and similar comments by stating that it did "not anticipate that the proposed construction staging activities would cause damages to the subterranean structures." AR8161.

Plaintiffs contend that the FEIS did not sufficiently address these geotechnical risks. The FEIS states "there is the potential for adverse effects related to liquefaction, seismically-induced settlement, ground loss due to tunnel construction, and landslides for portions of the LPA alignment." AR6429. The FEIS also states that "[g]round improvement would be required in advance of tunneling to provide adequate support and to minimize settlement." *Id.* Mitigation Measure GT-1 (AR6913) requires that, following Project approval, a pre-construction survey would be performed. This survey would determine whether additional support for nearby structures would be required prior to construction and would provide a baseline against which "acceptable threshold values for vertical, horizontal, and angular deformation" would be measured. AR6913.

Plaintiffs argue that the pre-construction survey amounts to impermissible deferred mitigation. Dkt. 56-1 at 44-45 (citing *S. Fork Bank of W. Shoshone*, 588 F.3d at 727). "Without establishing the baseline conditions . . . , there is simply no way to determine what effect the proposed [Project] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Plaintiffs contend that the FEIS here is like the one found deficient in *Northern Plains Resource Council, Inc.*, 668 F.3d at 1083-85. There, the FEIS contained limited data as to the impact of a planned project on various species of wildlife, including the pallid sturgeon and the sage grouse. *Id.* However, the FEIS included a mitigation measure that "pre-

construction surveys would be conducted to determine the extent of sage grouse habitats and activity in the protected area." *Id.* at 1084. The Ninth Circuit concluded that

> such mitigation measures, while necessary, are not alone sufficient to meet . . . NEPA obligations to determine the projected extent of the environmental harm . . . before a project is approved. Mitigation measures may help alleviate impact after construction, but do not help to evaluate and understand the impact before construction.

Id. Plaintiffs contend that the result should be the same with respect to Defendants' proposed pre-construction survey.

Plaintiffs' position is not persuasive. The FEIS discusses soil conditions (FEIS 4-200, 4-193, 4-202, 4-190; AR7142) and geotechnical risks (AR11030, 45669-70) along the proposed route of the Project, noting that its "alignment is overlain by alluvial soils and undocumented fill that are potentially susceptible to ground loss associated with tunnel construction." FEIS 4-199 (AR6642). The FEIS states that its geotechnical analysis is based on Appendix U, a technical memorandum which discusses the geotechnical and subsurface conditions along the Project route by examining "known geologic hazards" through the review of various publications including, in relevant part, "publications by the California Geological Survey ["CGS"]." AR11052; AR11030. These CGS publications identify liquefaction zones based on "historic occurrence of liquefaction or local geological, geotechnical and groundwater conditions" (AR11069). The same technical memorandum stated that an investigation should be performed to "supplement and provide site specific data to facilitate final design for maintaining the integrity of existing structures." AR11094. Appendix U was prepared in April 13, 2010. After it was created, but prior to the release of the FEIS in February 2010, Metro commissioned an engineering firm to prepare a second geotechnical report. AR68935-69365. That report was completed in November 2010. In it, the engineering firm states that it had collected prior geotechnical studies and conducted additional field exploration to fill in gaps in prior data. AR68944. A total of 11 borings were drilled along the project route, from which samples were gathered and tested. *Id.*

The additional study prepared by Metro prior to the release of the FEIS distinguishes this case from *Northern Plains*. Unlike the agency in *Northern Plains*, Defendants here conducted significant analyses to determine baseline conditions. In this context, the Ninth Circuit has held that planned mitigation measures, which may be general or prospective, do not conflict with the obligations imposed an agency by NEPA. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (approval of mitigation measures that were "described in general terms" and contained prospective monitoring plans "[b]ecause the actual adverse effects are uncertain, and the EIS considered extensively the *potential* effects and mitigation processes." (emphasis in original)); *see also, Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) ("There is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences

have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."). As the Ninth Circuit also explained in *Okanogan Highlands Alliance*, "NEPA does not contain . . . 'a substantive requirement that a complete mitigation plan be actually formulated and adopted.'" 236 F.3d at 473.

Here, Defendants conducted sufficient analyses of the baseline geotechnical and subsidence conditions to show that they took a "hard look" at the likely impacts of the Project. In this context, a mitigation measure providing for a pre-construction survey does not amount to the impermissible deferral of analysis. For these reasons, the discussion of geotechnical impacts is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).[17]

2. Vibration Impacts

The FEIS concludes that C/C construction on the Lower Flower Segment could have significant vibration impacts (AR6383, 6703) and notes that several historical buildings may be affected by the vibration. AR6506, 6471. Ultimately, however, the FEIS concludes that, with mitigation, the Project would not have significant vibration impacts on these historical structures. AR6393-95, 6506. The FEIS provides several mitigation measures in this regard, including the following: (i) appropriate distances, according to FTA standards, "shall be maintained near-vibration sensitive locations to avoid potential construction-related vibration impacts." FEIS 8-23 (AR6902); and (ii) a "vibration monitoring plan shall be developed . . . to ensure appropriate measures are taken to avoid any damage to sensitive buildings." *Id.* Further, in responses to comments that were submitted, Metro made a commitment to protect buildings by using soil grouting, and equipment or construction techniques that would result in less vibration. AR8200-01. Ultimately, Metro concluded that these mitigation measures would make any vibration impacts insignificant. FEIS 4-165.

Plaintiffs contend that Metro's conclusion is not entitled to deference because it was not based on a rigorous analysis of concrete, substantial evidence. Dkt. 56-1 at 46 (citing *Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1075 (9th Cir. 2002); *State Farm*, 463 U.S. at 43; *Sierra Forest Legacy v. Sherman*, 46 F.3d at 1176-77).

The FEIS shows that Defendants conducted an extensive analysis of potential vibration impacts. It catalogues buildings by "land use category" as defined by the FTA, documents the FTA vibration level

[17] That the November 2010 engineering report was not attached to the FEIS does not change the outcome. "[I]t is well settled that supporting studies need not be physically attached to the EIS. They only need be available and accessible." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974). There has been no suggestion that the November 2010 engineering report was not made available to Plaintiffs or that they could not get access to it.

criteria for each land use category, and discusses predicted vibration levels, with citations to scientific sources. *See* FEIS 4-168 (AR6395). Attached to the FEIS is a "Noise and Vibration Analysis," which analyzed possible vibration impacts to various sensitive and historical buildings along the proposed route of the Project. This analysis constitutes the requisite "hard look" required by NEPA.

Given the substantial analysis, the mitigation measure providing that a "monitoring plan shall be developed" is not a basis to find that the FEIS is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Where substantial analysis of impacts has occurred, the Ninth Circuit has approved of similar prospective mitigation measures. *See City of Sausalito*, 386 F.3d at 1211 (where the FEIS contained a "detailed, fifteen-page analysis of traffic concerns," mitigation measures providing for "ongoing traffic monitoring" and a "Traffic Management Plan" were acceptable).

