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	September 12, 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 PLAINTIFF TODAY'S IV, INC. AND 515/555 FLOWER ASSOCIATES, LLC'S MOTION FOR INJUNCTIVE RELIEF (DKT. 101)**

PLAINTIFF JAPANESE VILLAGE LLC'S MOTION FOR RECONSIDERATION (DKT. 107)

DEFENDANTS' MOTIONS TO STRIKE PORTIONS OF DECLARATIONS (DKT. 112, 114)

I. Introduction

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") are present or former owners of real property that is located near the route of the planned Regional Connector Transit Corridor Project (the "Project").[1] The Project involves the construction of a new subway line in the City of Los Angeles that will connect certain existing rail stations.

[1] Bonaventure and Japanese Village currently own property near the planned route. 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.

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These actions arise from the June 29, 2012 decision of the Federal Transit Administration ("FTA"), approving the Project. Plaintiffs named several defendants.[2] They claimed that Defendants 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. In connection with these allegations, Plaintiffs brought a joint Motion for Summary Judgment ("Plaintiffs' SJ Motion"). The Federal Defendants and the Metro Defendants filed separate Cross-Motions for Summary Judgment (the "Defendants' SJ Motions"). On May 29, 2014, the Court granted in part and denied in part those motions. The Court granted Plaintiffs' SJ 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, and granted Defendants' SJ Motions with respect to all other claims raised in the Motions. Dkt. 96.[3]

At the time it issued the Order on the summary judgment motions (the "SJ Order"), the Court deferred ruling on Plaintiffs' request for injunctive relief. It ordered the parties to meet and confer about the request for injunctive relief and file statements 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. Dkt. 96 at 47-48. On June 27, 2014, the parties filed these remedy statements. Defendants' Remedy Statement, Dkt. 100; Plaintiffs' Remedy Statement, Dkt. 101. At that time, the Court took the request for injunctive relief under submission.

On July 1, 2014, Japanese Village filed a Motion for Reconsideration of the SJ Order (the "Motion for Reconsideration"). Dkt. 106. Defendants filed motions to strike portions of certain declarations that were filed with the Motion for Reconsideration (the "Motions to Strike") (collectively, the "Motions"). Dkt. 112, 114. On September 8, 2014, the Court conducted a hearing on the Motions. For the reasons stated in this Order, the Motions to Strike are GRANTED and the Motion for Reconsideration is DENIED. The Request for injunctive relief is GRANTED IN PART.

[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] For consistency, throughout this Order, citations to briefs of the parties refer to the docket numbers used in *Japanese Village LLC v. Federal Transit Administration, et al.*, LA CV13-00396 JAK (PLAx). However, Plaintiffs' SJ Motion was denied as to all of the claims brought by Japanese Village. Therefore, although the discussion with respect to remedy continues to cite docket entries used in the Japanese Village matter, that discussion is relevant only to Bonaventure and Flower Associates.

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II. Factual Background[4]

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. 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 nearby roadways. For these reasons, Defendants contend that the Project will result in significantly better subway service in the most highly-concentrated employment area in downtown Los Angeles. FEIS 1-28. The subway route begins at 7th and Flower Street and then proceeds 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 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 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. The C/C method involves digging a trench at 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 is to proceed 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.

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[4] A detailed factual history is set forth in the SJ Order. Dkt. 96. That discussion is incorporated here by this reference.

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The following map reflects the route and construction methods that were proposed in the FEIS:

FEIS 4-446, AR6673

Several business and property owners objected to the use of C/C construction 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. Certain property owners argued that two open-face tunneling methods could potentially be used through tiebacks: the Sequential Excavation Method ("SEM") and the "Open-Face Shield" method. AR18410-24; 27728-36; MSAR15815-16; AR38730-42. A member of Metro's Tunnel Advisory Panel ("TAP"), Harvey Parker, also raised the possibility of using these methods in December 2010. MSAR15815-16. And, in August 2011, 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.

Between February 2011 and June 2012, Metro also conducted a series of studies, which concluded that Open-Face Shield tunneling and SEM would not be feasible on the Lower Flower Segment. *See* AR17663-772; AR82410-27; MSAR17236-54. These studies state that, because the soil beneath the Lower Flower Segment "consist[s] 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 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. These studies showed 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.

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.*

B. The SJ Order

On May 29, 2014, the Court granted in part and denied in part the SJ Motions. The Court denied Plaintiffs' SJ Motion with respect to all of the claims made by Japanese Village. *Id*. at 32-47. These included claims that the FEIS failed adequately to analyze the impact of Project construction on noise and vibration levels in Japanese Village as well as the impact on parking near Japanese Village. *Id.* The Court granted Plaintiffs' SJ Motion with respect to their claim that the FEIS failed adequately to explain why Open-Face tunneling and SEM were rejected on the Lower Flower Segment. Dkt. 96 at 24-25. The Court noted that Defendants had concluded, in separate, non-public studies, that these alternatives were infeasible. *Id.* at 22. However, the Court stated that, in the FEIS, "Defendants were required, 'for alternatives which were eliminated from detailed study . . . briefly [to] discuss the reasons for their having been eliminated.'" *Id.* at 24 (quoting *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 2000)). And, the Court noted that the FEIS failed to address why neither Open-Face Shield nor SEM tunneling was considered for the Lower Flower Segment. Thus, the Court determined that the FEIS was "not in accordance with the law" with respect to the lack of discussion of Open-Face tunneling alternatives. *Id.* at 25.

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C. Facts Relevant to the Motion for Reconsideration

The hearing on the SJ Motions was conducted on February 24, 2014, and the SJ Order was issued on May 29, 2014. On May 14, 2014, prior to the issuance of the SJ Order, but after the hearing on the SJ Motions, a trial was conducted in Los Angeles Superior Court regarding challenges to the Project under the California Environmental Quality Act (the "CEQA Trial"). *See* Declaration of Robert D. Crockett ("Crockett Decl."), Dkt. 107, ¶ 2. On May 14, 2014, at the CEQA Trial, Crockett, who was counsel for Japanese Village, was approached by Susan MacAdams, a former rail consultant for Metro. *Id.* Crockett declares that MacAdams told him that she had previously raised safety concerns about the Project alignment in Little Tokyo. *Id.* ¶ 3. On May 15, 2014, she emailed him a PDF copy of her handwritten comments regarding the Project. *Id.* ¶ 4; Declaration of Susan MacAdams ("MacAdams Decl."), Dkt. 108, Exh. A. These comments, which were written in 2011, pointed out certain safety issues with respect to the track alignment at the 1st and Central Ave station, including "issues with respect to steepness of grade, turn radius, and platform grade." MacAdams Decl. ¶¶ 5-6, 11. MacAdams states that these comments were shared with others at Metro in 2011, including Arthur Leahy, Metro's Chief Executive Officer. *Id.* ¶ 14. MacAdams states that none of her comments about the track alignment was published. *Id.* ¶ 17.

In order to verify MacAdams's claims, Crockett considered retaining an engineer. Crockett Decl. ¶ 5. However, prior to doing so, on May 16, 2014, Crockett sent an email to Metro's counsel. He asked whether the diagrams of the Project alignment provided in the administrative record were the most recent drawings of the alignment below Japanese Village. *Id.* On May 20, 2014, Metro's counsel responded by email that the diagrams in the administrative record had been superseded by new alignment drawings. *Id.* ¶ 6; Declaration of Lawrence Ho ("Ho Decl."), Dkt. 109, Exh. C. Metro's counsel attached the new drawings to that email. Crockett Decl. ¶ 6. The new drawings are dated December 7, 2012, which was after the issuance of the ROD (the "December 2012 Alignment Plans"). Ho Decl., Exh. C. A comparison of the drawings in the administrative record (the "2011 Alignment Plans") with the December 2012 Plans shows that a change was made to the Project alignment after the issuance of the ROD. The 2011 Alignment Plans showed that the tunnel would pass beneath Japanese Village at a steady grade of between 1.36% and 1.15%. Ho Decl., Exh. B. The grade of the track at the 1st and Central Ave station was 1.15% and, after the station, the grade of the tunnel increased to 4.87% to reach the surface and connect with the Gold Line. In the December 2012 Alignment Plans, the tunnel has a grade of 0.5% down 2nd Street; as the tunnel turns under Japanese Village, the grade increases to a 4.0% grade. Ho Decl., Exh. C.

