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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, *el al*.,	Case No.5:16-cv-00133-GW (SPx)
Plaintiffs,	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
vs.	
FEDERAL HIGHWAY ADMINISTRATION, *et al*.	Filed : January 22, 2016 Hearing : January 23, 2017; 8:30 am Judge : Hon. George Wu
Defendants.	Courtroom : 10

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I. INTRODUCTION

The Mid County Parkway ("MCP" or "Project") is a massive new freeway infrastructure project that would create a six to eight lane freeway between the cities of Perris and San Jacinto and would also expand several miles of Interstate 215 ("I-215") between Perris and the March Air Reserve Base. Instead of minimizing impacts to local residents affected by the Project, the Federal Highway Administration ("FHWA") approved a 1.732 billion dollar project alternative that "would result in the highest impacts to residential relocations in areas with minority and low-income populations" by literally dividing existing neighborhoods instead of routing the freeway through mostly vacant industrial areas.

In the process of analyzing an alternative that had already been chosen as the preferred alternative by the Riverside County Transportation Commission ("RCTC") the combined Environmental Impact Report and Environmental Impact Statement ("EIR/S") engages in an opaque and misleading depiction of the proposed project's size and route, which fails to provide an accurate picture of the effects on the disadvantaged communities that will be divided by this new freeway. It further misrepresents the environmental justice and community impacts by comparing hypothetical, nonexistent businesses and employees to the actual, existing homes and residents who will be forced to move because of the Project.

FHWA curtailed a reasonable range of alternatives by changing the project in 2009 to sixteen miles and adding upgrades to I-215, yet eliminating alternatives for the new sixteen mile Project based on an older thirty-two mile version of the MCP from 2008 or even earlier. Simply moving forward with alternatives from a disapproved thirty-two mile freeway fails to analyze reasonable alternatives to the new Project such as incorporating High Occupancy Vehicle ("HOV") lanes, different road alternatives, or combining road upgrades with transit.

Finally, FHWA skirts the substantive mandate of Section 4(f) of the

Department of Transportation Act by failing to provide evidence that there are not feasible and prudent alternatives or that the scant evidence provided meets the legal standard required for the permanent impacts to historic resources.

II. FACTUAL BACKGROUND

The Mid County Parkway is a 1.732 billion dollar, multi-facility freeway infrastructure project between the cities of Perris, in the west, and San Jacinto, in the east. MCP-AR-006134, MCP-AR-006250.[1] It includes a west-east sixteen mile, limited access, six-lane freeway that connects I-215 with State Route 79 ("SR-79") in the east. AR:6018, AR:6161. The west-east freeway route would be larger than six lanes to accommodate future highway lanes or transit facilities. AR:6161. The MCP also includes a north-south upgrade and addition of lane capacity to I-215, between Van Buren Boulevard adjacent to the March Air Reserve Base in the north and Nuevo Road in Perris in the south. AR:6028.

It is a joint project proposed by RCTC, FHWA, and the California Department of Transportation, which conducted an environmental analysis of the Project under the California Environmental Quality Act ("CEQA") and National Environmental Policy Act ("NEPA") through the preparation of a combined EIR/S. AR:6018. The purpose of the MCP is to improve west-east movement of motor vehicles and goods, provide capacity for the forecast demand of traffic in 2040, meet state highway standards that would accommodate tractor trailer truck traffic, limit access to the highway, and provide compatibility with potential, future transit that may not be limited to automobile and truck traffic. AR:6103.

The west-east portion of the MCP originates at a 75-100 foot three level interchange at I-215 and from there would "bisect a residential community located between Placentia Avenue and River Street" in Perris resulting "in a 'physical

[1] Hereinafter AR:[page number]. Zeros preceding the AR number omitted.

change that would permanently alter the character of the existing community.'" AR:6403. The preferred, and later adopted, alternative "would result in the highest impacts to residential relocations in areas with minority and low-income populations" and where seven existing schools are within .25 miles of the Project. AR:6052, AR:7300. It also runs directly adjacent to Paragon and Liberty parks and would divide neighborhoods in Perris from those areas. AR:6394.

From Perris, all of the MCP alternatives analyzed in the EIR/S travel east along the existing footprint of the Ramona Expressway to south of the Lake Perris State Recreation Area and the San Jacinto Wildlife Area, and through important core reserves designated for wildlife and habitat conservation under the Western Riverside County Multiple Species Habitat Conservation Plan ("MSHCP"). AR:6310, AR:6342, AR:7018. The MCP would expand the Ramona Expressway through the San Jacinto Valley, adding several interchanges where none currently exist. AR:6270, AR:6272. Several of the new interchanges would encourage new development, including large subdivision and mixed use projects, which have been proposed to connect to interchanges and freeway designs in the MCP. AR:006342-3, AR:59779-82, AR:62364. The San Jacinto Valley currently has large areas designated as agricultural lands and conservation areas under the Riverside County General Plan and MSHCP. AR:6342, AR:7018.

Despite the Mid County Parkway's purpose of "[p]rovid[ing] increased capacity to support the forecast travel demand," the Project will reduce travel time, but only result in "some improvements" or "no substantial change" to regional traffic congestion compared to the no build conditions. AR:6103, AR:7357, AR:6054. As the FHWA admits, the Project will result in only "some improvements in traffic conditions . . . or no substantial change compared to the No Build condition," and even "result in traffic conditions slightly worse than the No Build condition" at some intersections. AR:7357.

A. Environmental Review and Project Approval

The initially proposed MCP was twice the current Project length and included a thirty-two mile facility between Interstate 15 ("I-15") in the west and SR-79. AR:6019. In 2004, FHWA issued a Notice of Intent to prepare an EIS to the public and included seven Build Alternatives and one No Project Alternative. AR:189-190. In September 2007, RCTC selected the Locally Preferred Alternative, Alternative 9, before the Draft EIR/S had been circulated. AR:6019.

Comments on the thirty-two mile MCP in the Draft EIR/S circulated in October 2008 revealed two main issues: 1) concern about cost and the availability of funds for the MCP, and 2) improvements to existing facilities like Cajalco Road in the west between I-15 and I-215 and the Ramona Expressway and State Route 74 ("SR-74") in the east between I-215 and SR-79 would be a better use of public funding and reduce impacts to communities, wildlife, state parks, wildlife areas, habitat preserves, open space, and agricultural lands. AR:6019; AR:13502-5.[2]

In response to those issues in 2009, the MCP was shortened from thirty-two miles to sixteen miles, changing the western boundary of the Project from I-15 to I-215. AR:3799. RCTC and FHWA determined that widening and improving Cajalco Road would remove the need for the western portion of the initial route AR:3800), but proceeded with the upgrade of the eastern portion of the MCP even though that was further from existing jobs and communities. The shortened MCP was also reconfigured to include a substantial north-south upgrade to I-215 for approximately six miles, which added lane capacity and intersection upgrades that were not included in the earlier thirty-two mile MCP project. AR:6101, AR:2, AR:6028. As a result of the revised Project, FHWA and RCTC issued a

[2] Plaintiffs and their affected members raised similar concerns. Declarations on behalf of Ileene Anderson, George Hague, Drew Feldmann, and Albert Thomas Paulek are submitted to address Plaintiffs' standing.

