

CADES SCHUTTE LLP

ORIGINAL

KELLY G. LaPORTE 6294-0
ELIJAH YIP 7325-0
1000 Bishop Street, Suite 1200
Honolulu, HI 96813-4216
Telephone: (808) 521-9200
Facsimile: (808) 521-9210
Email: klaporte@cades.com
eyip@cades.com

Attorneys for Plaintiff
SENSIBLE TRAFFIC ALTERNATIVES AND
RESOURCES, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI ‘I

SENSIBLE TRAFFIC ALTERNATIVES
AND RESOURCES, LTD., dba The
Alliance For Traffic Improvement, a
Hawai‘i non-profit corporation,

Plaintiff,

v.

FEDERAL TRANSIT
ADMINISTRATION OF THE U.S.
DEPARTMENT OF
TRANSPORTATION;
ADMINISTRATOR OF THE FEDERAL
TRANSIT ADMINISTRATION OF
THE U.S DEPARTMENT OF
TRANSPORTATION; DEPARTMENT
OF TRANSPORTATION SERVICES
OF THE CITY & COUNTY OF
HONOLULU; DIRECTOR OF THE
DEPARTMENT OF

CIVIL NO. _____

NOTICE OF HEARING MOTION;
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM IN SUPPORT
OF MOTION; DECLARATION
OF KELLY G. LaPORTE;
DECLARATION OF CLIFF
SLATER; EXHIBITS “1” – “17”;
CERTIFICATE OF
COMPLIANCE WITH LOCAL
RULE 7.5; CERTIFICATE OF
SERVICE

HEARING

Date: _____

Time: _____

Judge: _____

TRANSPORTATION SERVICES OF
THE CITY & COUNTY OF
HONOLULU; JOHN DOES 1-10;
JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE ENTITIES
1-10; and DOE GOVERNMENT
ENTITIES 1-10,

Defendants.

NOTICE OF HEARING MOTION

TO: FEDERAL TRANSIT ADMINISTRATION
OF THE U.S. DEPARTMENT OF
TRANSPORTATION
Hawaii – Region 9
201 Mission Street
Suite 2210
San Francisco, CA 94105-1831

ADMINISTRATOR OF THE FEDERAL
TRANSIT ADMINISTRATION OF THE U.S
DEPARTMENT OF TRANSPORTATION
Hawaii – Region 9
201 Mission Street
Suite 2210
San Francisco, CA 94105-1831

DEPARTMENT OF TRANSPORTATION
SERVICES OF THE CITY & COUNTY OF
HONOLULU
650 South King Street
Third Floor
Honolulu, HI 96817

DIRECTOR OF THE DEPARTMENT OF
TRANSPORTATION SERVICES OF THE
CITY & COUNTY OF HONOLULU
650 South King Street
Third Floor
Honolulu, HI 96817

NOTICE IS HEREBY GIVEN that the above-identified Motion for Preliminary Injunction shall come on for hearing before the Honorable _____, Judge of the above-entitled Court, in his/her courtroom in the United States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawai'i, on _____, at _____ o'clock ____ .m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai'i, November 14, 2003.

CADES SCHUTTE LLP

KELLY G. LaPORTE
ELIJAH YIP
Attorneys for Plaintiff
SENSIBLE TRAFFIC
ALTERNATIVES, LTD.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

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HONOLULU; DIRECTOR OF THE
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HONOLULU; JOHN DOES 1-10;
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ENTITIES 1-10,

Defendants.

CIVIL NO. _____

PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff SENSIBLE TRAFFIC ALTERNATIVES AND RESOURCES, LTD., dba Alliance For Traffic Improvement, a Hawai'i non-profit corporation, by and through its attorneys, hereby moves this Court for an order preliminarily enjoining Defendants FEDERAL TRANSIT ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION; ADMINISTRATOR OF THE FEDERAL TRANSIT ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION; DEPARTMENT OF TRANSPORTATION SERVICES OF THE CITY & COUNTY OF HONOLULU; DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION SERVICES OF THE CITY & COUNTY OF HONOLULU; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; and DOE GOVERNMENT ENTITIES 1-10 (collectively, "**Defendants**"), from construction and operation of the Initial Operating Segment ("**IOS**") identified in the Final Environmental Impact Statement for the Primary Corridor Transportation Project submitted on July 23, 2003, including the encumbrance of any funds for the IOS. A preliminary injunction should issue because Defendants have not complied with the National Environmental Policy Act, 42 U.S.C. §§ 4332 et seq., and the Hawai'i Environmental Policy Act, Haw.

Rev. Stat. ch. 343, in conducting environmental review of proposed actions related to the O'ahu Primary Corridor Transportation Project.

This motion is made pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure, the attached memorandum, and the records and files in this case.

DATED: Honolulu, Hawai'i, November 14, 2003.