On June 23, 2014, Metro announced that it would be closing a parking lot at the southwest corner of 1st and Alameda Streets. Crockett Decl., Exh. 1. It provided the public with a map of 13 alternative parking

sites in Little Tokyo. *Id.*, Exh. 1 and 2. This map included the Japanese Village parking structure as one such site. *Id.*

D. Facts Relevant to the Request for Injunctive Relief

In the SJ Order, the Court requested that, in connection with the supplemental remedy briefing, Defendants provide an updated timeline with respect to Project construction. In their remedy statement, Defendants represent that the construction schedule for the Project is as follows:

June 24, 2014	Notice to Proceed issued and utility relocation commenced
January 2015	Complete initial advance utility relocation
February 2015	Start tunnel launch construction site at Little Tokyo
July 2015	Complete Flower Street advanced utilities relocation, begin sewer and storm drain relocation and soldier pile and decking installation on Flower Street
February 2016	Start tunneling in Little Tokyo
April 2016	Complete solder pile and decking installation on Flower Street
August 2016	Extract TBM at 4th/Flower

Roy Decl., Dkt. 100-4, ¶¶ 13-15.

In support of their request for injunctive relief, Plaintiffs have presented declarations from an expert, Russell G. Clough ("Clough");[5] the Managing Director of the Bonaventure, Michael Czarcinski ("Czarcinski"); the Director of Engineering at the Bonaventure, Patrick Serge ("Serge"); and the attorney for the Bonaventure, Christopher Sutton ("Sutton"). *See* Dkt. 102-05. Clough states that C/C construction "creates extreme disruption to the surrounding community due to its noise, dust, air pollution and traffic and circulation effects." Clough Decl., Dkt. 102, ¶ 9. Clough also contends that utility relocations "are extremely disruptive to the community; . . . they involve blocking off portions of the streets, removing the street surfaces, relocating, removing, temporarily supporting or replacing utility lines, diverting traffic . . . etc." *Id.* ¶ 24. Czarcinski details the ways in which the environmental impact from C/C excavation and utility relocations will harm the guests and employees of the Bonaventure, which he expects will result in future lost profits and goodwill. Czarcinski Decl., Dkt. 103, ¶¶ 6-26. Serge states that the noise from utility relocation has exceeded the standard for noise

[5] Clough is a civil engineer who specializes in underground construction and tunneling projects. Clough Decl. ¶¶ 3-5. He was an Adjunct Professor of Civil Engineering at Stanford University from 1994 through 2010 and has worked on large tunneling projects, including for Bay Area Rapid Transit in the San Francisco Bay Area. *Id*. ¶¶ 5-8.

emissions set forth in the Mitigation Monitoring and Reporting Program approved by Metro. Serge Decl., Dkt. 105, ¶¶ 4-11. Finally, Sutton makes certain calculations with respect to the cost of C/C construction and utility relocation, and declares that utility relocation comprises a significant portion of the costs of C/C construction, whereas almost no utility relocation costs are associated with TBM. Sutton Decl., Dkt. 104, ¶¶ 4.5-4.9.

Plaintiffs and Defendants dispute whether utility relocation would be required if Open-Face tunneling or SEM were used instead of C/C construction. Clough states that utility relocation would not be required for Open-Face tunneling or SEM because tunneling would be at a depth that is below where the utilities are presently located. Clough Decl., Dkt. 102, ¶ 24.a.[6] In response, Defendants have provided the declaration of Girish Roy, the Metro Deputy Executive Officer responsible for the Project. Dkt. 100-4. Roy provides a list of technical reasons why the utility relocation would be required if either Open-Face tunneling or SEM were used on the Lower Flower Segment. *Id.* at ¶¶ 17-19.[7]

Plaintiffs and Defendants also dispute whether closed-face tunneling activities planned north and east of the Lower Flower Segment would preclude adopting Open-Face tunneling or SEM on the Lower Flower Segment. Clough contends that closed-face tunneling in other parts of the Project route would preclude these alternatives on the Lower Flower Segment because the depths of the tunnels and stations in the different portions of the Project must be coordinated at the design phase. Clough Decl. ¶ 13. Underlying this contention is an assumption that the SEM and Open-Face tunneling alternatives would involve tunneling at a greater depth than if the C/C construction method were used. *See id.* ¶¶ 15-23. Clough also contends that allowing Defendants to purchase a closed-face TBM for the Little Tokyo portion might make it financially infeasible for the agencies later to switch to the SEM or Open-Face tunneling alternatives on Lower Flower Street. *Id.* ¶ 21. Roy responds that there are at least two places along the Project alignment at which a closed-face TBM could be extracted and an Open-Face TBM or SEM inserted for use on the Lower Flower Segment. Roy Decl. ¶ 27. And, Roy asserts that it is possible that it would be less expensive for Metro to procure and use two tunneling machines -- one open-faced and one with a closed-face -- than for Metro to use Open-Face tunneling or SEM for the entire Project alignment. Roy Decl. ¶ 28.

[6] Plaintiffs also cite AR10158 to support their contention that utility relocation would not be required for tunneling alternatives. Dkt. 101 at 14. That page of the administrative record is a "Description of Construction" document issued by Metro that says utility relocation will be necessary for C/C construction. However, there is nothing on that page or the companion pages that states whether utility relocation would be necessary were alternative methods used.

[7] Roy is a "[c]ivil [e]ngineer with extensive training and decades of construction experience, primarily in constructing transit projects." *Id.* ¶ 3.

Finally, Plaintiffs and Defendants dispute whether Open-Face tunneling and SEM are feasible alternatives that could be adopted following supplemental environmental review. Clough acknowledges the risks associated with using SEM or Open-Face tunneling at shallow grades under Flower Street. Cough Decl. ¶¶ 17, 19. However, he suggests a "Deep Tunneling Alternative" that would avoid the risks associated with using SEM or Open-Face tunneling at shallow grades. *Id.* ¶¶ 16-20. He contends that this alternative should be analyzed in a supplemental EIS. *Id.* ¶ 16. Roy, on the other hand, contends that "much of the analysis regarding alternative construction methods has already been completed" and "it is very unlikely that any new information will lead Metro's experts to conclude that tunneling on lower Flower Street would be safe and feasible." Roy Decl. ¶¶ 5, 9.

III. Analysis

A. Motions to Strike

The Motion for Reconsideration submitted by Japanese Village relies on three pieces of "newly discovered evidence": (i) the comments on the Project alignment made in 2011 by MacAdams (the "2011 MacAdams Comments"); (ii) the December 2012 Plans; and (iii) two documents regarding redirection of parking that were announced June 23, 2014 (the "June 2014 Parking Announcements"). Dkt. 106 at 6. These were attached to the declarations of MacAdams, Ho, and Crockett, respectively. Dkt. 107-09.

The FTA concedes that the 2011 MacAdams Comments should have been a part of the administrative record, and has added them to that record. However, the FTA contends that: (i) the remainder of the MacAdams declaration (Dkt. 108); (ii) the Declaration of Lawrence Ho and its Exhibit C, which is evidence of the December 2012 Plans (Dkt. 109); and (iii) paragraphs 5, 6, 8, and 9 to the Crockett Declaration and its Exhibits 1 and 2, which are evidence of the June 2014 Parking Announcements (Dkt. 107), should be stricken. The FTA contends that, under the APA, a Court's review is limited to the administrative record that was before the agency at the time it made the decision that is being challenged. With the exception of the 2011 MacAdams Comments, none of the "newly discovered evidence" was available when the FTA issued its ROD on June 29, 2012.

Generally, a Court's review under the APA is limited to the administrative record that was before the agency at the time it made the challenged decision. Here, that decision is the issuance of the ROD. *See* 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . ."); *Ranchers Cattlemen Action Legal Fund United Stockgrowers v. USDA*, 499 F.3d 1108, 1117 (9th Cir. 2007) ("Under the APA, courts must refrain from de novo review of the action itself and focus instead on the agency's decision-making process."); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978) ("[T]he role of a court

in reviewing the sufficiency of an agency's consideration of environmental factors is . . . limited . . . by the time at which the decision was made . . .").

The Ninth Circuit has recognized five exceptions for judicial review under the APA that goes beyond the administrative record. *See Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) *amended,* 867 F.2d 1244 (9th Cir. 1989). The district court may inquire outside the administrative record when:

> (i) it is necessary to explain the agency's action;
> (ii) it appears the agency has relied on documents or materials not included in the record;
> (iii) supplementation of the record is necessary to explain technical terms or complex subject matter involved in the agency action;
> (iv) an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticism ... under the rug'"; and
> (v) a plaintiff makes a strong showing of bad faith or improper behavior.

Animal Def. Council, 840 F.2d at 1436-37.