Recirculated Draft EIR and Supplemental Draft EIS ("Recirculated EIR/S") in 2013. AR:6021. The purpose and objectives of the new 16-mile route remained the same as the initial 32-mile Project, except for modification of the distance and a change of five years for the design year, and included the preferred Alternative 9. Compare AR:938 with AR:6023.

The Recirculated EIR/S and Final EIR/S included three alternative routes through the city of Perris: a northerly alignment (Alternative 4); a central alignment (Alternative 5); and a southerly alignment (Alternative 9). AR:6142, AR:6146, AR:6150. Each of those three alternatives included the same design variations on the bridge over the San Jacinto River and a parallel route through agricultural lands slightly west of the city of San Jacinto. AR:6150, AR:6360. The alternatives for the sixteen mile west-east component of the shortened MCP followed the same alignment as the eastern half of the original thirty-two mile freeway analyzed in the Draft EIR/S, except that Alternative 9 was designed to avoid Paragon Park and Fire Station No. 90. *Compare* AR:1089 with AR:6616.

On March 27, 2015, the Final EIR/S was released identifying Alternative 9 as the selected route—previously identified as the locally preferred alternative in 2007. AR:6019, AR:69381. Compared with the other build alternatives, the preferred alternative "would result in the highest impacts to residential relocations" in an area "dominated by minority, and Hispanic residents with high percentages of disadvantaged students." AR:6052, AR:6217, AR:107850-51.

Twelve days later RCTC adopted Alternative 9 with the San Jacinto River Bridge Design Variation as the approved Project on April 8, 2015. AR:53474. FHWA issued a Record of Decision on the MCP on August 17, 2015. AR:97. Plaintiffs filed the instant case on January 22, 2016. Dkt. No. 1.

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III. LEGAL BACKGROUND

A. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA") is "our basic national charter for protection of the environment." *California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1012 (9th Cir. 2009). The statute "establishes 'action-forcing' procedures that require agencies to take a 'hard look' at environmental consequences." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). "[T]he comprehensive 'hard look' mandated by Congress…must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). NEPA requires "disclosure of relevant environmental considerations that were given a 'hard look' by the agency," thereby facilitating "informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005).

> An EIS serves two purposes: First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Ctr. for Biological Diversity, 623 F.3d at 642. To this end, the NEPA implementing regulations require that an EIS provide a "full and fair discussion of significant environmental impacts" of the proposed agency action. 40 C.F.R. § 1502.1. An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposal. *Id.* § 1502.14(a).

"Courts must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir.

2003). Although an agency has wide discretion in assessing the scientific evidence, it must take a hard look at issues, respond to reasonable opposing viewpoints, *id.*, and must not rely on incorrect assumptions or data, *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005); *see also WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) ("NEPA requires more" than asking a court "to assume the adequacy and accuracy of partial data without providing any basis for doing so.").

B. Section 4(f) of the Department of Transportation Act

The Department of Transportation Act of 1966 includes a provision—Section 4(f)—requiring the FHWA to make "special effort . . . to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 303(a) (2014); *see also* 23 U.S.C. § 138(a) (2015). Section 4(f) allows approval of a transportation project requiring the use Section 4(f) lands "only if-- (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." 49 U.S.C. § 303(c). Unlike NEPA, Section 4(f) of the Department of Transportation Act imposes a substantive mandate. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008). The Ninth Circuit has held that Section 4(f) resources "may be 'used' for highway purposes only if 'there [are] truly unusual factors present in [the] case,' if 'feasible alternative routes involve uniquely difficult problems,' or if 'the cost or community disruption resulting from alternative routes [reach] extraordinary magnitudes.'" *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984) (alteration in original) (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971)).

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IV. STANDARD OF REVIEW

A court "shall grant summary judgment if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Administrative Procedure Act ("APA") governs judicial review of FHWA's compliance with NEPA, *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007), and Section 4(f) of the Department of Transportation Act. *See Overton Park*, 401 U.S. 402, 415-16 (1971). Under the APA, courts must hold unlawful and set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or was made "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D) (2015). "Although the arbitrary and capricious standard is a narrow one," courts must "engage in a substantial inquiry, a thorough, probing, in-depth review" to determine if the agency presented "a rational connection" between the facts and its conclusions. *Native Ecosystems Council*, 418 F.3d at 960. And in determining if an EIS issued "without observance of procedure required by law," a court determines "whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.*

A decision is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

V. ARGUMENT

A. The Flawed Project Description Does Not Permit Meaningful Public Review of the Project Under NEPA

In order for environmental review to adequately evaluate the environmental

ramifications of a project, it must first provide a comprehensive and correct description of the proposed project itself. One of NEPA's purposes is to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (internal citations and alteration omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is "almost certain to affect the agency's substantive decision[s]." *Robertson*, 490 U.S. at 350. To meet this purpose, NEPA procedures emphasize clarity and transparency of process. *See Pub.Citizen*, 541 U.S. at 756-57. It is particularly important for the agency to accurately and clearly describe the proposed action to the affected public.

The MCP would permanently alter the physical, environmental, and social structure of the communities along the route, which is especially dramatic where the freeway project will bisect the community of Perris and the agricultural areas of the San Jacinto Valley. Yet, the EIR/S engages in an opaque and misleading depiction of the proposed project's size and route; thereby, failing to provide an accurate picture of the effects on the disadvantaged communities that will bear the brunt of the environmental impacts of a new freeway dividing their community.

The purpose of public issuance of an EIS is to provide "a springboard for public comment." *Pub. Citizen*, 541 U.S. at 768. NEPA regulations provide that "public scrutiny [is] essential." 40 C.F.R. § 1500.1(b). Therefore, agencies must "[e]ncourage and facilitate public involvement in decisions," 40 C.F.R. § 1500.2(d), so that "environmental information is available to public officials and citizens before decisions are made," *id.* § 1500.1(b). Moreover, NEPA documents "shall be written in plain language . . . so that decisionmakers and the public can

readily understand them." *Id.* § 1502.8. NEPA documents are "unacceptable if they are indecipherable to the public." *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004).

The EIR/S fails to clearly and transparently disclose the true width and dimensions of the Project and route through the affected community in violation of NEPA. The EIR/S describes the MCP as a six-lane controlled access freeway, AR:6150) for which "[g]enerally, the needed right of way varies from 220 ft to 660 ft in width." AR:6161. Where the body of the EIR/S references maps of the Project width, it generally provides conceptual drawings or regional maps (*see e.g.* AR:6162, AR:6136, AR:6152, AR:6166), which fail to disclose to the public and decision makers the precise route of the new freeway through the community. This failure left the affected public unable to meaningfully participate in the "democratic" NEPA process, while also downplaying the significant impacts to land use and community cohesion.