3. Grade Separation Impact

It is well established that an impact on traffic may be an environmental one. *See City of Sausalito*, 386 F.3d 1186. Plaintiffs contend that the failure of the FEIS to analyze the impacts of the grade separation constitutes a failure to analyze a significant impact of the project, which violates NEPA. Dkt. 56-1 at 46 (citing *Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d at 1074-75).

Plaintiffs contend that Metro admitted at public meetings that there could be a grade separation between the concrete decking covering the trench in C/C construction and existing sidewalk and driveway elevations. Dkt. 56-1 at 46 (citing AR8132-33 (comment by TPG noting that Metro representatives indicated the C/C construction could be done with decking at existing street level or higher than existing street level). The FEIS states that the "deck may be either flush with the existing street surface, or raised above the street surface with Americans with Disabilities Act (ADA)-compliant ramps to allow continued vehicle and pedestrian access." FEIS 4-449 (AR6676). Plaintiffs argue that the grade separation may affect vehicular traffic and pedestrian safety.

The FEIS includes a substantial discussion of the impact on traffic that may be caused by C/C construction. It also discusses several mitigation measures with respect to such impact. *See* AR 6699-70, AR6713, AR6681-82. Defendants also conducted a traffic study; it resulted in a 160-page report that was attached to the FEIS as Appendix L. AR10197-101356. This traffic study concluded that the "primary impact to traffic" during C/C construction "is usually associated with the time it takes to install decking." AR10331.[18]

[18] The traffic study did not include an express analysis of the impact of the grade separation.

The FEIS did not contain a discussion of how the grade separation itself may impact traffic. However, a review of an EIS is governed by a "rule of reason" to determine whether it contains a "reasonably thorough discussion" of the "significant aspects of the probable environmental consequences." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997). Here, the FEIS and Appendix L demonstrate that Defendants took a "hard look" at the probable effect on traffic that would result from the Project. Although Defendants did not expressly address the impact of the grade separation, Plaintiffs' claim that the grade separation will have significant impacts on traffic is not supported by substantial evidence. Plaintiffs cite only a February 2012 comment by the owner of the Citigroup Center and a September 2011 letter from Thomas Properties Group, both of which asserted the same general concerns about possible traffic effects. Neither presented any supporting evidence. AR18417; AR8132-33. Absent any evidence that the grade separation will cause a significant environmental impact, there is no showing that Defendants failed to take a "hard look" at the traffic impacts of C/C construction. For these reasons, the failure of the FEIS specifically to address the traffic impact of the grade separation is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).[19]

4. Impact on Emergency Ingress and Egress

Public safety and emergency risks are impacts that must be analyzed under NEPA. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1032 (9th Cir. 2006) (risk of terrorist event must be analyzed under NEPA). Plaintiffs contend that the FEIS fails adequately to analyze or discuss any mitigation as to the likely impact the Project will have on emergency ingress and egress to properties adjacent to the construction areas. Dkt. 56-1 at 48. Stakeholders expressed concern about the impact of C/C construction on emergency ingress and egress from their properties. AR8139-40, 8186. In responses to these comments, Metro stated it "would not allow construction activities to impede safe evacuation of the building or access for emergency personnel at any time." AR8160. Plaintiffs argue that this is insufficient because it fails to provide information as to how this goal will be accomplished with the street closures and narrowed walkways needed for C/C construction. Dkt. 56-1 at 48 (citing AR598-605).

In the FEIS, Metro stated it would give emergency providers early notification before disrupting traffic. FEIS 4-492 (AR6719). The FEIS stated that Metro would provide "[s]afe pedestrian detours with

[19] After the FEIS was published, Defendants designed "flushish" decking that would be only ten inches higher than the street and would have a 3% grade. Dkt. 66-1 at 55 (citing AR20200, 15676-77; FTAR5476, 86133). This resolution was developed after months of discussions with the Flower Street stakeholders. AR14083. This later-developed mitigation measure does not require a supplemental EIS. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989) ("[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized.").

handrails, fences, k-rail, canopies, and walkways" as needed, and, "direct[pedestrians] to nearby alternate crosswalks when others were closed." FEIS 3-60 (AR6221). Mitigation measure SS-15 provides that Metro "shall keep sidewalks, entrances to buildings, lobbies, corridors, aisles, doors, or exits that remain in use by the public clear of obstructions. Metro shall post appropriate warnings, signs, and instructional safety signs." AR6940. Furthermore, the Safety and Security Technical Memorandum attached to the FEIS (AR12184-85) discusses police and fire response during construction.

Defendants' discussion of the impact of construction on emergency ingress or egress is not extensive. However, the FEIS and accompanying Safety and Security memorandum contain a "reasonably thorough discussion" of the probably safety consequences of the Project. *Navajo Nation*, 535 F.3d at 1110. Under the applicable arbitrary and capricious standard, the FEIS was sufficient.

5. Construction Noise Impacts

Plaintiffs contend that the FEIS fails to analyze the impact of the C/C construction on noise levels along the Lower Flower Segment. Dkt. 56-1 at 50. The FEIS identifies FTA thresholds for construction noise impacts at 90dBA for daytime hours and 80dBA for nighttime hours for residential uses and 100dBA for daytime and nighttime hours for commercial and industrial uses. AR6364-65. The FEIS then analyzes the noise levels normally generated by various types of construction equipment that will be used along the route of the Project. AR6386. The highest noise level of any piece of equipment is 90dBA. As a result, the FEIS concludes that the noise levels would not exceed the FTA thresholds. AR6383.

Plaintiffs argue that the FEIS does not provide information as to how many pieces of equipment, or what combination of equipment, will be used at any given time on the Lower Flower Segment. Dkt. 56-1 at 50. Therefore, they assert, the FEIS does not provide an adequate analysis of aggregate noise levels from the C/C construction. Further, Plaintiffs argue that these measures are insufficient without any quantitative analysis of the impacts or the effects of the suggested mitigation measures.

The FEIS shows that Defendants conducted an analysis of noise impacts and developed mitigation measures in accordance with the FTA's Transit Noise and Vibration Impact Assessment. AR40418. Defendants then measured existing noise levels in 11 locations and conducted noise and vibration studies. FEIS 4-125, 4-132, 4-134. The FTA guidance provides a formula for calculating the effect of the combination of "two or more sound pressure levels at a single location." AR40440. The FEIS noted that Metro would "prohibit noise levels generated during construction from exceeding the FTA construction noise criteria," and proposed limiting simultaneous operation of equipment. FEIS 4-471. Furthermore, the FEIS directs contractors to implement additional mitigation measures, such as erecting temporary noise barriers, and using high-performance mufflers and portable noise sheds to keep noise levels below FTA criteria. FEIS 8-25 to -26 (AR6904-05). The FEIS shows that Defendants did not act arbitrarily or capriciously in concluding that these mitigation measures would be sufficient to

address noise levels and not have them exceed the designated thresholds. *See Navajo Nation I*, 479 F.3d at 1058.