Japanese Village contends that the second and fourth exceptions apply to the challenged evidence. Thus, it argues that the MacAdams declaration demonstrates that Defendants relied on the 2011 MacAdams Comments, which were not included in the administrative record. And, Japanese Village contends that the Ho declaration and the December 2012 Plans show that the EIS failed to analyze the serious environmental consequences of the change to Project alignment. Finally, Japanese Village contends that the June 2014 Parking Announcements show that the EIS failed to analyze serious parking impacts of the Project. Dkt. 116 at 17.[8]

These arguments are not persuasive. Defendants have already placed the 2011 MacAdams Comments in the administrative record. Accordingly, the rest of her declaration, which was created after the issuance of the ROD, is not necessary to show that the record should be supplemented. And, the FTA

[8] Japanese Village also argues that the Court may take judicial notice of the June 2014 Parking Announcements. Dkt. 116 at 18. However, "[a] party cannot circumvent the rules governing record supplementation by asking for judicial notice instead of supplementation. . . . When asking for judicial notice of documents in a case where the court is reviewing an agency action, a party must still satisfy one of the . . . exceptions to the general rule against supplementation." *Native Ecosystems Council v. Weldon*, 848 F. Supp. 2d 1207, 1228 (D. Mont. 2012) *vacated as moot,* 2012 WL 5986475 (D. Mont. Nov. 20, 2012); *accord Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1296 (9th Cir. 1990) (construing a motion for judicial notice as a motion to supplement the administrative record, and denying the motion).

could not have considered MacAdams's declaration, when approving the Project because it was written over two years after the FTA issued the ROD.

Further, the Ho Declaration, December 2012 Plans, Crockett Declaration, and June 2014 Parking Announcements do not show that the FTA failed to analyze a serious environmental impact at the time it issued the ROD. The June 2014 Parking Announcements and the December 2012 Plans were made after the FTA issued the ROD approving the Project. Thus, these documents were not before the FTA when it decided whether to approve the Project as contemplated by the EIS. And, because the materials were created after the ROD was issued, Japanese Village has not shown that the FTA relied on them, or that they are necessary to explain the FTA's decision. Under these circumstances, it is not "appropriate ... for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (denying a motion to take judicial notice of post-decision documents and granting a motion to strike portions of briefs which relied on those documents) (quoting *Ass'n of Pac. Fisheries v. E.P.A.*, 615 F.2d 794, 811-12 (9th Cir. 1980)).

For these reasons, Japanese Village has not shown that it is appropriate to supplement the administrative record in order to include these documents in connection with the Motion for Reconsideration. Japanese Village contends that such evidence must be allowed under Local Rule 7-18, which contemplates the filing of a motion for reconsideration upon the "emergence of new material facts . . . occurring after" a court's decision. L.R. 7-18. However, Local Rule 7-18 cannot be used as a basis to ignore the standards governing review under the APA. Rather, in this context, the Rule should be interpreted and applied in a manner that is consistent with the rules that permit the supplementation of the administrative record. Thus, a motion for reconsideration based on newly discovered evidence may be made in the NEPA context when the newly discovered evidence shows that the agency, at the time it made its decision, relied on documents or materials not included in the record, swept "stubborn problems or serious criticism ... under the rug," or that agency decisionmakers acted in bad faith. *Animal Def. Council*, 840 F.2d at 1436-37. In this case, the 2011 MacAdams Comments are the type of newly discovered evidence that may be offered on a motion for reconsideration. Those materials were relied upon or considered by Metro prior to issuance of the FEIS. However, the present Motion for Reconsideration may not be based on post-decision information that is not a basis for the decision-making by the agencies at the time they issued the FEIS and approved the ROD.[9]

[9] As noted below, it may be appropriate to consider such materials in a case challenging the failure of an agency to issue a supplemental environmental impact statement. This provides further support for striking the post-ROD materials. *Accord Ass'n of Pac. Fisheries v. E.P.A.*, 615 F.2d 794, 812 (9th Cir. 1980) (declining to consider post-decision materials "as a new rationalization either for sustaining or attacking the Agency's decision" where there

For these reasons, the Motions to Strike are GRANTED. Therefore, the Motion for Reconsideration fails as to the arguments made with respect to the December 2012 Plans and June 2014 Parking Announcements. Whether reconsideration is warranted based on the 2011 MacAdams Comments is next addressed.

B. Motion for Reconsideration

1. Legal Standard

Local Rule 7-18 provides that a motion for reconsideration may be based on three grounds:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

"Evidence is not newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994). The phrase "at the time of summary judgment" refers to the date on which an order on summary judgment is rendered. Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2859 (West 1995). Therefore, "if [evidence] was in the possession of the party before the judgment was rendered it is not newly discovered and does not entitle the party to relief." *Id*.; *see also Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) ("Counsel for the trustee admitted that the evidence he was offering was available before disposition of the motion for summary judgment. Therefore, as a matter of law . . . the trustee was not entitled to reconsideration based on that evidence."); *Arnold v. ADT Sec. Servs., Inc*., 627 F.3d 716, 722 (8th Cir. 2010) ("The evidence was not newly discovered, however, because it was produced to plaintiffs before the district court issued its order . . ."); *Beugler v. Burlington Northern & Santa Fe Railway Co*., 490 F.3d 1224, 1229 (10th Cir. 2007) ("We agree with the district court's conclusion that the bulk of the 'newly discovered evidence' . . .

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were other means by which petitioners could seek agency review of evidence developed after promulgation of regulations).

was not in fact 'new' because it was known or discoverable before the court entered summary judgment in favor of Burlington Northern.").

2. Whether the 2011 MacAdams Comments Constitute Newly Discovered Evidence[10]

Japanese Village learned of the 2011 MacAdams Comments on May 14, 2014 and received a copy of her comments on May 15, 2014. Crockett Decl. ¶¶ 2-4. The Court conducted a hearing on the SJ Motions on February 24, 2014 and issued the SJ Order on May 29, 2014. Thus, Japanese Village discovered the evidence two weeks prior to the issuance of the SJ Order. A strict application of the rule with respect to newly discovered evidence requires a finding that the 2011 MacAdams Comments were not "newly discovered" evidence that warrant reconsideration.

Nevertheless, the arguments with respect to this evidence are considered.

3. Whether Reconsideration is Warranted Based on the 2011 MacAdams Comments

To prevail on a motion for reconsideration because of newly discovered evidence, "the movant must show the evidence (1) existed at the time of the trial or proceeding at which the ruling now protested was entered; (2) could not have been discovered through due diligence; and (3) was of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Duarte v. Bardales*, 526 F.3d 563, 573 (9th Cir. 2008) *abrogated on other grounds by Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014). The first two of these criteria are met: the 2011 MacAdams Comments to the Project alignment were created prior to the briefing and hearing on the SJ Motions. *See* MacAdams Decl., Exh. A. And, Japanese Village had no reason to seek discovery of this document – Defendants certified that a complete administrative record had been prepared, and Japanese Village had no reason to suspect that this was left out of the record. Thus, the only issue is whether earlier production of these comments would have changed the Court's decision on the SJ Motions.

Japanese Village contends that the failure to include the 2011 MacAdams Comments in the administrative record is an independent basis to warrant reconsideration of the SJ Order. Generally, "[j]udicial review of agency action shall be based on 'the whole record.'" *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). This includes "everything that was

[10] As noted above, Japanese Village contends that the following constitutes "newly discovered evidence": (i) the 2011 MacAdams Comments; (ii) the December 2012 Plans; and (iii) the June 2014 Parking Announcements. Because the Court has stricken the latter two, only the 2011 MacAdams Comments may be considered.

before the agency pertaining to the merits of its decision." *Id.* (citing *Thompson v. United States Dep't of Labor,* 885 F.2d 551, 555–56 (9th Cir.1989)). "When it appears the agency has relied on documents or materials not included in the record, supplementation is appropriate." *Id*. However, the record need not include "every scrap of paper that could or might have been created" on a subject. *Californians for Alternatives to Toxics v. U.S. Fish & Wildlife Serv.*, 2:10-CV-1477FCDCMK, 2011 WL 838957, *3 (E.D. Cal. Mar. 3, 2011) (quoting *TOMAC v. Norton,* 193 F.Supp.2d 182, 195 (D.D.C.2002)). And, the APA "provides that the court must take 'due account' of the rule of 'prejudicial error' in reviewing agency actions." *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982); 5 U.S.C. § 706. There may be harmless error "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Buschmann*, 676 F.3d at 358. When an administrative record "looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless." *Portland Audubon Soc*., 984 F.2d at 1548.

Defendants state that the 2011 MacAdams Comments were "inadvertently overlooked" in preparing the administrative record. Declaration of Girish Roy in Opposition to Motion for Reconsideration ("Roy Reconsideration Decl."), Dkt. 113-3, ¶ 12. Thus, they concede that the MacAdams Comments should have been included in the record. Defendants then explain that the comments were "specifically reviewed" by the Project team in August 2011. Roy Reconsideration Decl. ¶ 10. And, the Project team responded to each of the comments by either justifying decisions that had been made and about which she had commented, or noting that her comments would be taken into consideration in the final design. *Id*., Exh. 2.