In comments, EPA noted "the Supplemental Draft EIS indicates that right of way needs vary from 220 feet to 660 feet in width as a result of topography, features of the natural and built environment, and design requirements." AR:9491-AR:9492. EPA emphasized that the MCP with a width between 220-660 feet would divide the community and that efforts should be taken to minimize the land use and community impacts, including outreach to affected residents. AR:9488, AR:9492. Unfortunately, many affected property owners and residents were unable to tell from the EIR/S whether the MCP affected their home and requested maps and clarification of the Project route.[3]

[3] *E.g.* AR:68939 ("I am very anxious to know whether or not my house is in the path of construction. Is my house going to be taken?"), AR:69431- 32 ("Please advise if my home is in the direct path of the proposed freeway."), AR:69393, AR:69431, AR:68999, AR:069341, AR:069316, AR:069338, AR:069218,

The agency informed some parties of the true dimensions and scope of the MCP, only in correspondence outside the EIR/S or buried in appendices to the Final EIR/S. When describing the MCP in correspondence with the U.S. Fish and Wildlife Service and Riverside County Regional Conservation Authority, the MCP proponents described the width of the Project as 200-1700 feet—*almost triple the maximum width described in the EIR/S*—where it expanded to include detention basins and interchanges. *E.g.* AR:10335, AR:10514, AR:10878. In order to find the actual width for the MCP, one must delve into the Final EIR/S appendices to decipher the details. Appendices to an EIS are to "consist of material which substantiates any analysis fundamental to the impact statement"; they are not to be the only place where fundamental information—such as an accurate project description—is found. *See* 40 C.F.R. § 1502.18(b); *see also id.* § 1502.15 (requiring an EIS "succinctly describe the environment of the area(s) to be affected . . . by the alternatives under consideration"); *see WildEarth Guardians*, 790 F.3d at 9226 (holding that mere inclusion, in appendix, of map agency used in its assessment, without any explanation in EIS, did not satisfy NEPA requirements).

For example, Attachment H to Appendix I, of the EIR/S provides the "Conceptual Plan of the Preferred Alternative (Alternative 9 Modified with the San Jacinto River Bridge Design Variation)" and provides the level of detail needed to analyze the actual width through the affected community of Perris by comparing the map scale in the figure to the MCP. AR:7976 AR:8017. Attachment O-2 of Appendix O of the EIR/S provides parcel acquisition information and diagrams, which also provides a scale in feet. AR:9189. Applying that scale manually to the route just north of Paragon Park in Perris reveals a project width from

AR:69250, AR:69296, AR:69346. Tellingly, none of the responses from RCTC staff provide links to the EIR/S itself. *Id*.

approximately 300 to 500 feet in the residential community next to the park and approximately 1500 feet at the adjacent interchange and detention basin at Redlands Ave. AR:7992, AR:7993 (showing Paragon Park southwest of intersection of Placentia Ave & Redlands Ave), AR:9220, AR:9223. In the neighboring community at the intersection with Evans Road, the MCP measures approximately 1700 feet in width accounting for all road improvements. AR:7994, AR:9224. The claim in the EIR/S that the "right of way varies from 220 ft to 660 ft in width" vastly understates the actual width by roughly 1,000 feet where it reaches over 1,700 feet in width. *Compare* AR:6161 with AR:10335.

Even if the appendices were easily decipherable, the Draft EIR/S and Recirculated EIR/S did not include a comparable "Conceptual Plan of the Preferred Alternative (Alternative 9 Modified with the San Jacinto River Bridge Design Variation)"; that detail was only provided in the Final EIR/S twelve days before the approval of the MCP. "[T]he broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). Previous parcel acquisition maps were at the citywide scale which hindered the ability of residents, affected property owners, and the public to comprehend a sense of the impacts to their property and community. AR:3601-3725 (Draft EIR/S), AR:5909-46 (Recirculated EIR/S).

The blatant understatement in width of over 1,000 feet at areas throughout the route is no minor oversight to communities that suffer additional pollution, traffic, noise, and aesthetic impacts of a freeway dividing their neighborhoods. *E.g.* AR:10250, AR:10194 Yet, the EIR/S masks these impacts by minimizing the width of the Project and engaging in a conflicting and enigmatic approach for disclosure, which precludes informed analysis by the public and decision makers in violation of NEPA. *See Native Ecosystems Council*, 418 F.3d at 960.

B. Failure to Objectively Evaluate the Effects of NEPA Alternatives

The EIR/S misrepresents the environmental impact of the MCP and alternatives, which fails to inform the public and decision makers of the relative impacts and merits of the Project and results in a misleading depiction of the preferred alternative. The alternatives section is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. This section must, among other things, "[r]igorously explore and objectively evaluate all reasonable alternatives, and. . . [d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits." *Id.* "[T]he touchstone for [the court's] inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

Instead of accurately depicting the effects and alternatives the EIR/S relies upon a hypothetical future baseline of development: businesses and employees that *could* be affected by Alternative 5 *should* those businesses ever be built, and compares those effects to the *existing* homes and residents who *would* be displaced by Alternative 9. Petitioners repeatedly emphasized that the EIR/S must not rely on hypothetical development because it "fabricates an inflated future growth and baseline in order to justify the Project and mask its numerous impacts." AR:9818, AR:9824-25, AR:10792, AR:13496-97. A flawed baseline precludes an accurate analysis, which is essential to implementing NEPA, and renders an EIS arbitrary and capricious. *Or. Nat. Desert Ass'n v. Jewell*, 823 F.3d 1258, 1264-65 (9th Cir. 2016). This inconsistent comparison results in a misleading EIR/S because it does not provide an objective comparison of the varying effects to the communities in Perris or the environmental justice impacts of the different alternatives.

In comparing alternatives the EIR/S claims that "Alternative 5 Modified

would bisect several large intermodal distribution centers along Rider Street, as well as impact commercial and industrial businesses adjacent to I-215, and a few industrial businesses along Perris Boulevard." AR:6051. Those "large intermodal warehouses [are] approved but not yet constructed and operational" and, yet, the EIR/S treats them as built for purposes of analyzing impacts. AR:6431, AR:6052. "Should these warehouse uses be displaced by Alternative 5 Modified", they "may not be able to be relocated within the Perris area." AR:6431, AR:6052. That assertion is purely speculative.[4] The warehouses are not constructed, no employers have purchased them, no employees work in them, and no analysis has been conducted about the availability for large replacement parcels. Relying on this hypothetical future baseline FHWA concluded that "[b]ecause of this potential loss of major employers . . . Alternative 5 is considered to have disproportionately high and adverse impacts to environmental justice populations." AR:6432.

FHWA did not make this same conclusion about its preferred alternative (Alternative 9) despite it "divid[ing] an existing community" and resulting in approximately 100 relocations of residential properties and displacement of 396 residents "with high percentages of low-income and/or minority populations." AR:6432, AR:6051, AR:6208. The EIR/S determines that there is "ample supply of existing housing stock in the immediate area," and thus, "Alternative 9 Modified is not considered to have disproportionately high or adverse impacts to environmental justice populations." AR:6432. However, the EIR/S bases this conclusion on the comparison of *hypothetical* future businesses and warehouses

[4] AR:107850 ("planned businesses … within… the Perris Valley Commerce Center Specific Plan approved by the City of Perris in 2011"), AR:89209 (Perris Ridge Commerce Center II in the "planning stage" includes hypothetical "401 estimated impacted employees … included in all nonresidential tables and discussions"), AR:6291 (Proposed Perris Ridge Commerce Center II).

that are not built, versus the *actual* homes and residences that exist in the area today. The EIR/S recognizes that Alternative 9 "would result in the highest impacts to residential relocations in areas with minority and low-income populations," but disregards those immediate impacts in favor of speculative future impacts. AR:6052, AR:6217. Misrepresenting the impacts to environmental justice populations is a "clear error of judgment" that is arbitrary and capricious because "the agency offer[s] an explanation that runs counter to the evidence before the agency." *See Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003).