E. Whether the EIS Adequately Analyzes and Mitigates Project Impacts to Little Tokyo and Japanese Village

1. Noise and Vibration Impacts

The FTA has identified "annoyance criteria" for vibration and noise impacts. Under their terms, vibration levels of 83VdB and noise levels of 48dBA, are considered "severe" impacts to Category 3 land uses (institutional, primarily daytime land uses) for infrequent events (fewer than 30 events per day). AR6357.[20]

a) Impact of Construction

The FEIS states that "[w]ith implementation of mitigation, noise and vibration impacts associated with construction . . . would be less than significant." AR6352, 6388. Plaintiffs contend that the noise and vibration studies in the FEIS contradict this conclusion. The analysis states that, after mitigation, vibration and noise impacts could reach 86VdB and 51dBA in the interior designer office that is located in the Japanese Village. AR8414. These levels exceed the respective annoyance criteria of 83VdB and 48dBA. AR8412. Plaintiffs argue that this contradiction shows either that "'the potential environmental consequences' were misunderstood by FTA . . . or that the FEIS is insufficient to 'enable those who did not have a part in is compilation to understand and consider meaningfully the factors involved.'" Dkt. 56-1 at 53 (quoting *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) and *Izaak Walton League v. Marsh*, 655 F.2d 346, 38-69 (D.C. Cir. 1981).[21]

Defendants developed the following mitigation measures to address the relevant impacts: (i) providing advance notice and coordinating with Japanese Village before tunneling or other activities;

[20] Japanese Village is considered a Category 3 land use under the FTA criteria. *See* FEIS 4-126, 4-161. Category 3 land uses include those "with primarily daytime uses that depend on low noise as an important part of operations." *Id.*

[21] Plaintiffs also refer to the analysis by an expert engaged by Metro. It was performed after the FEIS was released, but before the FTA issued its ROD. The report concluded that noise with mitigation would range from 42-50dBA. AR18780. Notwithstanding this finding, the FTA did not supplement the FEIS. Plaintiffs assert that this decision was a violation of NEPA. Dkt. 56-1 at 53-53 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 30, 74 (1989)). However, because this subsequent analysis identified no new impact -- indeed, it concluded that the noise levels would be lower than those previously identified -- no supplemental EIS was required.

(ii) monitoring vibration and noise levels in buildings adjacent to the tunneling; and (iii) offering to relocate affected residents temporarily if noise levels exceed FTA annoyance criteria. Dkt. 66-1 at 85 (citing FEIS 4-173). Although Defendants recognize that the vibration and noise impacts may exceed the annoyance thresholds for the interior designer office, the FEIS concluded these impacts would not be significant for the Japanese Village because they would only last for a "few days." FEIS 4-173, 4-161.

A significance determination is often "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989). This is the case when the dispute turns on analysis of documents which "requires a high level of technical expertise," such that a court should "defer to 'the informed discretion of the responsible federal agencies.'" *Id.* at 377.

Here, there is no factual dispute that the construction noise will likely be above the FTA threshold for the interior designer office located in the Japanese Village. The resulting dispute is whether the mitigation measures, which require temporary relocation of residents rather than the limitation of the noise, are sufficient. "NEPA, of course, does not require that these harms actually be mitigated." *S. Fork Band Council of W. Shoshone*, 588 F.3d at 727. Rather, it requires only that "an EIS discuss mitigation measures, with 'sufficient detail to ensure that environmental consequences have fairly been evaluated.'" *Id.* NEPA is a procedural, rather than a substantive, statute. Here, Defendants have met their procedural burden by analyzing the likely impacts of construction on the Japanese Village and identifying mitigation measures. Thus, Plaintiffs have not shown that the conclusion of the FEIS with respect to noise impacts is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

b) Operational Impacts

(1) Impacts Analysis

The FEIS concludes that, although noise from passing trains "would result in potentially adverse effects at . . . office uses" in the Japanese Village Plaza, they would not be significant in light of the planned mitigation. AR6392. Once again, Plaintiffs argue that this conclusion is not supported by the analysis in the report prepared by the expert engaged by Defendants. Again, this report was prepared after the FEIS was published, but before the FTA issued its ROD. Dkt. 56-1 at 54. Japanese Village cites the analysis of its own expert in support of the claim that the operational noise impacts of 36 to 40 dBA at 63Hz of the trains operating under Japanese Village Plaza will cause noise that "will not only be audible but will also be annoying." AR18785. Its expert also opines that Metro must mitigate the train noise down to 25 decibels in order for impacts to be "audible during quiet times, but . . . less annoying." AR18785. By contrast, Defendants' expert concluded that noise impacts below 40dBA at 63Hz would

not be significant. AR18773-77; FEIS 4-173. Defendants contend that this opinion is consistent with the FTA's Noise and Vibration guidance, which states that a vibration of 40dBA at 60Hz is the "[a]pproximate threshold of perception for many humans." AR40568.

Deference is warranted to the opinions of the expert engaged by Defendants. "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." *Marsh*, 490 U.S. at 378. Under these circumstances, it is proper for the Court to "defer to the informed discretion of the responsible federal agenc[y]." *Sierra Club v. U.S. EPA*, 34 F.3d 955, 961 (9th Cir. 2003). The FEIS is, therefore, not arbitrary and capricious or an abuse of the agency's discretion with respect to operational noise impacts in Japanese Village.

(2) Mitigation Measures

Plaintiffs argue that the FTA violated NEPA by failing to explain why certain mitigation measures that are planned for other Project locations were not adopted near Japanese Village. Dkt. 56-1 at 56. The noise experts engaged by FTA were aware of several mitigation measures that could have been taken to reduce noise impacts, including "bridge bearing isolators" and "isolated slab track" technology. AR18785, 18777. Plaintiffs argue that isolated slab track technology would reduce noise in the Japanese Village to 43dBA, which is below the 50dBA FTA threshold level. This technology was used near the Walt Disney Concert Hall and the Colburn School of Music on Grand Avenue. It was not, however, selected for the portion of the line passing under Japanese Village. *See* AR38. Instead, the FEIS proposes "high compliance resilience fasteners" to "reduce ground-bone noise below FTA annoyance criteria." *Id.* Plaintiffs contend that there is an insufficient explanation as to why the FEIS did not adopt isolated slab track technology. Dkt. 56-1 at 57.