Under these circumstances, there is no requirement that the Court reconsider the SJ Order. When a court finds that an administrative record is incomplete, the normal result is that the party challenging the agency action is permitted to supplement the record through discovery or an evidentiary hearing. *See Portland Audubon Soc.*, 984 F.2d at 1549. Here, any failure to include the 2011 MacAdams Comments in the record can be remedied by considering this evidence in acting on the Motion for Reconsideration. The Court has and will do so. Therefore, that these documents were not included in the administrative record does not require a per se reversal of the SJ Order.[11]

[11] At the hearing on the Motion for Reconsideration, counsel for Japanese Village argued that, had the 2011 MacAdams Comments been in the record during the NEPA process, the residents of Little Tokyo would have raised more challenges to the Project. However, Japanese Village does not have standing to assert the claims of those individuals. And, as explained below, Japanese Village has not shown that the 2011 MacAdams Comments are relevant to its challenges to the FEIS and the ROD.

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Turning to the substance of the MacAdams Comments, Japanese Village has failed to meet its burden to show that, had they been included in the administrative record, it "would have been likely to change the disposition of the case." *Duarte*, 526 F.3d at 573. In essence, Japanese Village contends that, had the 2011 MacAdams Comments been disclosed during the NEPA process, it could have anticipated the post-ROD changes in Project alignment and brought challenges to any potential change prior to the conclusion of the FEIS process. This argument is not persuasive, for several reasons.

First, the 2011 MacAdams Comments focused on the grade of the rail tunnel at the 1st and Central Ave station and the portion of the rail alignment to the east of the station. MacAdams commented that the grade at both the station and east of the station deviated from Metro's design criteria. However, neither of these portions of the proposed rail is underneath Japanese Village. And, other documents in the administrative record discussed these precise deviations from design criteria. *See* AR70866, 76851. For example, the "Summary of Suggested Deviations from Design Criteria" notes the "platform slope at 1st/Central Avenue Station is 1.16%" and the Metro design criteria specify that maximum track grade at a platform should be 1%. AR70869. The document explains the deviation from the design criteria was necessary because "[t]he proposed station at 1st/Central Avenue is constrained in profile by the requirement to tie into the existing Gold Line and pass under an existing parking structure [the Japanese Village parking structure] on Central immediately west of the station." *Id*. The document also discusses the vertical curve east of the 1st and Central Ave station platform. AR70870. The statements in these documents, which were part of the administrative record, were sufficient to put Japanese Village on notice of the same deviations from design criteria that were discussed in the 2011 MacAdams Comments. However, Japanese Village did not make any comments with respect to these issues during the NEPA process. Therefore, Japanese Village has not shown that the omission of the 2011 MacAdams Comments from the record was material or caused harm because it "had no bearing on the procedure used or the substance of decision reached." *Buschmann*, 676 F.3d at 358.

Second, none of the 2011 MacAdams Comments addressed whether there would be effects on Japanese Village, including noise, vibration or greater demand for its parking area by those using the rail system. Rather, they focused on passenger safety and comfort. *See* MacAdams Decl., Exh. A. Therefore, they do not merit reconsideration of the SJ Order because they are not relevant to any of the challenges to the FEIS previously made by Japanese Village.

Third, Japanese Village has not made any argument that the 2011 MacAdams Comments showed that Defendants violated NEPA. Thus, it does not contend that these comments show that Defendants failed to consider any particular alternatives to the planned project or that they failed to analyze or plan to mitigate its impact. Indeed, Defendants have shown that Metro carefully considered the 2011 MacAdams Comments during the design process. Thus, MacAdams made comments to the preliminary design for the Project. Roy Decl. ¶ 8. After receiving the 2011 MacAdams Comments, and before the

FTA issued the ROD, Metro responded to them. And, as a result, the Project design was modified. Accordingly, her comments are not relevant to the version of the Project that was ultimately approved by the FTA. Japanese Village has not shown that Defendants failed to take the requisite "hard look" at any of the concerns raised by MacAdams or that her comments otherwise show that the agency action was arbitrary, capricious, unlawful, or an abuse of discretion.

For these reasons, reconsideration is not warranted based on the 2011 MacAdams Comments. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 741 (9th Cir. 2001) (district court did not abuse its discretion in denying a motion for reconsideration where newly discovered evidence would not have altered the disposition of the case).

4. Whether Reconsideration is Warranted Based on the December 2012 Plans or June 2014 Parking Announcements

Even if the Court were to deny the Motions to Strike, reconsideration of the SJ Order is not warranted based on the 2014 Parking Announcements and December 2012 Plans, for several reasons.

First, Japanese Village has not shown that reconsideration based on post-ROD evidence is appropriate. To prevail on a motion for reconsideration based on newly discovered evidence, "the movant must show the evidence . . . was of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Duarte*, 526 F.3d at 573. This litigation concerns the adequacy of the FEIS and the decision by the FTA to approve it in the ROD. A judicial review of APA claims with respect to the FEIS and the ROD, is limited to a consideration of the record evidence that was before the agency when it took the challenged action. *See Vermont Yankee*, 435 U.S. at 555 ("[T]he role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is . . . limited . . . by the time at which the decision was made . . ."); *Ranchers Cattlemen*, 499 F.3d at 1117 ("Under the APA, courts must refrain from de novo review of the action itself and focus instead on the agency's decision-making process."). Changes to the Project in December 2012 or June 2014 occurred after the ROD was issued. Accordingly, it is not appropriate to consider such evidence in determining whether to find the ROD or the FEIS deficient because it was not before the agencies when they made the challenged decisions. *Accord Rybachek*, 904 F.2d at 1296 n.25 (it is not "appropriate ... for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision.").[12]

[12] A separate issue is whether the 2014 Parking Announcements or the December 2012 Plans may, under the Local Rules and standards governing "newly discovered evidence," be considered in connection with a motion for reconsideration. The December 2012 Plans were produced to Japanese Village approximately ten days before the issuance of the SJ Order. Japanese Village received the December 2012 Plans on May 20, 2014. Crockett

Second, this Motion for Reconsideration is not the proper vehicle to challenge changes to the Project that occurred after the ROD was issued. As a prerequisite to seeking such judicial review and action under the APA, plaintiffs must exhaust their administrative remedies with respect to their claims. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) ("The rationale underlying the exhaustion requirement is to avoid premature claims and to ensure that the agency possessed of the most expertise in an area be given first shot at resolving a claimant's difficulties."). In *Monsanto Co*., for example, the Supreme Court explained that it was improper for a district court to enjoin an agency action that was different than the action underlying the initial suit. In that case,

> Respondents . . . brought suit under the APA to challenge a particular agency order: APHIS's decision to *completely* deregulate RRA. The District Court held that the order in question was procedurally defective, and APHIS decided not to appeal that determination. At that point, it was for the agency to decide whether and to what extent it would pursue a *partial* deregulation. If the agency found, on the basis of a new EA, that a limited and temporary deregulation satisfied applicable statutory and regulatory requirements, it could proceed with such a deregulation even if it had not yet finished the onerous EIS required for complete deregulation. If and when the agency were to issue a partial deregulation order, any party aggrieved by that order could bring a separate suit under the Administrative Procedure Act to challenge the particular deregulation attempted.

561 U.S. at 159-60 (citing 5 U.S.C. § 702).

Decl. ¶ 6. The Court issued the SJ Order on May 29, 2014. *See Wallis*, 26 F.3d at 892 n.6; *Frederick S. Wyle Prof'l Corp.*, 764 F.2d at 609. However, because the SJ Motion had been under submission for several weeks at the time that Japanese Village discovered the December 2012 Plans and the SJ Order was issued shortly thereafter, the Court has elected to deem the December 2012 Plans newly-discovered evidence for purposes of the Local Rule. The June 2014 Parking Announcements were made after the SJ Order was issued. L.R. 7-18 (a motion for reconsideration may be made based on "the emergence of new material facts or a change of law occurring after the time of such decision"). However, to prevail on a motion for reconsideration because of newly discovered evidence, "the movant must show the evidence . . . existed at the time of the trial or proceeding at which the ruling now protested was entered." *Duarte*, 526 F.3d at 573. The June 2014 Parking Announcements plainly did not exist at the time the SJ Order was entered. Notwithstanding this procedural deficiency as to this evidence, the merits of the Motion for Reconsideration on this ground is considered in this Order.