Aerial photos and maps of the alternatives demonstrate that Alternative 5 would be built north of Rider Street where there is mostly vacant land. AR:6620. However, Alternative 9 would divide the existing neighborhood northeast of the intersection of Perris Boulevard and Placentia Avenue. AR:6620. This type of apples to oranges comparison improperly masks the very real impacts to disadvantaged residents based on warehouse employers that may never materialize. Indeed, the lack of transparency was noted by RCTC commissioners during the hearing approving the MCP when "Commissioner Jeffries expressed concern that [the amount of homes and business impacted] was not disclosed to the Commissioners" despite the conflicting representations in the EIR/S. AR:51565

In order to "objectively evaluate… so that reviewers may evaluate their comparative merits" of alternatives, as required by NEPA, the EIR/S could have compared existing residents to existing businesses and employees, or future residents to future businesses and employees. 40 C.F.R. § 1502.14. The EIR/S had the same information about planned developments for both residential and business projects, yet chose to employ the comparison in a way that puts the finger on the scale to inflate baseline impacts to employees and minimize impacts to residents. Relying on an inaccurate baseline to compare environmental effects leads to an improper NEPA analysis. As the Ninth Circuit recently held, in order to establish

an accurate baseline an EIS must succinctly describe the environment of the areas to be affected by the alternatives under consideration, and insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. *Jewell,* 823 F.3d at 1264 (citing 40 C.F.R. §§ 1500.1(b), 1502.15,). In *Jewell* the Ninth Circuit found that the Bureau of Land Management did not accurately assess the existing baseline conditions in the area by discounting the presence of sensitive species. *Id*. at 1264-65. Similarly FHWA's improper inflation of hypothetical future businesses and employees that could be affected by Alternative 5 to mask the impacts to the actual current residents affected by Alternative 9 fails to provide the accurate analysis and public scrutiny that are "essential to implementing NEPA" and meet the agency's obligation to "insure the professional integrity, including scientific integrity, of the discussions and analyses" *See id*. at 1265 (citing 40 C.F.R. §§ 1500.1(b), 1502.24).

As Plaintiffs emphasized during comments, relocations of residents by Alternative 9 would occur in an area "dominated by minority, and Hispanic residents with high percentages of disadvantaged students" and must be objectively analyzed. AR:107850- AR:107851. A 2003 report by the Civil Rights Project at Harvard University found that "when housing is taken away for freeway projects in minority and low-income communities or becomes unaffordable, the displaced individuals have fewer options for seeking alternative housing and may end up living farther away from their jobs and social networks." AR:15974. The report went on to find that "an individual's residential location is crucial and encompasses not only issues of affordability, but also access to public schools, police and fire protection, and public transportation." *Id*. Indeed affected residents in Perris expressed exactly these concerns during public comment:

> it's going to be hard to buy another house because my credit is not the way it used to be because I don't have the income that I used to have… I have an

> 11-year old and a 8-year old. They're happy in the house that they live. They happy with their school that they go… don't want to lose my neighbors. I don't want to lose my friends.

AR:51785, AR:51562-3.

The MCP will also have significant, negative impacts on the residential community. "[L]ow income and minority communities face greater risks from environmental pollution as a result of living and working near highly polluted areas, including highways." AR:15973. Residents would also deal with "disruption of local traffic patterns [due to closures] and access to residences, businesses, and community facilities; increased traffic congestion; and increased noise, vibration, and dust." AR:6404-5. Access and use of schools and neighborhood parks would also be impacted. AR:6405. Dozens of road closures would separate homes from schools, parks, and neighbors. AR:7952-74 [Attachment G to Appendix I].

FHWA's reliance on dubious economic assumptions to justify a preferred alternative under NEPA should be rejected because it does not "state a rational connection between the facts found and the decision made." *NRDC v. U.S. Forest Serv*., 421 F.3d 797, 806 (9th Cir. 2005). In *NRDC*, the U.S. Forest Service misinterpreted data from economic reports to justify choosing the preferred alternative because it resulted in better "projected market demand scenarios." *Id.* at 807. The Forest Service's mistake "doubled the demand projection," which the agency used to gauge the relative desirability of each of the proposed alternatives. *Id*. The Ninth Circuit held that the Forest Service's EIS was misleading, violating NEPA, because it relied on these inflated projections to select an alternative. *Id.* at 807-08, 816. The EIR/S here also relied upon inflated forecasts of job losses and economic impacts to claim that the preferred alternative would have less impacts on environmental justice populations and the community. This led the FHWA to choose Alternative 9 based on inaccurate and misleading data that does not "state a

rational connection between the facts found and the decision made." *See id.* at 806.

C. Failure to Provide a Reasonable Range of NEPA Alternatives

FHWA's failure to develop a reasonable range of alternatives for the revised MCP that included new north-south upgrades to I-215 and a truncated west-east route runs afoul of NEPA because the EIR/S simply relies on alternatives proposed or eliminated for a different project—the original thirty-two mile, west-east project. FHWA changed the project, eliminated alternatives based on the previous version of the MCP, and yet failed to develop alternatives to meet the new project. Instead FHWA simply advanced the same routes and lane dimensions from the previous alternatives analysis. FHWA fails to analyze reasonable alternatives such as incorporating HOV lanes, different road alternatives such as those that proved viable for the western half of the MCP, or combining road upgrades with transit. Instead, the EIR/S relies upon three Build Alternatives with the same number of lanes, same I-215 upgrades, same fourteen mile west-east route connection with the Ramona Expressway and that only vary in their route through the city of Perris.

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

767. "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

1. Evolution of the MCP and Environmental Review

Prior to moving forward with the MCP, FHWA and RCTC conducted a Tier 1 EIR/S[5] for the "preservation of right-of-way for a transportation corridor" in western Riverside County. AR:52393. Instead of fully evaluating all the Tier 1 alternatives RCTC moved forward with the MCP without completing a Final EIR/S. AR:6019.[6] FHWA and RCTC initiated environmental review for the MCP as a thirty-two mile freeway between I-15 and SR-79. AR:6138. The 2004 notice for the Draft EIR/S described eight project alternatives for the thirty-two mile MCP. AR:1073. In September 2007, over one year before the circulation of the Draft EIR/S, the RCTC Board selected a Locally Preferred Alternative (Alternative 9 Temescal Wash Design Variation) for the MCP. AR:6138, AR:1174.