Defendants respond that the FEIS explained that additional mitigation measures were not necessary because the fasteners would decrease noise to levels that were not significant. Dkt. 66-1 at 86 (citing FEIS 4-164). The FEIS explains that single trains passing below Japanese Village would have a significant impact only if they generated a noise level above 40 dBA. It then states that if two trains passed beneath this location simultaneously -- which would be an infrequent occurrence – it would result in a noise impact above 50dBA. EIS 4-163 to -164. As a result of this assessment, the FTA chose to implement the "high compliance resilience fasteners or other appropriate measures as needed to eliminate impacts . . . below FTA annoyance criteria." FEIS 4-173. Because the high compliance resilience fasteners are expected to reduce the 50dBA to 40dBA, Defendants argue that they reasonably concluded this mitigation measure was sufficient. Dkt. 66-1 at 87. Furthermore, Defendants explained their choice to use isolated slab track technology near the Walt Disney Concert Hall because it is "a more sensitive land use." AR8251.

At the hearing on the Motions, counsel for Japanese Village pointed out that Defendants' own expert, in a memorandum released on March 28, 2012, recommended using isolated slab track technology as a mitigation measure. *See* AR18777. In the memorandum, the expert provided updated information regarding likely noise impacts for trains operating near the Japanese Village. The expert noted that ground borne noise would be between 54 and 57 dBA in the office of the interior designer located in the Japanese Village. That expert also found that the noise level there would be reduced to 48 to 51 dBA with use of high compliance resilience fasteners; this level is above the FTA's annoyance criteria. This conclusion in the March 2012 report, which was made after additional field testing (AR18764), differs from the information in the expert's July 2011 study, which was attached as Appendix 2 to the FEIS. That study anticipated that noise impacts to Japanese Village would be between 40 to 50 dBA. AR8411.

Generally, an agency determination is not entitled to deference when it "runs counter to evidence before the agency." *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Ins. Co.*, 43 U.S. 29, 43 (1983). At the same time, "an 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." *Marsh*, 490 U.S. at 373.

Here, the FEIS provides for possible use of additional mitigation. Indeed, the FEIS states that high compliance resilience fasteners or "other appropriate measures" would be implemented "as needed" to eliminate impacts below FTA annoyance criteria. FEIS 4-173 (AR6400). Thus, the FEIS contemplates use of isolated slab track technology should it prove to be necessary. Based on the information Defendants had when the FEIS was completed, a mitigation measure providing for use of high compliance resilience fasteners was not arbitrary and capricious. And, given that the FEIS contemplates use of additional mitigation, including isolated slab track technology, the FTA's later study did not require the preparation of a supplemental EIS.

2. Parking Impacts

Plaintiffs contend that the FEIS inadequately addressed the impact on parking that would be caused by the Project. Patrick Gibson, an expert engaged by Japanese Village, stated in a February 2012 analysis submitted to Defendants, that Japanese Village "has only 218 parking spaces for use by its employees and customers. . . . The parking garage at [Japanese Village Plaza] currently operates at near capacity conditions during the midday hours" and "the inability of customers or employees to park at [Japanese Village Plaza] could lead to a serious decline in business at the center." AR18787-88. Japanese Village points out that the proposed 1st/Central Station is adjacent to the Japanese Village parking structure (AR5908), and argues that the FEIS failed to consider such potential, operational impacts. AR18787.

The FEIS states that the Project will "temporarily displace on-street parking and inhibit use of some off-street parking lots." AR6650. It also provides that, "approximately half of the off-street parking that would be removed is in Little Tokyo and is therefore a disproportionate impact when compared to the remainder of the study area." *Id.* In connection with the FEIS, FTA and Metro conducted a 160-page transportation study, which included an extensive discussion about the impact on parking. *See* AR10245-47, 10250, 10293-94, 10306-09. As part of the study, an "on-street parking evaluation was conducted to assess the number of spaces that may be removed due to each one of the alternatives" which "included a field inventory of the number of available on-street parking and loading spaces." AR10224. The FEIS recognizes the impacts discussed above (FEIS 4-32, AR6259), and addresses them through mitigation measures EJ-2 and EJ-3. FEIS 8-62 to -63. AR6941.

These measures provide that any unmet demand for parking spaces eliminated during construction will be temporarily addressed by providing new parking areas within one block of the land uses that rely on those spaces. They also provide that, "Metro shall provide two acres of land . . . northeast of 1st and Alameda Streets[] for the purposes of providing alternative parking services during construction." FEIS 8-63 (AR6942). Mitigation measure EJ-11 provides that "[p]rior to construction, Metro shall conduct an annual parking needs assessment in Little Tokyo" and "provide replacement for parking spaces lost as a result of the project as described in EJ-3." FEIS 8-65 (AR6944).[22] The parking analysis will be conducted on an annual basis throughout the duration of construction. *Id.*

The FEIS includes a sufficient analysis of parking impacts and planned mitigation measures during construction. *See City of Sausalito v. O'Neill*, 386 F.3d at 1210-11 (requisite "hard look" at parking impacts had been taken where the FEIS contained a "detailed, fifteen page analysis of traffic concerns describing the methods used to study traffic, and contained a "Traffic Management Plan" and "Transportation Demand Management Program" specifying measures to alleviate traffic and parking concerns including providing shuttle service and alternative modes of transportation.").

Plaintiffs contend that the FEIS failed to analyze and mitigate the *permanent* displacement of 130 off-street parking spaces around Little Tokyo when the Project has been completed. Dkt. 56-1 at 58-59 (citing AR6256, 6258). The parking study conducted by Metro focused on the loss of on-street rather than off-street parking, and largely addressed impacts during construction rather than upon its completion. Similarly, the mitigation measures related to parking are planned only during the period of

[22] The "annual parking needs assessment" does not make the FEIS deficient under *Northern Plains Resource Council, Inc.*, 68 F.3d at 1083-85. Defendants conducted an extensive parking assessment and developed baseline data with regard to the number of space available. See AR10245-47; AR10309. Thus, they have taken the requisite "hard look" at parking impacts. Any future, ongoing assessment of parking needs as a mitigation measure does not make the FEIS deficient. *See City of Sausalito*, 386 F.3d at 1211 (FEIS satisfied NEPA where it "specifically provide[d] for ongoing traffic monitoring").

construction. *See* AR6221, AR6941-43. However, the FEIS addressed the permanent loss of off-street parking:

> Typically, privately-operated parking lots are considered transitional land uses that could be developed by the owners for higher and better uses. Several other privately-operated parking lots and structures are located in the vicinity. Loss of the current parking lot may cause an inconvenience for users but it would not represent a significant impact. Parking demand in the area would be partially offset by the increased public transit access provided by the proposed project. . . . This change would not be a significant impact with respect to displacements.

FEIS 4-42, AR6269. Defendants' position is also supported by the "Station Planning Toolkit" in Appendix J of the FEIS. It states that "the Little Tokyo Block 8 Mixed-Use Development (MXD) Project is presently in construction to include . . . an additional 600 public parking spaces to serve the local area." AR10085. This development alone would provide more than the 130 spaces that will be lost elsewhere as a result of the Project.