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This case presents similar facts. Thus, Japanese Village brought suit under the APA to challenge the adequacy of the FEIS and the decision of the FTA to approve the FEIS in the ROD. Changes to the Project after the issuance of the ROD are not the subject of this litigation. And, although Japanese Village raised certain issues as to the FEIS with respect its assessment of the Project design and parking analysis, it has not presented any claims with respect to the new design or parking plan to Defendants through an administrative process. Consequently, Defendants have not had the opportunity to consider whether supplemental environmental review of these decisions is appropriate. *See* Dkt. 113 at 22 (Defendants have "made no-post ROD determinations regarding the need for supplemental environmental review" with respect to claims made by Japanese Village).

For these reasons, judicial review of the changes to the Project is premature and inconsistent with the exhaustion requirement. *Accord Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) ("[P]ost-decision information, . . . may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) ("The federal courts ordinarily are empowered to review only an agency's *final* action") (emphasis in original); 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

These conclusions do not leave Japanese Village without a remedy with respect to any changes to the Project made after the FTA issued the ROD. Rather, an agency is required to prepare a supplement to an 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 that bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371-72 (1989) ("It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval."). However, before Japanese Village can seek judicial review of an agency decision whether to prepare an SEA or supplemental EIS, it must show that its claim for a supplemental EIS was "properly administratively appealed, such that . . . Defendants were 'on notice of' and had 'an opportunity to consider and decide' whether to issue a supplemental EIS." *Wilderness Soc. v. Bosworth*, 118 F. Supp. 2d 1082, 1102 (D. Mont. 2000).

This procedure is consistent with the exhaustion requirement, which "allow[s] the administrative agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative process." *United Farm Workers v. Ariz. Agric.*

Employment Relations Bd., 669 F.2d 1249, 1253 (9th Cir.1982); *Buckingham v. Sec'y of U.S. Dep't of Agr.*, 603 F.3d 1073, 1080 (9th Cir. 2010). In response to claims that the December 2012 Plans reflect a substantial change to the Project, Defendants may conclude that a supplemental EIS is necessary. If they do so, there would be no need for a judicial decision. Similarly, Defendants may conclude to prepare a SEA,[13] and then find that the change to the Project alignment does not result in any significant impact. This would result in the creation of an administrative record that would be the basis for a later judicial review. *Accord Marsh*, 490 U.S. at 378 (an agency's decision whether to prepare a supplemental EIS is governed by the "arbitrary and capricious" standard, and explaining that "courts should . . . carefully review[] the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance-or lack of significance-of the new information."). For these reasons, until an administrative record is developed, it is premature and improper for the Court to review any post-ROD decision to change the Project alignment. *Accord Nevada v. Dep't of Energy*, 457 F.3d 78, 84 (D.C. Cir. 2006) (in challenging the sufficiency of the FEIS and ROD, a possible post-ROD adoption of an "interim transportation plan" was not ripe for judicial review until the interim plan was finalized).

Third, even if the Court considers the post-approval changes to the Project, Japanese Village has not shown that the December 2012 Plans will cause noise and vibration impacts that were not considered in the FEIS. The expert retained by Japanese Village is a structural engineer. Ho Decl. ¶ 2. He admits that he is "not an acoustic engineer," but opines that a change in grade "would likely lead to increased noise and vibration under Japanese Village as rail cars, wheels and electric motors are required to transition to a much higher relative grade." *Id*. ¶ 11. Defendants' experts state that the modified alignment will, for the most part, result in a deeper underground placement than the prior design. Roy Decl. ¶ 15. Only when the alignment approaches the parking garage in Japanese Village is the alignment in the December 2012 design closer to the surface. Accordingly, Defendants' expert opines that noise and vibration impacts will not be significant because, unlike with respect to retail and office spaces, there are no noise thresholds for parking garages. *Id*. ¶¶ 15, 18. In light of this conflicting evidence, Plaintiffs have not shown that any change in Project alignment would cause any increased noise and vibration impacts that were not already considered in the FEIS.[14]

[13] *See Marsh,* 490 U.S. at 373 ("[I]f an agency is unsure whether a proposed project requires [a] ... supplemental EIS, federal regulations direct the agency to prepare an environmental assessment on which it may then base its decision.").

[14] It is also significant that Japanese Village has not established the admissibility of Ho's proffered expert opinion with respect to noise and vibration impacts. Ho is not an acoustical engineer. Thus, there is not a sufficient basis shown for the admission of his opinions as to ground-level noise and vibration impacts resulting from TBM. *See* Fed. R. Evid. 702. Nor does his declaration set forth the "reliable principles and methods" upon which his opinion is based. *Id.*

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Fourth, Japanese Village has not shown that the mitigation measures with respect to noise and vibration provided in the FEIS are insufficient. As noted, NEPA "does not mandate particular substantive results, but instead imposes only procedural requirements." *Laguna Greenbelt, Inc. v. United States Dep't of Transp.,* 42 F.3d 517, 523 (9th Cir.1994). Thus, in determining whether a mitigation plan is sufficient, a court "need only be satisfied that the agency took the requisite 'hard look' at the possible mitigating measures." *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). With respect to the noise and vibration during construction, Japanese Village does not contend that Defendants have failed to take the requisite hard look at possible mitigation measures but, rather, that the planned measures are substantively insufficient. *See* Dkt. 116 at 10-11 (a mitigation measure which recommends temporary relocation of tenants during construction is improper under NEPA). That is not the standard under which the Court reviews agency decision-making. See *Laguna Greenbelt, Inc.,* 42 F.3d at 523; *Okanogan Highlands Alliance*, 236 F.3d at 473.

Fifth, even if the Court were to consider whether a mitigation measure that offers temporary relocation of tenants is substantively sufficient under NEPA, the result would be the same. 40 C.F.R. § 1508.20 provides that mitigation includes:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

The offer temporarily to relocate tenants during the few days in which construction noise will exceed FTA thresholds is a proper mitigation measure under this regulation. It "[c]ompensat[es] for the impact by . . . providing [a] substitute . . . environment[]." 40 C.F.R. § 1508.20. Accordingly, Japanese Village has not shown that this mitigation measure violates NEPA or its implementing regulations.

Finally, to the extent Japanese Village contends that noise caused by the operation of the trains, as opposed to the noise that is caused by construction of the underground facilities, will be greater under the planned change in Project alignment, the mitigation measures in the FEIS are sufficient. Mitigation measure NV-29 requires that Metro and FTA incorporate rail design features to reduce ground-borne noise impacts below the noise significance criteria of the FTA. AR 38. Japanese Village has not shown that any new noise impacts cannot be addressed by these mitigation measures.

* * *

For these reasons, Plaintiffs have not shown that reconsideration of the SJ Order is warranted. Therefore, the Motion for Reconsideration is DENIED.

C. Bonaventure and Flower Associates' Request for Injunctive Relief

1. Legal Standard for Granting Injunctive Relief

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Thus, a plaintiff seeking injunctive relief must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a[n] . . . injunction." *Id.* at 141. This traditional four-factor test applies to a plaintiff seeking an injunction to remedy a NEPA violation. *See id*.; *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 24 (2008).

Even when a plaintiff establishes that it is entitled to some injunctive relief, its scope must be tailored to the nature and extent of the legal violation. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). Thus, "[i]f a less drastic remedy," such as vacatur of an agency decision or declaratory relief, is "sufficient to redress [the plaintiff's] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted." *Monsanto Co*., 561 U.S. at 165-66*; see also 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 injunction of the project giving rise to the EIS).

2. Remand or Vacatur of an Agency Action

When a court finds that an agency's action was arbitrary and capricious in violation of the APA, "the proper course [is] to remand to the Agency for clarification of its reasons." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657 (2007); *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012). The remand allows the agency to reconsider or explain its initial action. *California Communities Against Toxics*, 688 F.3d at 992. In conjunction with remand, a court may also vacate the agency's action. *Id.* However, "[a] flawed [agency action] need not be vacated." *Id.* (citing *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1405 (9th Cir.1995); *W. Oil &*

Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir.1980). Rather, "when equity demands, the [agency action] can be left in place while the agency follows the necessary procedures" to correct its action. *Idaho Farm Bureau,* 58 F.3d at 1405.

3. The Parties' Positions with Respect to Relief

Plaintiffs seek significant injunctive relief. They contend that the Court should require Defendants to prepare a supplemental EIS to analyze Open-Face tunneling and SEM as alternatives to C/C construction. They also seek an order that would prohibit the FTA and Metro from taking any action that would foreclose or unduly prejudice the selection of the Open-Face or SEM tunneling alternatives. This order would include enjoining Defendants from: (i) conducting any construction along the Project route west of the intersection of 2nd Street and Broadway and on Flower Street, including any closed-face TBM planned in that location; (ii) relocating utilities associated with C/C construction along the Lower Flower Segment; and (iii) ordering or purchasing a tunnel boring machine that cannot perform Open-Face or SEM tunneling alternatives. Dkt. 101 at 6.