When the Draft EIR/S was circulated in October 2008 it proposed seven project alternatives: two No Project Alternatives (Alternatives 1A and 1B) and five Build Alternatives (Alternatives 4, 5, 6, 7, and 9). AR:1097. All of the Build Alternatives in the Draft EIR/S were "six- to eight-lane, controlled-access" freeways for the eastern half of the thirty-two mile MCP between I-215 and SR-79. AR:1099, AR:1105, AR:1111, AR:1118, AR:1124.

In 2013, FHWA issued a Recirculated EIR/S when it determined only to proceed with the sixteen mile eastern span of the MCP from I-215 in Perris to SR-

[5] "Tiering" is appropriate for general matters at an earlier stage with subsequent narrower analyses incorporating the earlier analysis. 40 C.F.R. § 1508.28.

[6] A Final Tier 1 EIS/EIR was "not completed… and all of the data and analyses contained in the… Tier 1 EIS/EIR needed to be updated for the analysis of the MCP Alternatives." AR:6094.

79 in San Jacinto, thus eliminating the western sixteen miles between I-15 and I-215. AR:3781. All of the alternatives, except for No Project alternative 1A, included a six lane roadway. AR:3907, AR:3911, AR:3958. Specifically, the Recirculated EIR/S, which was later adopted as the Final EIR/EIS, included three Build Alternatives (4, 5, and 9) with two design variations (San Jacinto River Bridge and San Jacinto North), and the two No Project/No Action Alternatives (Alternatives 1A and 1B). AR:3803. Alternatives 1A and 1B were simply for "comparison of future with-project conditions to the future without-project ground conditions" and "not developed to meet the defined project purpose" or to be viable for approval by FHWA. AR:6200-01.

The alternatives in the Recirculated and Final EIR/S for the sixteen mile west-east component of the shortened MCP followed the same alignment as the eastern half of the original thirty-two mile freeway analyzed in the Draft EIR/S, except that Alternative 9 was designed to avoid Paragon Park and Fire Station No. 90. *Compare* AR:1089 to AR:6616. The routes east of I-215 were designed to directly connect to the western half of the original thirty two-mile MCP and not proposed as independent alternatives for an eastern route. *See e.g.* AR:1089.

The MCP in the Recirculated and Final EIR/S also included a different component than the earlier project, a north-south upgrade to I-215 for approximately 6 miles that added lane capacity and intersection upgrades between Van Buren Boulevard adjacent to the March Air Reserve Base in the north and Nuevo Road in the south and was a common element of all of the Build Alternatives. *See e.g.* AR:6028, AR:6101.

The Final EIR/S noted alternatives that were eliminated from consideration because of issues affecting the western half of the original thirty-two mile MCP including engineering issues associated with the Cajalco Dam and Metropolitan Water District Facilities or "the modification to the project limits" to the sixteen

mile MCP after the circulation of the Draft EIR/S. AR:6250, AR:6251, AR:6252. Thus, outside of the design variations proposed in the Recirculated EIR/S and Final EIR/S no additional alternatives were proposed or analyzed for the MCP after it was cut in half and the north-south freeway upgrades to I-215 were included in the revised sixteen mile project.

2. FHWA Fails to Analyze a Reasonable Range of Alternatives for a New, Revised Project

Plaintiffs noted that moving forward with the same alternatives in the shorter sixteen mile MCP did not result in a reasonable range of alternatives because many of the alternatives proposed, but eliminated, were eliminated due to constraints on the original thirty-two mile MCP. AR:9826, AR:14532, AR:15977-78. Thus, once the MCP was reduced to sixteen miles and added approximately six miles of upgrades to I-215, there was no disclosure or analysis of alternatives to the shortened MCP beyond the previous alternatives proposed for the eastern sixteen miles of the thirty-two mile facility.

FHWA admits that "the alternatives discussed in Section 2.6, Alternatives Considered and Withdrawn from Further Consideration, starting on page 2-117 in the Final EIR/EIS are alternatives that were considered for the original thirty-two mile-long MCP facility." AR:9928, AR:9914. Yet, all of these alternatives were eliminated because of constraints affecting the western half of the original thirty two mile MCP, not the sixteen mile revised MCP. AR:6251, AR:6252 (engineering issues associated with the Cajalco Dam and Metropolitan Water District Facilities or "the modification to the project limits" to the sixteen mile MCP). Despite FHWA's claims that the shortened MCP has independent utility and logical termini and "will provide more direct routes for travelers… whose trips require east-west movements in addition to north-south movements" along the I-215 upgrade there is no evaluation of a range of alternatives for the sixteen mile MCP outside the

alternatives carried forward from the original thirty-two mile design. AR:9919, AR:6130-31. The shortened west-east route and over six mile north-south upgrades to I-215 create an *independent* project to the original facility, yet no independent alternatives analysis of those alternatives is provided.

FHWA further claims that the range of alternatives is reasonable because the "foundation for the range of alternatives considered for the modified MCP project in the Recirculated EIR/S is found in the initial CETAP planning that was conducted as part of the RCIP from 1999-2000." AR:9928. However, the FEIR/S admits that EIR/EIS process was "not completed… and all of the data and analyses contained in the… Tier 1 EIS/EIR needed to be updated for the analysis of the MCP Alternatives." AR:6094. FHWA cannot properly rely upon an uncompleted analysis that it acknowledges needs to be updated and is over fourteen years old.

FHWA only provides a conclusory analysis for the justification of the range of alternatives for the shortened MCP. AR:9929-30. There is no further discussion of why the alternatives already proposed for a larger, different project, still constituted a reasonable range of alternatives. Plaintiffs recognize that Alternative 9 in the Final EIR/S included a design variation to avoid Paragon Park and Fire Station No. 90 and integrate the San Jacinto River Bridge design that was not included in the Draft EIR/S. However, slight variations on the alignment of the adopted route does not constitute the reasonable range of alternatives contemplated by NEPA. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218-19 (9th Cir. 2008) (rejecting agency's consideration of "a very narrow range of alternatives," "hardly different" from one another).

3. FHWA's Failure to Analyze Anything But Six Lane Mixed-Flow Freeways Is Not a Reasonable Range of Alternatives

FHWA also fails to analyze viable alternatives proposed by the public and transit agencies. Early and often throughout the MCP environmental review

process Plaintiffs suggested environmentally superior alternatives including, among other things, HOV lanes, reducing reliance on single occupancy automobiles through increased transit, transportation demand reduction, and various non-freeway lane configurations. *E.g.* AR:145-6, AR:506, AR:13640-1, AR:13678, AR:14527. Similarly, the Riverside Transit Agency suggested alternatives that integrate with public transit including "[d]esignated traffic lanes… for carpools and transit." AR:59425-26, AR:11056, AR:13640-1.