For these reasons, the FEIS contains a "reasonably thorough discussion" of operational parking impacts. *Navajo Nation I*, 479 F.3d at 1058. Although this analysis is not extensive, it is more comprehensive that those the Ninth Circuit has found inadequate in other NEPA cases. For example, in *Kern*, 284 F.3d at 1074, the court found a "two-sentence statement" to be "obviously inadequate" when it amounted to nothing more than "an impermissible attempt to tier the analysis" and a "promise of a later site-specific analysis" to be performed in connection with other projects. *Id.* Here, by contrast, the FEIS weighs the loss of off-street parking against the likely decrease of parking demand as a result of the Project and the existing availability of other parking in the area. Although brief, this analysis is sufficient. *See Navajo Nation I*, 479 F.3d at 1058 (brief analysis of wastewater diversion was sufficient where FEIS contained a quantitative analysis of snowmaking impact and concluded it would be "negligible"). Plaintiffs, therefore, have not shown that the conclusion of the FEIS with respect to parking was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5. U.S.C. § 706(2)(A).

3. Impacts on Future Development in Little Tokyo

NEPA requires agencies to analyze the "environmental impacts of the alternatives including the proposed action," which must include "[i]ndirect effects and their significance." 40 C.F.R. § 1502.16. Indirect effects are defined as those that are "later in time or farther removed in distance, but are still reasonably foreseeable . . . includ[ing] . . . effects related to induced changes in the pattern of land use." 40 C.F.R. § 1508.8(b). However, agencies are "not required to engage in speculative analysis." *N. Plains Res. Council, Inc.*, 668 F.3d at 1078. In analyzing a different NEPA provision, the Ninth Circuit

concluded that a future impact is not reasonably foreseeable when it could "conceivably" occur but "it is at least as likely" that it will not occur. *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1182 (9th Cir. 1990).

Japanese Village argues that the FEIS failed adequately to analyze the impact of the Project on future development in Little Tokyo. Dkt. 56-1 at 61-62.[23] Japanese Village presents two bases to support this position. First, it argues that the easement under its parking garage will prevent future construction, Dkt. 56-1 at 62 (quoting AR37706). Second, it contends that the FEIS failed to consider or mitigate the effect of the Project on properties Metro will occupy during construction, but leave vacant after the Project has been completed.

a) Impacts of Easement under Japanese Village Parking Garage

The planned transit tunnel under Japanese Village will require a permanent underground easement of 23,000 square feet. It will be located 15 feet below the surface of the Japanese Village Plaza. AR5921, 6262, 6266. Plaintiffs contend that this easement will restrict future development of Japanese Village and that the FEIS failed to analyze this effect. Dkt. 56-1 at 61; *see also Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1011 (9th Cir. 2011) (agencies required to consider indirect effects "includ[ing] growth inducing effects and other effects related to induced changes in the pattern of land use").

The arguments advanced by Japanese Village on this issue are unpersuasive for two principal reasons. *First*, NEPA requires that the agency analyze "induced *changes* in the pattern of land use." 40 C.F.R. § 1508.8(b) (emphasis added). Although Japanese Village contends that the Project will inhibit its future development, it has not demonstrated that it will induce changes in the current pattern of land use. This is precisely what the FEIS concludes. *See* AR8249 ("acquisition of underground easements would have no adverse land use impacts because the underground easements would not change existing land uses.").

Second, even if NEPA requires an analysis of the potential impact of the Project on the possible future development plans of a private landowner, NEPA requires only analysis of such "reasonably

[23] Plaintiffs also assert that the Project conflicts with the Central City Community Plan, which includes the need to "support additions to the housing stock in Little Tokyo." The premise of this argument is that housing will be impeded by the underground easements that are planned as part of the implementation of the Project. NEPA requires agencies to analyze "[p]ossible conflicts between the proposed action and the objectives of . . . local . . . land use plans . . ." 40 C.F.R. § 1502.16(c). However, Plaintiffs have provided no evidence to support a finding that the easements will impede the development of residential housing. Further, Plaintiffs waived this argument because they did not raise it during the comment periods associated with the EIS process.

foreseeable" indirect impacts.[24] 40 C.F.R. § 1508.8(b). Japanese Village has not demonstrated that the claimed impact that it has identified was "reasonably foreseeable" at the time that the FEIS was finalized. Japanese Village raised this issue in three letters. They were dated September 6, 2011 (AR18217), February 2012 (AR18479), and March 2012. AR18514. The first two discussed the possible impact of the Project on future development in general terms. *See, e.g.*, AR18217 (September 2011 letter stating the Project would "restrict substantially the future development plans at Japanese Village Plaza"). It was not until March 2012, which was approximately one month after the FEIS comment period had closed, that Japanese Village provided Defendants with more specific information about potential development plans. It was at that time that Japanese Village described plans for a high-rise tower in place of its parking garage, an expanded office tower, and three levels of subterranean parking. AR18550; AR18514. The cover email attached to the drawings stated that they reflected a "concept exploring the developmental property rights of [Japanese Village]." AR18514. Given the information Defendants had available when the FEIS was finalized in January 2012, future development above the easement was not reasonably foreseeable.

At the hearing, Plaintiffs argued that, even if Japanese Village had not timely provided plans for proposed development, Defendants could reasonably have foreseen, based on the location of the underground easement and the nature of the neighborhood, that the owners of properties located above the easement would likely seek to develop them in the future. Japanese Village is a one-story development with many nearby properties with five-story buildings. However, based on this information, although it was "conceivabl[e]" that future development above the subsurface easement might occur, it was "at least as likely" that it would not. *Headwaters, Inc.,* 914 F.2d at 1182. Again, these facts are not sufficient to show that impacts on future development were "reasonably foreseeable" such that Defendants' failure to consider them in the FEIS was arbitrary and capricious, an abuse of discretion or not in accordance with applicable agency regulations. Moreover, as the FEIS stated, "[t]he subsurface easement would not preclude future development beneath the entire parcel; only future underground development within the area of the easement would be precluded. In addition, the subsurface easement would not preclude any aboveground future development on the parcel." AR8241. Thus, without specific plans, it was not reasonably foreseeable to Defendants that any possible future development by Japanese Village would be precluded by the subsurface easement. *Id.*

For these reasons, Plaintiffs have not shown that the FEIS improperly failed to consider indirect impacts of the Project in violation of 40 C.F.R. § 1508.8(b).

[24] Although Japanese Village may later raise Fifth Amendment "takings" issues with respect to the valuation of the proposed easement, such potential claims are not part of this action. At the hearing on the Motions, counsel for Japanese Village stated that there will likely be a separate eminent domain proceeding, in which such issues may be raised, including as an affirmative defense by Japanese Village.

b) Impacts of Future Development on Properties Metro Will Use During Construction but Leave Vacant after Project Completion

During the Project, Metro will use several parcels of property that will not be needed upon its completion. *See* AR6045, 6716, 6886, 6271 ("some privately-owned parcels needed for construction staging currently contain buildings, but would be owned by Metro and may be vacant after construction"). The FEIS does not analyze the potential indirect effects of this change in the usage of these properties. Rather, it states that such parcels "shall be included in the Metro Joint Development Program for possible development" and "shall be environmentally and separately cleared." AR6045, 6271, 6716, 6886. In responding to comments on the FEIS, Defendants concluded that assuming future development "would be completely speculative." AR8246. Plaintiffs argue that this position was in error because the Defendants were required by NEPA to analyze the possible future development of these parcels as "induced changes in the pattern of land use." Dkt. 56-1 at 68.