Defendants argue that the appropriate remedy is declaratory relief and remand without vacatur of the FTA's decision to approve the Project. Dkt. 100 at 21-22, 46. Once the matter is remanded to the agencies, the FTA and Metro state that they intend to issue "a supplemental NEPA document that addresses the deficiency identified by the Court [and] will cure the violation by giving the public another opportunity to provide input related to the reasons that the FTA and Metro eliminated those infeasible construction methods." *Id*. at 22.[15] Subsequently, the FTA would issue either a Finding of No Significant Impact or an Amended Record of Decision. *Id*. at 21-22 (citing 23 C.F.R. §§ 771.119(h), 771.127(b), 771.130(a) and (b)).

For the reasons stated below, the Court REMANDS and PARTIALLY VACATES the ROD and GRANTS IN PART Plaintiffs' request for mandatory and prohibitive injunctive relief.

[15] Defendants state that they would either prepare a supplemental environmental assessment ("SEA") or supplemental EIS. They state that they cannot select one of these at this time, because they cannot predetermine the outcome of a NEPA process. Generally, a supplemental EIS is required either when the agency makes substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action. 40 C.F.R. §1502.9(c). An SEA may be prepared for any action that "does not clearly require the preparation on an EIS, or where the Administration believes an EA would assist in determining the need for an EIS." 23 C.F.R. § 771.119(a). Although a supplemental EIS must be circulated for public comment (40 C.F.R. § 1502.9), that is not required as to an EA. 23 C.F.R. § 771.119(d). However, an SEA "must be made available for public inspection." *Id.*

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4. Application

a) Remand With or Without Vacatur

In general, when a court finds that the action of an agency violated the APA, it remands the matter to the agency for further consideration and vacates the challenged action in whole or in part. *See* 5 U.S.C. § 706(2); *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy*, 232 F.3d 1300, 1305 (9th Cir. 2000) ("An administrative decision . . . will be set aside if the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action is found to be without observance of the procedure required by law."). However, a district court is "not required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, it is not required to set aside every unlawful agency action."); *California Communities Against Toxics*, 688 F.3d at 992; *Idaho Farm Bureau Fed'n,* 58 F.3d at 1405; *W. Oil & Gas Ass'n,* 633 F.2d at 813. "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *California Communities Against Toxics*, 688 F.3d at 992 (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C.Cir.1993)).

The circumstances here warrant partial vacatur of the ROD. In the SJ Motion, Plaintiffs raised numerous challenges to the FEIS and the ROD. In the SJ Order, the Court granted Plaintiffs' SJ Motion only as to one of their claims, *i.e*., the "claim that the FEIS failed adequately to explain why open-face tunneling alternatives were rejected on the Lower Flower Segment." Dkt. 96 at 48. The Court noted that Defendants had presented certain evidence that Open-Face Shield and SEM were infeasible on the Lower Flower Segment, but that the FEIS failed to address why neither of these alternatives was considered. *Id.* at 23-24. And, the Court explained that, although Defendants "are not required to consider, through a comprehensive alternative analysis, options that are neither feasible nor consistent with Project goals," they were "required to explain in the FEIS, at least briefly, the reasons that such alternatives were rejected." *Id.* at 24. The Court granted Defendants' Motion with respect to all other claims raised in the SJ Motions. *Id.* at 48.

The deficiency in the FEIS was limited. Defendants failed to mention, even briefly, the reasons that Open-Face and SEM tunneling had been rejected. Plaintiffs contend that the SJ Order is a finding that Defendants were to complete a comprehensive alternatives analysis of both SEM and Open-Face Shield tunneling. Dkt. 101 at 5. The SJ Order did not state that Defendants' conclusion with respect to the infeasibility of SEM or Open-Face Shield was arbitrary and capricious or that SEM or Open-Face Shield should have been evaluated as separate alternatives in the FEIS. Rather, it stated that Defendants did not comply with NEPA because, with respect to the SEM and Open-Face Shield

alternatives, "which were eliminated from detailed study[,]" they failed even "briefly [to] discuss the reasons for their having been eliminated." Dkt. 96 at 24 (quoting *Am. Rivers v. FERC*, 201 F.3d 1186, 1200 (9th Cir. 2000).

Because the NEPA violation was so narrow, a complete vacatur of the ROD is inappropriate. *Accord Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 527 (9th Cir. 1994), *as amended on denial of reh'g* (Dec. 20, 1994) ("[E]ven where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met."); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1109 (E.D. Cal. 2013) (quoting *Allied-Signal, Inc.*, 988 F.2d at 150) (declining to vacate an agency rule when the NEPA violation was minor and did not raise serious doubt whether the agency chose correctly). A complete vacatur would also have significant consequences, *i.e.*, substantial delay to parts of the Project for which no NEPA violation has been identified and the loss of $4.7 million per month for the duration of the delay. Roy Decl. ¶¶ 15-22. These factors also support the denial of the request for a complete vacatur. Accord *California Communities Against Toxics*, 688 F.3d at 994 (declining to vacate an EPA rule where "[s]topping construction [on a power plant] would be economically disastrous" in light of the fact that it was a "billion-dollar venture employing 350 workers.").[16]

In contrast, Defendants have not shown that a partial vacatur of the ROD with respect to its provisions approving C/C construction on the Lower Flower Segment would have the same disruptive consequences. And, although the agencies previously conducted certain draft studies with respect to the feasibility of SEM and Open-Face tunneling (*see* SJ Order, Dkt. 96 at 21-24), a partial vacatur is necessary to "ensure that agencies carefully consider information about significant environmental impacts" and "guarantee relevant information is available to the public." *N. Plains Res. Council*, 668 F.3d at 1085.

Defendants acknowledge that, upon remand, Metro must revisit the prior decision with respect to the feasibility of Open-Face tunneling and SEM. Roy Decl. ¶ 8. During this process, "it is possible that the public review of Metro's analysis and conclusions . . . will result in new information that is relevant" to the conclusion that Open-Face tunneling and SEM are infeasible. *Id*. Absent vacatur of the portions of the ROD approving the use of C/C construction on the Lower Flower Segment, Metro will not have any incentive to consider seriously and fairly any public comments submitted in response to any supplemental NEPA analysis. Accordingly, partial vacatur of the ROD is appropriate.

[16] Here, the Project is a $1.3 billion dollar venture that will employ approximately 16,500 individuals over the four-year construction period. *See* AR6840; FTAR20825.

For these reasons, the Court remands the action and vacates the ROD with respect to its approval of C/C construction on the Lower Flower Segment. Once the action is remanded, Defendants must produce a supplemental NEPA analysis that addresses the feasibility of the Open-Face Shield and SEM tunneling alternatives.[17] Thereafter, the FTA shall issue either a Finding of No Significant Impact or an Amended Record of Decision. This remedy satisfies NEPA's purpose of "guarantee[ing] relevant information is available to the public," *N. Plains Res. Council*, 668 F.3d at 1085, without causing undue disruption to the entire Project.

b) Injunctive Relief

In addition to vacatur of the ROD, Plaintiffs seek an order that would bar Defendants from taking any action that would foreclose or unduly prejudice the selection of Open-Face tunneling or SEM on the Lower Flower Segment. This request includes an order that would enjoin Defendants from:
(i) conducting any construction along the Project route west of the intersection of 2nd Street and Broadway and anywhere on Flower Street, including any closed-face TBM planned in that location;
(ii) relocating utilities associated with C/C construction along the Lower Flower Segment; and
(iii) ordering or purchasing a tunnel boring machine that cannot implement the Open-Face or SEM tunneling alternatives. Dkt. 101 at 6.[18]

When a court finds that an agency action was arbitrary or capricious and remands its decision for further, responsive actions, it has "many remedial tools at its disposal" to ensure that the agency remedies the deficiencies in the FEIS. *Winter*, 555 U.S. at 33.