FHWA completely fails to propose or analyze an alternative that incorporates HOV or carpool lanes, (AR:6172), despite the fact that it claims to rely on the Tier 1 analysis as the foundation of alternatives. The Tier 1 analysis stated that RCTC, Riverside County, and the affected cities placed a "specific emphasis on the ongoing development of HOV facilities in Riverside County" and included project designs with "the provision of HOV lanes as part of the preferred [] alternative." AR:9928, AR:52457. FHWA's failure to describe why it failed to analyze an alternative that considered HOV lanes runs contrary to NEPA. *See N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969,978 (9th Cir. 2006) ("An agency must…explain its reasoning for eliminating an alternative."). FHWA's claims that HOV lanes were not considered because "no traffic congestion is expected on the MCP facility through the horizon year of 2040" is belied by the recognition in the FEIR/S that there will be "some improvements" or "no substantial change" to traffic compared to the no build conditions. AR:6172, AR:7357. Moreover, it fails to recognize the substantial greenhouse gas reductions that can result from reductions in single vehicle automobile use and increased transit alternatives. AR:013678, AR:013693 (Attorney General: "alternatives to individual vehicle travel" and public transit reduce greenhouse gas emissions).

Similarly, the EIR/S fails to consider alternative lane configurations that meet the revised MCP's Purpose and Need, outside of solely six lane freeway

alternatives. FHWA and RCTC admit that a non-freeway alternative is viable for the western portion of the former MCP from I-15 to I-215, which is closer to job centers and housing in the city of Riverside and Orange County. AR:6020. However, no attempt is made to develop or analyze an alternative that relies on upgrades to the existing road network, except for No Action Alternative 1B, which FHWA concedes was developed simply for comparison and not an attempt to analyze viable alternatives because it could not meet the MCP's Purpose and Need. AR:6200-01. Likewise, the Final EIR/S fails to analyze any alternative that includes potential combined transit and roadway improvements. The Final EIR/S claims that transit is not a viable alternative because one of the Project objectives is to "move goods", which could not be achieved via transit. AR:9927. However, this does not account for upgrades to *both* transit and existing roadways and the Final EIR/S recognizes that "[s]tate highways and other roads" can be designed to meet the design STAA truck standards. AR:009915. Instead, FHWA relies upon earlier screening of alternatives for a different project—the thirty-two mile west-east MCP—in order to summarily reject viable alternatives.

The Ninth Circuit has held an EIS inadequate because it failed to consider an obvious, reasonable, and less environmentally damaging alternative. In *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980), the agency proposed a 10.8 mile highway segment. *Id.* at 777. The range of alternatives included different locations for the highway, but all of the build alternatives were four lanes. *Id.* at 784. The court faulted the agency for failing to consider "an improved and widened two-lane road for any portion of the project," which "was both reasonable and obvious." *Id.* at 783-84. Because the state originally planned for a two-lane road for part of the project, evidence showed that auxiliary lanes could improve traffic capacity, some areas did not present the same safety needs, lower traffic capacity was acceptable in some towns, and that parkland would be

spared by a two-lane road, the court found the EIS deficient for failure to consider a two-lane alternative. *Id.* at 784. Similarly here, the MCP EIR/S only considers six lane alternatives that could be widened to eight lanes in the future. AR:6161. There is no consideration of a four lane alternative with an HOV lane or combined transit and road upgrades, which could meet the project objectives while reducing the greenhouse gas and air pollution impacts and encouraging carpooling and transit.

The Ninth Circuit's decision on a proposed highway in *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.* also provides guidance on a reasonable range of alternatives. 123 F.3d 1142 (9th Cir. 1997). In *Carmel-by-the-Sea* the purposes of the freeway project included relieving traffic congestion, improving safety, and meeting traffic service needs for the following twenty years. *Id.* at 1155. The alternatives considered included a new freeway, improving the existing highway, or both. *Id.* at 1157-58. It also considered, but rejected, HOV lanes among other alternatives. *Id*. at 1158. The Ninth Circuit concluded the alternatives "span[ned] the spectrum of 'reasonable' alternatives" and thus satisfied NEPA. *Id.* at 1159.

In the present case all of the alternatives, besides the No Action alternatives, are a new six lane freeway that varies by less than two miles from north to south through the City of Perris. AR:6161, AR:6174 (Compare scale to alternative routes). Even No Action Alternative 1B is a six lane roadway upgrade contemplated by the General Plan. AR:6201. However, the Final EIR/S recognizes that Alternatives 1A and 1B were "not developed to meet the defined project purpose" and only "to allow for comparison" of conditions with and without the Build Alternatives. AR:6200-01. Thus the only variation in the viable alternatives is a two mile west-east route through the City of Perris; the eastern fourteen miles of the Build Alternatives follow the same route, and all of the Build Alternatives include the same upgrade of I-215. *See e.g.*AR:6174, AR:6612 (Compare scale to alternative routes). Simply analyzing the same Project, except for a two mile

stretch through the City of Perris, for all of the viable alternatives, which are carried over from a different project does not "span the spectrum of reasonable alternatives" required by NEPA. *See Carmel-by-the-Sea*, 123 F.3d at 1157-59.

Technical traffic reports completed for the MCP determined that a six-lane freeway would be required to accommodate the predicted level of traffic, yet no analysis was done to determine whether HOV lanes or public transit could be included to meet the total six lane traffic demand. AR:98148. Alternatives with fewer mixed-flow lanes or integrated transit seem to be both reasonable and obvious, and like in *Coalition for Canyon Preservation*, it is likely that making the MCP less than six mixed flow lanes in some stretches of the road (to protect important areas, or because certain portions require less capacity), including HOV lanes or integrating public transit could still meet the desired traffic demand.

D. The Mid County Parkway Violates Section 4(f) of the Department of Transportation Act

FHWA fails to provide evidence in the record that feasible and prudent alternatives, including Avoidance Alternative 3 Option B ("Avoidance Alternative 3B"), cannot be implemented to avoid Section 4(f) resources and it cannot demonstrate that there are "severe" or "uniquely difficult" problems of "extraordinary magnitudes" as required under Section 4(f) to permanently use historic resources that the statute protects. *Stop H-3 Ass'n*, 740 F.2d at 1449; 23 C.F.R. § 774.17. Plaintiffs noted that the environmental review "fails to analyze all feasible alternatives" to avoid Section 4(f) resources including the Multi-Use Prehistoric Site because it "fails to properly conduct an alternatives or mitigation analysis that demonstrates there are no feasible and prudent alternatives." AR:009886.

"Section 4(f) is 'a plain and explicit bar to the use of federal funds for construction of highways [which use Section 4(f) resources]—only the most

unusual situations are exempted.'" *Overton Park*, 401 U.S. at 411 (1971). "A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other *severe problems of a magnitude that substantially outweighs* the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17 (emphasis added). Section 4(f) resources "may be 'used' for highway purposes only if 'there [are] truly unusual factors present in [the] case,' if 'feasible alternative routes involve uniquely difficult problems,' or if 'the cost or community disruption resulting from alternative routes [reach] extraordinary magnitudes.'" *Stop H-3 Ass'n*, 740 F.2d at 1449 (alterations in original) (quoting *Overton Park*, 401 U.S. at 413, 416).