There has been no showing of error on this issue. Information about the possible impact the Project would have upon its completion on particular land use was too indefinite for Metro and the FTA to appraise during the process that led to the FEIS. During that time period they did not know, and could not reasonably have foreseen, how these properties would be used after the completion of the Project. They were not required to speculate about and then analyze potential effects on the properties that would be used for particular activities during the Project. Dkt. 66-1 at 90. Plaintiffs do not identify evidence as to what future development Defendants should reasonably have foreseen, and how such development would change "the pattern of land use." Defendants' inability "do the impractical" when "not enough information is available to permit meaningful consideration" does not constitute a NEPA violation. *N. Plains Res. Council, Inc.*, 668 F.3d at 1078 (discussing the agency's responsibility to analyze future impacts in the context of a cumulative impacts analysis).

Finally, "[o]nce an agency has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002). Here, the FEIS was appropriate in light of the scope of the Project. Defendants reasonably considered the impact of the construction and operation associated with the Project. Because there were no reasonably foreseeable plans for properties that might later remain vacant, an analysis of any future projects was beyond the scope of the FEIS. Therefore, Plaintiffs have not shown that any failure of the FEIS to address the potential impact of future development on these parcels was arbitrary and capricious, an abuse of discretion, or otherwise in violation of the law.

4. Subsidence Impacts

The EIS acknowledges that tunneling "would have the potential for adverse impacts related to ground settlement. . . immediately above the alignment as well as adjacent to structures including the historical buildings." AR6429. The FEIS proposes that these impacts be mitigated through "a survey of structures within the anticipated zone of construction," a "geotechnical instrumentation and settlement monitoring plan" to be developed prior to construction, and advance grouting of the tunnel alignment "to provide adequate soil support and minimize settlement as geotechnical conditions require." . *See* FEIS 8-34 to 35 (AR6913-14). Plaintiffs contend that this amounts to inadequate deferred analysis of impacts. Dkt. 56-1 at 64 (*S. Fork Band of W. Shoshone*, 588 F.3d at 727).

As discussed in Section V.D.1, *supra*, a mitigation measure that provides for a deferred analysis of the geotechnical and subsidence risks is generally inadequate. Here, however, Defendants collected substantial baseline data to determine conditions along the route of the Project. In addition to the studies discussed in Section V.D.1, *supra*, the FTA conducted a study after the FEIS was released, but before the ROD was signed. The FTA determined that structures within Japanese Village would have "unmitigated damage levels ranging from 'Moderate' to 'Very Severe' from ground loss caused by tunneling." AR18761-62. The report goes on to state that with "successful implementation of compensation grouting, the settlement under these buildings could be controlled to acceptable levels" between 0.25 and 0.5 inches. AR18761-62.[25] This mitigation measure was included in the FEIS. *See* FEIS 8-35 (AR6914). Thus, Defendants' analysis satisfies the purposes and requirements of NEPA, *i.e.,* "to ensure that agencies carefully consider information about significant environmental impacts," and "to guarantee relevant information is available to the public." *N. Plains Res. Council*, 668 F.3d at 1085.

For these reasons, the consideration of subsidence impacts and related mitigation measures in the FEIS was not arbitrary and capricious, an abuse of discretion, or otherwise in violation of the law.

F. Whether the FEIS Unlawfully Deferred Analysis of Various Impacts

"NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment." *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983). "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." *Kern v. Bureau of Land Mgmt*., 284 F.3d at 1072. Furthermore, NEPA requires that agencies "discuss mitigation of reasonably likely impact at the outset." *S. Fork Band of W. Shoshone*, 588 F.3d at 727.

[25] This analysis was prepared after the FEIS was completed, but before the ROD was signed.

Plaintiffs contend that Defendants have deferred several studies, surveys, and the development of mitigation plans until after the NEPA process has been completed. Plaintiffs argue that they include: the development of a traffic management and construction mitigation plan to address transportation impacts (AR6881); the completion of structural surveys to establish ground movement and ground loss potential to assess geotechnical and subsidence impacts (AR6913, 6432); and surveys of historical buildings with respect to noise and vibration impacts (AR6927, 6384-85, 6508). In essence, Plaintiffs contend that any mitigation measure that includes plans for future analysis or development of a plan is inadequate under NEPA. This is incorrect. Mitigation plans may be "conceptual" and remain "flexible to adapt or future problems." *Carmel-By-The-Sea*, 123 F.3d at 1154. However, mitigation plans must not defer baseline analyses and must discuss the effectiveness of mitigation. *See N. Plains Res. Council*, 668 F.3d at 1083; *S. Fork Band of W. Shoshone*, 588 F.3d at 727.

The adequacy of the mitigation measures relating to geotechnical risks and noise and vibration impacts were addressed in Sections V.D.1 and V.D.2, *supra*. As explained, mitigation measure GT-1, which provides for a preconstruction survey of ground movement, is sufficient given that the FEIS and the record demonstrates that Defendants conducted substantial analysis of these potential impacts. Similarly, mitigation measures NV-1 and NV-2, which provide for the creation of vibration monitoring plans, are sufficient because Defendants adopted them after gathering baseline data regarding noise and vibration impacts. Similarly, mitigation measure TR-1, which provides that a traffic management plan will be devised, is adequate under NEPA given the significant analysis of traffic impact that Defendants conducted prior to issuing the FEIS. *See* FEIS 8-2 (AR6881); *City of Sausalito*, 386 F.3d at 1211 (mitigation measures providing for traffic management plan was sufficient where FEIS contained a fifteen-page analysis of traffic concerns). For these reasons, Plaintiffs have not demonstrated that the mitigation discussion in the FEIS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

G. Whether Changes to the Project Subsequent to Release of the FEIS Require a Supplemental EIS

1. Legal Standard

The CEQ regulations (40 C.F.R. §1502.9(c)) require preparation of a supplemental EIS when:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

The CEQ regulation does not define "substantial changes." However, the Ninth Circuit has accepted CEQ guidance regarding when changes in a proposed action will require a supplemental EIS. *See Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1048-49 (9th Cir. 2011). In deciding whether a supplemental EIS is required, a court should consider each of the following issues: (i) whether the modified portion is a primary or secondary aspect of the overall project; (ii) whether the modifications are minor; and (iii) whether the modification will have environmental impacts that the agency has not yet considered. *Russell Country*, 668 F.3d at 1048-49. In making this determination, the court should also keep in mind that "[w]hen 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 when the 'new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.'" *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 13-35653, 2014 WL 1814172, --- F.3d --- (9th Cir. May 8, 2014).