[17] The Court declines to mandate a particular form of supplemental NEPA analysis. Plaintiffs contend that Defendants are required to prepare a supplemental EIS "to analyze feasible tunneling alternatives, including SEM and open-face tunneling." Dkt. 101 at 9. However, as noted, the SJ Order did not conclude that either SEM or Open-Face tunneling was feasible. Plaintiffs cannot seek at this juncture to demonstrate, without bringing a motion for reconsideration, that these forms of tunneling were feasible alternatives that should have been presented together with a detailed study in the FEIS. Therefore, Plaintiffs have not shown that a supplemental EIS must be mandated by the Court. *See* 40 C.F.R. § 1502.9(c) (a supplemental EIS is required when an agency makes substantial changes or there are new circumstances bearing on the proposed action). Further, Plaintiffs' argument that a supplemental EIS is necessary "meaningfully [to] influence the selection of alternatives" is unpersuasive. Dkt. 101 at 11. The publication of an SEA will satisfy the public notice goals of NEPA, because such documents "must be made available for public inspection." 23 C.F.R. § 771.119(d); *accord High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, C 09-04621 RS, 2012 WL 1933744 (N.D. Cal. May 29, 2012) (declining to require a specific type of analysis because such an order would "improperly infringe on [the agency's] discretion and technical expertise in defining the scope of its own environmental impact statement").

[18] Plaintiffs also seek an order requiring Defendants to create a supplemental EIS rather than an SEA. However, for the reasons stated, it would be inappropriate to mandate a particular form of supplemental NEPA analysis.

Here, a narrow injunction with respect to certain aspects of Project construction is appropriate for the period when the Agency prepares the supplemental NEPA analysis. Plaintiffs have shown that an injunction of C/C construction along the Lower Flower Segment is warranted; however, they have not met their burden to show that it is appropriate to enjoin utility relocation, the purchase of a closed-face TBM, or all tunneling activities west of 2nd Street and Broadway.

(1) Irreparable Harm

Plaintiffs contend that the failure of Defendants to explain in the FEIS why SEM and Open-Face Shield tunneling were not feasible, caused significant harm to Plaintiffs. *First*, Plaintiffs contend it will result in "procedural" harm. Because the information was not included in the FEIS, Plaintiffs and other members of the public lost their opportunity and right under NEPA to comment meaningfully and knowledgeably about the Project. Such comments could have influenced the outcome of the federal decision-making. Dkt. 101 at 11 (citing *Save Strawberry Canyon v. DOE*, 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009)). However, the Supreme Court has explained that a violation of NEPA does not *per se* establish irreparable harm. *See Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987) (no presumption of irreparable injury when an agency fails thoroughly to evaluate the environmental consequences of a proposed action); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2757 (2010). Thus, procedural harm is insufficient by itself to warrant an injunction.

Second, Plaintiffs contend that C/C construction and associated utility relocation will cause irreparable harm through the noise, dust, vibration, glare, traffic and seismic stability issues that will occur as a result of these activities. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000). However, Plaintiffs have not shown that utility relocation activities are linked to the NEPA violation. Thus, they have not shown that such activities would only occur if the Defendants adhere to the present construction plan after completing the environmental analysis with respect to Open-Face and SEM tunneling. Defendants admit that utility relocation is currently underway on the Lower Flower Segment. Roy Decl. ¶ 14.[19] Plaintiffs contend that "[t]hese major utility relocations would not be necessary under Flower Street if Metro's Board and the FTA were ultimately to decide . . . to . . . use SEM, since the tunnels would be built under the utilities

[19] Presently, water lines and power ducts and vaults are being relocated. Id. This utility relocation is scheduled to be completed by January 2015. *Id.* Storm drains and sanitary sewer lines are scheduled to be relocated beginning in July 2015. *Id.* Relocation of the storm drains and sanitary sewer lines is scheduled to take place at the same time as soldier pile installation and installation of temporary decking on the Lower Flower Segment. That would constitute the beginning of C/C construction. *Id*.

currently planned for relocation." Clough Decl. ¶ 24a.[20] However, Defendants have presented evidence that relocation of utilities would be necessary for reasons that are independent of the construction method used on the Lower Flower Segment. Roy Decl. ¶ 17. For example, if Metro were to use SEM on the Lower Flower Segment, it would have to condition the ground through a process called "jet grouting." *Id.* ¶ 18. The presence of large utilities under the street could adversely affect such grouting. This would result in pockets of ground that were not properly conditioned, which could in turn cause a collapse of the ground during tunneling. *Id.* Further, jet grouting can result in damage to utilities due to the pressure that is applied when grout is forced into the ground. *Id.* This, in turn, could lead to ground failure if, for example, a water line were damaged. *Id.*[21] For these reasons, Defendants have shown that utility relocation would be required even if Open-Face and SEM tunneling were adopted. Therefore, Plaintiffs have not shown that they will be irreparably harmed by utility relocation activities along the Lower Flower Segment.

By contrast, Plaintiffs would suffer irreparable harm if C/C construction proceeded along the Lower Flower Segment. This would result because the C/C construction would preclude the later use of the alternative of SEM or Open-Face tunneling in that area. Thus, were it later determined by the Defendants as a result of the required reassessment of these alternatives that one or both of them is superior to C/C construction in that location, it would be too late to switch to one or both alternatives.[22] Moreover, Plaintiffs have submitted the declaration of an expert witness who opines that C/C construction "creates extreme disruption . . . due to noise, dust, air pollution and traffic and circulation effects." Declaration of Russell Clough ("Clough Decl."), ¶ 9. And, the Managing Director of the

[20] Plaintiffs also suggest that utility relocation would not be required if Defendants adopt another alternative, which Plaintiffs call the "Deep Tunnel Alternative." Dkt. 101 at 22. The Deep Tunnel Alternative, which was suggested by Plaintiffs' expert, would require construction of the tunnel at a level that is approximately 60 feet deeper than the current route. Clough Decl. ¶¶ 16-20. However, Plaintiffs did not raise this alternative in connection with the SJ Motion. And, they do not contend that Defendants should have considered this alternative during the NEPA process. Nor could they have made such a claim; there is no evidence that the Deep Tunnel Alternative was raised by Plaintiffs or any other party during the administrative process. Accordingly, any argument with respect to this alternative has been waived. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 553 (1978) (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.).

[21] Defendants also point to other reasons why utility relocation would be required even with a tunneling alternative. *See* Dkt. 100 at 16-17.

[22] Defendants contend that construction of a tunnel launch site in Little Tokyo and commencement of tunneling with a closed-face TBM would not preclude SEM or Open-Face tunneling on the Lower Flower Segment. See Roy Decl. at 8. However, Plaintiffs do not seek to enjoin Project construction east of 2nd Street and Broadway.

Bonaventure asserts that these activities will limit access to the Bonaventure and disrupt events that are scheduled to occur at the hotel. Czarcinski Decl., Dkt. 103, ¶¶ 22-32.[23]

Further, absent an injunction that bars C/C construction pending the completion of a supplemental NEPA analysis, Plaintiffs would be denied the opportunity to participate in a meaningful, good faith process through which Defendants would consider alternatives to C/C construction, as required by NEPA.[24] Defendants have represented that they already have initiated the preparation of an analysis that is responsive to the SJ Order. And, they contend that, even if a full supplemental EIS were prepared, the review process would conclude no later than April 2015. Roy Decl. ¶ 5. Substantial C/C construction is not scheduled to begin until July 2015. *Id.* ¶¶ 5-6. Accordingly, any procedural harm caused by the NEPA violation may be limited because Plaintiffs will have an opportunity to participate in a good faith substantive review process by Defendants that will be concluded before the commencement of the C/C construction that has been planned. But, if that occurs, there is also no prejudice caused to the Defendants by enjoining C/C construction at this time; under their expected schedule, they would not commence such construction prior to the completion of the required assessments of the alternatives to C/C construction.

Third, Plaintiffs contend that it is necessary to enjoin Defendants from ordering any TBM and conducting any tunneling activities, including planning and design work for the tunnel, west of the intersection of 2nd Street and Broadway. They argue that this is necessary to prevent Defendants from committing resources to one type of tunneling equipment with the practical effect that Defendants would not consider in good faith alternative methods and equipment for the Lower Flower Segment. Dkt. 101 at 21. As they state, "TBMs only move in one direction – forward. . . . Thus, once tunneling has commenced with a closed-face machine, the 'die is cast'" such that Open-Face tunneling or SEM could not be used on the Lower Flower Segment. *Id.* at 22. Plaintiffs also claim that, absent injunctive relief as to tunneling activities west of 2nd Street and Broadway, Open-Face Shield or SEM tunneling could not be used along the Lower Flower Segment because this would require that "the tunnel grade west of

[23] Plaintiffs also contend that, if a seismic event were to occur, the C/C construction may cause the collapse of either the Bonaventure or the building in which Flower Associates is a tenant. Dkt. 101 at 13. However, Plaintiffs have not demonstrated that such an outcome is "sufficiently likely" to merit injunctive relief. *Amoco Prod. Co.*, 480 U.S. at 535.