1. The Record Does Not Support the Determination that Avoidance Alternative 3B Is Not Prudent

The Final EIR/S acknowledges that the MCP will permanently "use" Section 4(f) resources including five historic sites: a multi-use prehistoric site ("Multi-Use Prehistoric Site") (P-33-16598) and four cultural resource sites (P-33-19862, P-33-19863, P-33-19864, and P-33-19866). AR:7532.[7] Plaintiffs address FHWA's analysis of the Multi-Use Prehistoric Site in Chapter 4.[8]

The Multi-Use Prehistoric Site is approximately 78.5 acres and includes rock shelters, ceremonial areas with rock art panels, milling features with bedrock mortars and slicks, midden deposits, areas of former habitation, and other artifacts. AR:7545. Each Build Alternative, including the approved route, would use 2.6 acres or 3.3% of the total area of the prehistoric site. AR:7547. In the section 4(f)

[7] Despite adjacency to parks and schools FHWA determined that the nearby parks, schools, and trails subject to Section 4(f) protections will not be permanently and substantially impacted constituting "constructive use." AR:7532-3.

[8] FHWA conducted two feasible and prudent analyses: Chapter 4 addressed the Multi-Use Prehistoric Site (AR7546-71); and Chapter 5 analyzed the four remaining cultural resource sites together. AR:7572-93.

analysis, FHWA evaluated the two No Build Alternatives, 1A and 1B from the NEPA analysis, and four avoidance alternatives. AR:7551-64, AR:10056. All avoidance alternatives were determined to be feasible in terms of sound engineering, but two would not meet the project purposes and thus, were considered imprudent. AR:7552. The two remaining alternatives—Avoidance Alternative 1 and Avoidance Alternative 3 (Options A and B)—were evaluated further to determine whether they would be "prudent" under the regulatory standards as defined by 23 C.F.R. § 774.17.

While Plaintiffs' position is that FHWA short-circuited Section 4(f)'s substantive requirements for Avoidance Alternatives 1, 3A and 3B, we focus the Court's attention on Avoidance Alternative 3B. Avoidance Alternative 3B "would shift the alignment at least 0.6 mi south of the Ramona Expressway… into the Lakeview Mountains." AR:7563. This route would not use a 1.5 mile segment of the Ramona Expressway, require "slightly more right of way", impact more non-transportation land uses, use approximately 35 more acres of a regional Habitat Conservation Plan "criteria areas", impact one prehistoric site, require construction on steep terrain for a distance of about 1.2 mi causing an increase in the project construction costs by roughly $39 million, require two additional crossings of the Colorado River Aqueduct, result in changes in the cut and fill, result in additional visual impacts, and would not serve the planned residential and employment growth in the San Jacinto Valley area without an additional extension of the future Park Center Drive. AR:7563-4

FHWA determined that Avoidance Alternative 3B was not prudent because it would not use a 1.5-mile-long segment of the existing Ramona expressway, substantially increase the project costs to an "extraordinary magnitude", and would result in substantially greater right of way and land use impacts, and contributions to cumulative impacts compared to the MCP Build Alternatives. AR:7560,

AR:7564. FHWA references Table 4.4, which provides an analysis of the feasible Avoidance Alternatives to determine whether they are prudent as defined by regulation. AR:7556-60. An avoidance alternative is not prudent if

> (3)(iii) After reasonable mitigation, it still causes:
> (A) Severe social, economic, or environmental impacts;
> (B) Severe disruption to established communities;
> (C) Severe disproportionate impacts to minority or low income populations; or
> (D) Severe impacts to environmental resources protected under other Federal statutes;
> (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
> (v) It causes other unique problems or unusual factors; or
> (vi) It involves multiple factors in [these] paragraphs . . .of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

23 C.F.R § 774.17 ("Feasible and prudent avoidance alternative" definition).

FHWA found that "[b]ased on the alignment through the Lake View Mountains, and the resulting greater amount of right of way and land use impacts" Avoidance Alternative 3B was not prudent because it would result in relatively greater impacts under a number of factors that cannot be supported by the record before FHWA or the Court. AR:7557-59. However, FHWA fails to provide sufficient information in the record to demonstrate that Avoidance Alternative 3B is not prudent, as required under 23 C.F.R. § 774.7(a) ("Section 4(f) evaluation… shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative"). Moreover, FHWA fails to demonstrate that the impacts meet the high bar to determine an alternative is imprudent under Section 4(f). "The Ninth Circuit has stated that alternatives are imprudent only where 'there [are] truly unusual factors present in [the] case,' if 'feasible alternative routes involve uniquely difficult problems,' or if 'the cost or

community disruption resulting from alternative routes [reach] extraordinary magnitudes.'" *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1117 (C.D. Cal. 1999) (alterations in original) (quoting *Stop H-3 Ass'n*, 740 F.2d at 1449).

The record does not support the determination that the "existing and planned land uses and resulting environmental impacts" of Alternative 3B would cause "severe disruption to established communities" that are "substantially greater and more severe." *See* 23 C.F.R. § 774.17(3)(iii)(B)("Severe disruption to established communities"); AR:7558, AR:7560, AR:7564. Table 4.5 calculates the impacts to existing and planned land uses, which states that Avoidance Alternative 3B will impact a total of 240.1 acres of existing land uses compared to the MCP adopted alternative of 152 total acres. AR:7562. However, 101.8 acres of the existing land uses impacted by Avoidance Alternative 3B are "Vacant Land." AR:7562. *Vacant* land is the *absence* of a land use, not a land use. When "Vacant Land" is removed from the "Existing Land Use" totals, Avoidance Alternative 3B results in *less* impacts to existing land uses than the preferred alternative. AR:7562.[9] Less land use impacts and impacts to vacant land cannot be substantially greater or more severe than impacts to existing land uses.

Similarly, the record does not Support the determination that Avoidance Alternative 3B "would impact minority or low income populations more than the MCP Build Alternatives."*See* 23 C.F.R. § 774.17(3)(iii)(C)("Severe disproportionate impacts to minority or low income populations"); AR:7558. There is no discussion or analysis about how Avoidance Alternative 3B would impact those populations. Table 4.5 does state that Avoidance Alternative 3B would impact 1.1 acres more of residential land uses and 2 acres more of public facilities.

[9] Avoidance Alternative 3B Existing land uses total 138.3 acres (240.1[total] minus 101.8[vacant land]). MCP Build Alternatives land uses total 145.7 (152 [total] minus 6.3 [vacant land]).

AR:7562. However, there is no discussion about whether and how the residential areas actually include residences, or whether the impacts to residences and public facilities would disproportionately impact minority or low income residents. Even if there is an additional 3.1 acres of impacts to those communities it is a slight increase relative to the overall impacts of the total project and "does not cause other severe problems of a magnitude that substantially outweighs" impacts to Section 4(f) resources. *See* 23 C.F.R. § 774.17.

While the record does demonstrate there would be more impacts to MSHCP Criteria areas under Avoidance Alternative 3B, it does not demonstrate that there will be "substantially greater and more severe" "environmental impacts" than the preferred alternative. AR:7557; *see* 23 C.F.R. § 774.17(3)(iii)(A)("Severe… environmental impacts"). Nor does it show that there will necessarily be "greater and more severe impacts to biological resources (plant and animals and the habitats in which they occur) in Western Riverside County MSHCP designated Critical Habitats." AR:7558; *see* 23 C.F.R. § 774.17(3)(iii)(D)("Severe impacts to environmental resources…").