When a supplemental EIS becomes necessary, the agency must "prepare, circulate, and file a supplement . . . in the same fashion (exclusive of scoping) as a draft and final statement." 40 C.F.R. § 1502.9(c)(4); *see also* 23 C.F.R. § 771.130(d) ("A supplement is to be developed using the same process and format (i.e., draft EIS, FEIS and ROD) as an original EIS, except that scoping is not required."). Generally, when an EIS is filed, NEPA requires notice of publication in the Federal Register. *See* 40 C.F.R. § 1503.1(a)(4) ("After preparing a draft [EIS] and before preparing a[n] [FEIS] the agency shall . . . [r]equest comments from the public"); 40 C.F.R. § 1506.10 (requiring Federal Register publication of notice of a draft or final EIS).

2. Application

Plaintiffs contend that Defendants have failed to comply with 40 C.F.R. § 1502.9(c) for the following reasons: (i) Defendants' changed Project construction times after the release of the FEIS to include nighttime construction; and (ii) Defendants changed the route of the Project after the DEIS was released by placing it under the Japanese Village, yet generated a "Supplemental Environmental Assessment" rather than issuing a supplemental EIS prior to the FEIS. Dkt. 56-1 at 76-79.

Defendants contend that the regulations requiring the publication of a supplemental EIS do not apply. Instead, they argue that 23 C.F.R. § 771.130(b) authorizes the release of a SEA rather than a supplemental EIS. This regulation provides that "a supplemental EIS will not be necessary where . . . [t]he changes to the proposed action . . . result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS. . ." Defendants contend that these circumstances are present because the majority of the changes that are reflected in the SEA "were made to reduce or avoid previously

identified impacts," and further, "all identified potentially significant impacts can be mitigated to less than significant." Dkt. 66-1 at 96 (quoting SEA 1).

a) Change to Proposed Construction Times

Plaintiffs claim that the nighttime construction permit that was recently obtained by Defendants is a change to proposed construction times. From this they argue that, because different noise and glare impacts will result, a supplemental EIS is required. However, Plaintiff has provided no evidence of an actual change in planned construction times. Although the noise variance application (MSAR15773-74) suggests that nighttime construction may occur, there is no further evidence as to when work will proceed. Moreover, the FEIS accounts for possible nighttime construction. It states that "[t]unneling operation would typically be continuous, occurring seven days a week, 20 hours per day," FEIS 4-452, and that "most construction for the station areas would take place during the nighttime and weekend hours." FEIS 3-50. To address the potential impact of this construction schedule, the FEIS provided mitigation measures to ensure nighttime construction noise remained below nighttime noise thresholds. FEIS 4-12 to -128, -138.

The FEIS also briefly analyzed the impact associated with the lighting that would be used during nighttime construction. It provides that "[d]uring construction, nighttime lighting would predominantly consist of security lighting, and light would be directed on-site. As such, nighttime lighting impacts would not be adverse or significant during construction." FEIS 4-89. Plaintiffs have identified no new lighting impacts.

As explained in *Marsh*, "the 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 actio[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." 490 U.S. at 374. Here, Plaintiffs have not demonstrated that a possible change in construction times will affect the quality of the human environment in a manner "not already considered" by the FEIS. Thus, a supplemental EIS was not required. *Accord California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 12-55856, 2014 WL 2038234, --- F.3d --- (9th Cir. May 19, 2014) (A supplemental EIS is not required when any changes were "qualitatively considered" in the EIS, were a "secondary aspect" of the EIS, and "did not alter the project's cost-benefit analysis.").

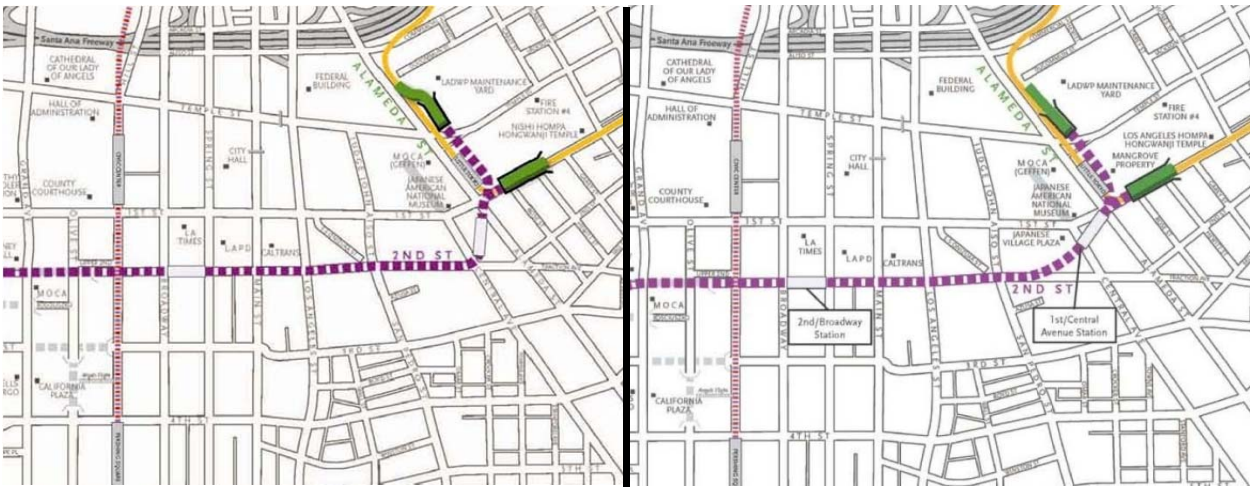
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-00378 JAK (PLAx) LA CV13-00396 JAK (PLAx) LA CV13-00453 JAK (PLAx)	Date	May 29, 2014
Title	Today's IV, Inc. v. Federal Transit Administration, et al. Japanese Village, LLC v. Federal Transit Administration, et al. 515 555 Flower Associates, LLC v. Federal Transit Administration, et al.		

b) Change to Route of the Project

The Draft EIS included an alignment of the Project that traveled through Little Tokyo, but not under Japanese Village. In contrast the FEIS reflects an alignment that crosses immediately under Japanese Village. These alternative routes are shown in the following figures:



(DEIS, AR169) (FEIS, AR5695)

Between the DEIS and the FEIS, Defendants prepared a SEA that analyzed the change to the route of the Project. Pursuant to 23 C.F.R. 771.130(b) a SEA may be prepared to assess the impacts of new changes to ascertain the significance of any new impacts. The SEA explained the change in alignment as a means of "reduc[ing] or avoid[ing] previously identified impacts," AR5663, and concluded that it would result in no new significant environmental impacts. AR5657. The SEA and portions of the DEIS were then made available to the public; comments were invited.