[24] Although procedural injury is not itself sufficient to establish irreparable harm, it is significant that, absent an injunction of C/C construction, any supplemental NEPA analysis could become a mere formality. In this context, "the combination of the injury suffered by plaintiffs due to federal defendants' procedural failure to comply with NEPA and the [environmental] injury the individual plaintiffs would suffer . . . leads the court to conclude that the plaintiffs have carried their burden of demonstrating the presence of an irreparable harm should the court not grant injunctive relief." *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998).

the 2nd/Broadway station …be changed from the Project's current grade." *Id*. ¶ 27. Therefore, Plaintiffs contend that, "to ensure that there is a meaningful and fair evaluation of all reasonable alternatives, all activities related to designing and planning the tunnel between the 2nd/Broadway station and the 2nd/Hope Street station must be enjoined." *Id.*

These arguments are not persuasive. Neither the purchase of a closed-face TBM nor tunnel planning and design west of 2nd Street and Broadway will directly cause any noise, dust, vibration or other environmental impacts to Plaintiffs in the Lower Flower Segment. And, Plaintiffs have not adequately shown that these activities would foreclose the use of SEM or Open-Face tunneling there. Rather, Defendants have presented evidence that are at least two places along the Project alignment west of Broadway -- the intersection of 2nd and Hope Street or the intersection of 4th and Flower Street -- at which a closed-face TBM could be extracted and an open-faced TBM or SEM inserted for use on the Lower Flower Segment. Roy Decl. ¶ 27. Thus, an injunction of all tunneling activities west of 2nd and Broadway is unjustified to address the violation established in the SJ Order. *See Califano*, 442 U.S. at 702 ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). Further, Defendants point out that it may be less expensive for Metro to procure two tunneling machines -- one open-faced and one with a closed-face -- than if Metro were to use open-faced TBM or SEM for the entire Project alignment. *Id.* ¶ 28. Accordingly, Plaintiffs have not shown that the commencement of closed-face TBM along other parts of the Project alignment would foreclose the selection and use of Open-Face tunneling or SEM along the Lower Flower Segment.

For these reasons, Plaintiffs have shown that they will be irreparably harmed by the commencement of C/C construction along the Lower Flower Segment. However, they have not shown that any irreparable harm will result from the following activities: (i) utility relocation along the Lower Flower Segment; (ii) the purchase of a closed-face TBM; and (iii) all tunneling activity west of 2nd Street and Broadway.

(2) Availability of Monetary Relief

"Environmental injury, by its nature, can seldom be adequately remedied by money damages . . ." *Cal. ex rel. Lockyer v. USDA*, 575 F.3d 999, 1020 (9th Cir. 2009). Further, monetary relief is not available under the APA. *See* 5 U.S.C. § 702 (waiving sovereign immunity only for claims "seeking relief other than money damages"); *Armendariz-Mata v. U.S. Dep't of Justice, Drug Enforcement Admin.*, 82 F.3d 679, 682 (5th Cir. 1996) ("[W]hen the substance of [an APA claim] is a claim for money damages, the case is not one covered by § 702, and, hence, sovereign immunity has not been waived."). Accordingly, although some of the harms asserted by Plaintiffs, *i.e*., lost profits to the Bonaventure, could be remedied by monetary relief, such relief is not available in this case. Therefore, this factor favors granting certain injunctive relief.

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	September 12, 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.		

(3) Balance of Hardships

Where "[environmental] injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545. In a more recent decision, the Supreme Court held that courts shall not "presume that an injunction is the proper remedy for a NEPA violation." *Monsanto Co*., 561 U.S. at 157. And, the Ninth Circuit has declined injunctive relief in NEPA cases where the public interest in allowing a project to continue outweighed the harm of environmental injury. *See Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (upholding a district court's finding that the balance of hardships did not tip sharply in plaintiff's favor even though plaintiff demonstrated environmental harm because the Project's benefits to the public, *i.e.,* decreasing the risk of forest fires and insect infestation and preventing job loss at timber companies, were significant); *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (upholding a denial of a preliminary injunction where the district court properly weighed the environmental harm posed by the project against the possible damage to project funding, jobs, and the state and national renewable energy goals that would result from an injunction halting project construction, and concluded that the balance favored Appellees); *see also Monsanto Co.*, 561 U.S. at 159 (reversing permanent injunction against partial deregulation of genetically-altered alfalfa because the agency had not yet made any deregulation decision and respondents could not show that they would suffer irreparable injury); *Amoco Prod. Co*., 480 U.S. at 545 (reversing issuance of preliminary injunction where an oil company's $70 million loss outweighed environmental concerns when the claimed injury "was not at all probable").

Here, Plaintiffs have presented evidence of irreparable harm in the form of environmental injury due to noise, dust, vibration, glare and other impacts from planned C/C construction. However, to enjoin Metro from continuing utility relocation and commencing all tunneling activities west of 2nd and Broadway would cause substantial harm to Project funding and would limit employment opportunities presented by Project construction. Roy Decl. ¶¶ 27-32. Further, there are several public benefits that will arise from the Project. It is expected to generate approximately 16,500 jobs during construction (FTAR14404), improve public transit in Los Angeles by providing access for approximately 18,000 new riders (FTAR14404), and result in net environmental benefits through reduced traffic and improved air quality. FTAR14404, 14797-14800; AR89-90, 101, 6037. Defendants anticipate that the Project will result in a reduction of about 60,000 metric tons of greenhouse gas emissions annually. FTAR 14404.

For these reasons, Plaintiffs have not shown that the balance of hardships weighs in favor of enjoining utility relocation, the purchase of a closed-face TBM, or tunneling activities west of 2nd Street and Broadway. *Accord Lands Council*, 537 F.3d at 1005 (appropriate for a district court to consider, in the balance of hardships analysis, the public benefits that would be provided by a project); *W. Watersheds Project*, 692 F.3d at 923 (district court properly weighed the environmental harm posed by the project

against the possible damage to project funding, jobs, and renewable energy goals that would result were project construction enjoined). However, the balance of hardships favors Plaintiffs with respect to C/C construction. The irreparable harm from C/C construction, both in the form of concrete injury through noise, dust, and loss of business and procedural harm for foreclosing the possibility of the use of SEM or Open-Face tunneling, outweighs the hardship to Metro of the injunctive relief granted here.

(4) Public Interest

"The preservation of our environment, as required by NEPA . . . is clearly in the public interest." *Earth Island Inst. v. U.S. Forest Serv*., 42 F.3d 1147 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 129 S.Ct. 365 (2008). Plaintiffs have shown that C/C construction will cause temporary environmental harm during construction. However, Plaintiffs have not demonstrated that utility relocation, the purchase of a closed-face TBM, or tunnel design and planning west of 2nd Street and Broadway will result in any environmental harm absent the issuance of injunctive relief.

Defendants have presented evidence that the Project will have significant social and environmental benefits both during and after construction. *See W. Watersheds Project*, 692 F.3d at 923 (in the public interest analysis, "[t]he district court properly took into account the federal government's stated goal of increasing the supply of renewable energy and addressing the threat posed by climate change, as well as California's argument that the ISEGS project is critical to the state's goal of reducing fossil fuel use, thereby reducing pollution and improving health and energy security in the state."). Broad injunctive relief could jeopardize the Project. Roy Decl. ¶ 13 (discussing the increased cost of a possible Project re-design and noting that such costs are "not currently funded by local, state, or federal project funding sources"); *id.* ¶ 21 (a delay of 12 months would waste $4.7 per month for the duration of delay plus a one-time, lump sum of $67 million for continued staffing of the Project and escalation of costs). When these risks are balanced against the harm claimed by Plaintiffs, which relate only to construction on the Lower Flower Segment, the public benefits of allowing the balance of the Project to proceed weigh in against granting injunctive relief. For these reasons, Plaintiffs have failed to carry their burden to show that the public interest "would not be disserved by a[n] . . . injunction." *Monsanto Co.*, 561 U.S. at 141.

IV. Conclusion

For the reasons stated in this Order, the Motions to Strike are GRANTED and the Motion for Reconsideration is DENIED. The Request for injunctive relief is GRANTED IN PART. The action is remanded for the preparation of a supplemental NEPA analysis. The ROD is vacated with respect to the approval of C/C construction on the Lower Flower Segment. Defendants are enjoined from commencing C/C construction on the Lower Flower Segment.

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	September 12, 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.		

After meeting and conferring with Defense counsel, Plaintiffs' counsel shall submit a proposed judgment consistent with this Order on or before September 19, 2014. If counsel cannot agree as to the form of the proposed judgment, Defendants' counsel shall timely file any objections to the form of the proposed judgment on or before September 23, 2014, together with a red-line showing any proposed changes.

IT IS SO ORDERED.

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