While the record does support FHWA's assertion that there will be more impacts to Western Riverside County MSHCP criteria areas, there is no discussion or analysis of the impacts on the environment or biological resources in those criteria areas. AR:7562 (use of approximately 35 more acres). The biological resources within the criteria areas are not universally valuable because the criteria cells designate areas where certain resources are to be conserved and other resources may not be as biologically valuable. AR:7062 ("MSHCP requires conservation of only those portions of the cells that meet the criteria for conservation"). For example, areas north of the Ramona Expressway may be dairy operations that are degraded as habitat, but still designated as a criteria cell. AR:7018. Additionally the Section 4(f) analysis fails to disclose impacts of

Avoidance Alternative 3B because the route is not disclosed. AR:7546("the avoidance alternatives in the vicinity of [the Multi-Use] prehistoric site [] not shown… to protect that prehistoric site from unauthorized artifact collecting, vandalism"). The record simply cannot support the determination of greater impacts to environmental and biological resources because there is no analysis or disclosure of the underlying resources impacted in the criteria cells.

Moreover, alternatives can be considered prudent even when they have significant consequences. In *Stop H-3 Association*, the court emphasized that protection of Section 4(f) lands is of "paramount importance." 740 F.2d at 1451 (quoting *Overton Park*, 401 U.S. at 412-13). There, the Ninth Circuit held that although an alternative involved displacing one church, four businesses, and thirty-one residences, it did not "r[i]se to the level" of a disruption of extraordinary magnitude. *Id.* Additionally, the increased cost of $42 million was not extraordinary, "especially in light of the projected total cost" of $386 million. *Id.* at 1452. And although the alternative also increased noise, air quality, and visual impacts to nearby residences, these likewise did not constitute disruptions of extraordinary magnitude. *Id.* Even the increased safety concerns were insufficient to support a determination that the alternative was imprudent. *Id.* 1452-53.

For FHWA to comply with Section 4(f), the imprudent alternatives that did meet the project purposes must have had "uniquely difficult problems," a "cost or community disruption" of "extraordinary magnitudes," or other "truly unusual factors," *Stop H-3 Ass'n*, 720 F.2d at 1449. The use of approximately 35 more acres of Western Riverside County MSHCP criteria areas does not meet this standard. AR:7562. Even when an alternative results in greater environmental impacts than the proposed use, those impacts must be of an extraordinary magnitude to make a finding that an alternative is not prudent. *Stop H-3 Ass'n*, 740 F.2d at 1452 (concluding that despite increased noise, air quality, and visual

impacts, alternative not imprudent under Section 4(f)). Here, greater impacts on MSHCP criteria areas does not automatically prove greater impacts on biological or environmental resources without site specific analysis to determine whether those environmental resources actually exist within the project footprint. "Even if the alternatives might impact biological resources more than the proposed use, these are not "of a magnitude that substantially outweighs" impacts threatened by use of Section 4(f) lands." *See* 23 C.F.R. § 774.17. While increased use of MSHCP lands is unfortunate, protection of Section 4(f) lands is of "paramount importance." *See Stop H-3 Ass'n*, 740 F.2d at 1452 (quoting *Overton Park*, 401 U.S. at 412-13).

The record does not demonstrate that the increased construction costs of Avoidance Alternative 3B are of an "extraordinary magnitude." *See* 23 C.F.R. § 774.17; AR:7558-9. $39 million is an approximate increase in construction and total costs of only 2-3 percent of the $1.732 billion project cost, not "18 to 20 percent" asserted in the Section 4(f) analysis. AR:6250; AR:007558-9.[10] Using inflated comparisons to assert a cost increase of extraordinary magnitude misleads the public and decision makers and offers an explanation "that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

The 2-3 percent increase in project costs of $39 million is not of an extraordinary magnitude under Section 4(f). AR:7558-9. *Stop H-3 Ass'n*, 740 F.2d 1441, 1452. In *Stop H-3 Association*, an increased cost of "$42 million (1978 dollars)" was not extraordinary, "especially in light of the projected total cost" of $386 million. *Id*. at 1452. Avoidance Alternative 3B only increases project costs by $39 million, less than the total increase in *Stop H-3 Association*, for a project that is at least 4.5 times more costly. Avoidance Alternative 3B only results in a 2-3

[10] A $1.732 billion increase in total cost is 2.2 percent of $39 million, and a $1.35 billion increase in construction costs is 2.9 percent of $39 million.

percent increase in project costs, while the increase in *Stop H-3 Association* totaled 10.9 percent. The increased project cost of Avoidance Alternative 3B does not meet the legal threshold for finding an Avoidance Alternative not prudent.

Based on the impacts described in subsections (3)(iii)(A)-(D) and (3)(iv) of the definition of "feasible and prudent avoidance alternative" in 23 C.F.R. § 774.17, FHWA concludes that Avoidance Alternative 3B is also not prudent under subsection (3)(vi) because the "cumulative impacts" would be "substantially more" for biological resources and would cause a cost increase of an "extraordinary magnitude." AR:7559. Because the record and law does not support FHWA's claims regarding the impacts to biological resources and increased costs, it cannot support a finding that Avoidance Alternative 3B would result in "cumulative impacts" that would be "substantially more" for biological resources and would cause a cost increase of an "extraordinary magnitude." AR:7559. FHWA did not demonstrate that Avoidance Alternative 3B had "uniquely difficult problems," or a "cost or community disruption" of "extraordinary magnitudes" justifying use of Section 4(f) resources. *See Stop H-3 Ass'n*, 720 F.2d at 1449.

VI. THE COURT SHOULD VACATE APPROVAL OF THE MCP

Vacatur of unlawful agency action is the presumptive remedy under the APA, which directs that a "reviewing court *shall* . . . hold unlawful and *set aside* agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or made "without observance of procedure required by law." 5 U.S.C. § 706 (emphasis added). The Supreme Court has explained that if an agency's decision "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Overton Park*, 401 U.S. at 413-14. Vacatur is particularly apt where the agency failed to meet NEPA's requirements to disclose and analyze

before it makes its decision. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1072, 1089 (9th Cir. 2011) (reversing agency approvals authorizing construction of 130-mile railroad line to haul coal due, in part, to NEPA violation); *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 U.S. Dist. LEXIS 79984, at *41 (N.D. Cal. June 16, 2016) (noting that "vacatur is the presumptive remedy" under the APA for procedural violations).

Because vacatur is the presumptive remedy under the APA and Supreme Court precedent, it is the agency's burden to prove that its faulty decision should remain undisturbed; remand without vacatur is the exception rather than the rule. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). In deciding whether to remand without vacatur, a court must weigh "the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Id.* The Ninth Circuit has authorized remand without vacatur in "limited" circumstances," only when the agency shows that "equity demands" it. *Id.* More specifically in the environmental context, the agency must show that vacatur could result in environmental harms. *See id.* Here, FHWA cannot meet this burden—the NEPA errors here are serious and no environmental harm would result from vacatur.

VII. CONCLUSION

For the reasons set forth above, the Court should grant summary judgment in favor of plaintiffs, set aside and vacate the MCP and its approvals, prohibit activities related to the MCP, and order compliance with NEPA going forward.

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CENTER FOR BIOLOGICAL DIVERSITY

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