Plaintiffs contend that the SEA was insufficient and that a supplemental EIS was required because the change resulted in new, unmitigated noise, geotechnical, and land use impacts. Dkt. 56-1 at 67. For example, they contend that the C/C construction along 2nd Street that was eliminated was simply moved to Central Avenue, and open cut construction was added to the area between Alameda Street and Central Avenue. Plaintiffs also argue that, although the Underground Light Rail Transit Alternative in the DEIS was without unmitigated noise, land use, or geotechnical impacts (AR378, 381, 270, 405), the approved Project will cause significant impacts with respect to each. AR8365-414. From this Plaintiffs argue that the conclusion that the Project reduces impacts from the DEIS is not entitled to deference

because it "runs counter to evidence before the agency." *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Ins. Co.*, 43 U.S. 29, 43 (1983).

Plaintiffs' arguments are not supported by the record. The maps in the SEA show that, as a result of the change in alignment, there will be less C/C and no additional open cut construction. *Compare* AR178 (DEIS 2-38) (showing open cut construction between Central and Alameda), *with* AR5835 (SEA 4.18.2-3) (same*), and* AR6673 (FEIS 4-446) (same). Both the DEIS and the SEA concluded that, although noise and vibration impacts during construction could be significant, implementation of mitigation measures would mitigate the effects. *Compare* AR380-81 (DEIS 4-119 to -120) ("Implementation of proposed mitigation measures would result in a less than significant impact to sensitive or historic buildings within 21 feet of the construction."), *with* AR5660, 5779 (SEA 4, 4.7-39) (supplemental noise and vibration studies showed that any potentially significant noise, vibration, and construction impacts could be mitigated to less than significant), *and* AR6392 (FEIS 4-165) ("With implementation of mitigation identified in Section 4.7.4.2.1 below, potential [vibration] and [noise] effects during construction will not be substantially adverse under NEPA" at the Japanese Village). Likewise, both the DEIS and FEIS[26] conclude that the Project will not have adverse impacts on land use. *Compare* AR270 (DEIS 4-9), *with* AR6237 (FEIS 4-11).

Furthermore, both the DEIS and FEIS state that the Project has the potential for adverse impacts "with respect to liquefaction, seismically induced settlement, [and] ground loss due to tunneling." DEIS 4-144 (AR405); *see also* FEIS 4-204 (AR6431). Similarly, the FEIS provides that the change of alignment allowed Metro to move "the main site of construction . . . away from the heart of Little Tokyo" (FEIS 9-3, AR6956) and "reduce construction impacts in Little Tokyo, reduce the amount of cut and cover activities, and reduce the extent of acquisitions" near Little Tokyo. AR7622. Thus, Plaintiffs have not pointed to any new, unmitigated impacts that will result from the changes to the route and that were not addressed in the DEIS.

The change in alignment is analogous to the modifications to the draft EIS addressed in *Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037 (9th Cir. 2011). There, the agency's final decision "included several trail closures that were not included in any of the alternatives discussed in the DEIS" as well as a "modified dispersed camping rule that was not discussed in a supplemental draft EIS." 668 F.3d at 1046-47. Like the Defendants in the present action, the agency in *Russell Country* argued that it was not required to prepare a supplemental EIS where the modified alternative "only lessens environmental impacts." *Id.* at 1047-48. The Ninth Circuit observed that the lack of

[26] The SEA and re-circulated portions of the DEIS did not include the discussions of land use or geotechnical impacts. Reference to the FEIS rather than the SEA is made in these instances. Because the FEIS incorporated the change in route that was presented in the SEA, it is appropriate to reference the FEIS to determine whether the change in route resulted in any significant environmental impacts that were not addressed in the DEIS.

environmental impact "tend[s] to show that the new alternative is a 'minor variation of one of the alternatives discussed in the draft EIS' and is 'qualitatively within the spectrum of alternatives that were discussed in the draft [EIS].'" *Id.* at 1048. However, a new alternative "may lessen environmental impacts and yet fall outside the range of alternatives discussed in a draft EIS. Supplementation may be required, for example, when modifications to a proposed action, although lessening environmental impacts, also alter the overall cost-benefit analysis of the proposed action." *Id.*

Under *Russell Country*, the claim by Defendants that the realignment of the route of the Project results in no new impacts is insufficient to demonstrate that a SEIS was not required. However, like the change to the project in *Russell Country*, the realignment is "qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]." *Id.* at 1047. Although Plaintiffs contend that the change in alignment caused new significant impacts, their assertions are not clearly supported by the administrative record. Rather, as in *Russell Country*, the change in alignment "eliminates [certain] adverse impact[s]" and leaves only impacts "that have already been fully considered." *Id.* at 1048-49. Therefore, Plaintiffs have not shown that the decision to prepare an SEA rather than a supplemental EIS between the issuance of the DEIS and the FEIS was arbitrary and capricious or otherwise not in accordance with the law.

H. Injunctive Relief

Plaintiffs have moved to enjoin both construction of the Project as well as its funding by the FTA until Defendants comply with NEPA. Dkt. 56-1 at 80. However, Plaintiffs have not shown that any immediate, alleged harm will result from the deficiencies in the conduct of the Defendants that are discussed in this Order because there is no showing that Defendants planned to commence construction immediately. At the hearing on the Motions, Metro's Counsel stated that, although light construction in preparation for the Project, *i.e.*, utility relocation, has already begun, substantial construction for the Project, which would cause the alleged, adverse environmental impacts, would not begin until December 2014. The claimed harm to Flower Associates and Bonaventure would arise from such construction. Finally, any injunctive relief must be carefully tailored to the deficiencies in the EIS. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32-34 (2008).

In light of the foregoing, and consistent with the discussion that the Court initiated about this issue during the hearing, the Court directs that the parties meet and confer about the potential for a renewed and refined request for injunctive relief. *See Winter*, 555 U.S. at 32-33 (when a plaintiff is successful on the merits of a NEPA claim, the court has "many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS" rather than an injunction of the project giving rise to the EIS.). Consistent with the statements of their counsel at the hearing, Defendants are directed to proceed expeditiously to consider the deficiencies identified in Section IV.C of this Order. Thereafter, they are promptly to notify Plaintiffs of what responsive action(s), if any, they plan to take and the

schedule on which they plan to take such action(s). On or before June 20, 2014, the parties shall file a joint statement, presenting their collective and/or respective views about whether specific, injunctive relief should be granted, and if so, its scope and the conditions, if any, pursuant to which it should be granted. Upon receiving this report, the Court will determine whether any further briefing and/or a hearing will be necessary prior to a decision on any issue(s) that are presented.

V. Conclusion

The Court GRANTS Plaintiffs' Motion with respect to their claim that the FEIS failed adequately to explain why open-face tunneling alternatives were rejected on the Lower Flower Segment. The Court GRANTS Defendants' Motion with respect to all other claims raised in the Motions. The Court DEFERS ruling on the request for an injunction until after the parties have met, conferred and reported as provided in this Order.

IT IS SO ORDERED.

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