CADES SCHUTTE LLP

KELLY G. LaPORTE
ELIJAH YIP
Attorneys for Plaintiff
SENSIBLE TRAFFIC
ALTERNATIVES, LTD.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

SENSIBLE TRAFFIC ALTERNATIVES
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FEDERAL TRANSIT
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Defendants.

CIVIL NO. _____

MEMORANDUM IN SUPPORT
OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This case arises from the City's desperate ambition to provide an answer – any answer, be it right or wrong – to the question of how to deal with Honolulu's traffic congestion problem. The answer, according to the City & County of Honolulu (the “**City**”), is the Primary Corridor Transportation Project (the “**Project**”). At the heart of the Project is a bus rapid transit (“**BRT**”) system consisting of two components: (1) a Regional BRT routing from Kapolei to Downtown; and (2) an In-Town BRT routing through portions of urban Honolulu. The City, however, has found it difficult to garner political support for the Project, which, among other things, makes it challenging to obtain consensus among the various federal, state, and local governmental entities involved in the environmental review process for the Project.

Undeterred, the City has pushed forward with the Project via an innovative circumsppection of the environmental review process with the complicity of the Federal Transit Administration of the U.S. Department of Transportation (the “**FTA**”).¹ The Project began the review process under the National Environmental Policy Act (“**NEPA**”) and the Hawai'i Environmental Policy Act (“**HEPA**”). At the last minute, however, when the opportunity for public comment

¹ FTA is providing federal funding for the Project.

on the Project expired, the City presented an entirely new conception of the Project: the Initial Operating Segment (“**IOS**”). The IOS is a diluted version of the In-Town BRT that does not include a Regional BRT component. FTA has given approval of the IOS separate from its determination on the BRT system originally proposed for the Project, which is pending. The environmental review process has also been bifurcated into separate tracks under HEPA and NEPA even though both statutes require a joint review process. This has allowed the IOS to escape review under HEPA altogether, as the IOS made its first appearance in an environmental impact statement (“**EIS**”) prepared solely for the purpose of satisfying the requirements of NEPA rather than in a joint EIS submitted pursuant to NEPA **and** HEPA. The IOS is nothing more than a “foot in the door” committing the City to eventual construction of a full-scale BRT system on O‘ahu. Historical experience teaches that transit projects, once begun, are highly unlikely to stop mid-way.

Plaintiff Sensible Traffic Alternatives and Resources, Ltd. (“**Plaintiff**” or “**ATI**”) consequently moves this Court for a preliminary injunction against efforts to fund, construct, and operate the IOS pending resolution of this lawsuit. Since the IOS is a “foot in the door,” its progress must be halted unless and until this Court determines that the FTA and the City have complied with NEPA and HEPA. Otherwise, the requirements of NEPA and HEPA are meaningless, for the door to the Project, once unlawfully opened, will inevitably remain ajar.

II. BACKGROUND

Traffic congestion on O‘ahu is a problem of keen interest to ATI. Its members are individuals and businesses involved in Hawai‘i’s tourism industry and other business pursuits. See Decl. of Cliff Slater at 2 (¶ 4). They regularly travel on the City’s highways, use the City’s public transit services, and own property situated along major City highways. See id. (¶ 5). Constraints on the flow of traffic in the City adversely affect the quality of life and economic interests of ATI’s members. See id. (¶ 6). As such, the very mission of ATI is to seek cost-effective solutions to reduce traffic congestion on O‘ahu. See id. (¶ 7). In sum, ATI has a cognizable interest in ensuring that the City does not take action effecting an increase in traffic congestion. See id. (¶ 8).

The City’s proposed solution to traffic congestion in Honolulu is the Project, a rapid-transit plan purportedly “intended to address existing and future mobility constraints in Oahu’s primary transportation corridor.” MIS/DEIS (attached hereto as Ex. “1”) at Abstract. Despite the City’s rhetoric, the Project threatens to worsen rather than improve the traffic situation in Honolulu. The City has staunchly denied this reality, and has manipulated the NEPA and HEPA processes to hide the flaws of the Project from the public.

At the start of the environmental review process under NEPA and HEPA, the City presented three alternatives for the Project. These alternatives

were discussed in a Major Investment Study/Draft Environmental Impact Statement (“**MIS/DEIS**”) for the Project submitted by the Department of Transportation Services of the City & County of Honolulu (“**DTS**”) and the FTA. The three alternatives were:

- (1) The No-Build Alternative, which consists of existing roadway projects, expansion of bus service (additional vehicles and routes) in developing areas to maintain existing service levels, and management of the vanpool program by the City;
- (2) The Transportation System Management (TSM) Alternative, which reconfigures the present bus route network to a hub-and-spoke network to reduce overall travel times, improve schedule reliability, improve operational efficiency, and improve off-peak service.
- (3) The Bus Rapid Transit (BRT) Alternative, which builds on the hub-and-spoke bus system in the TSM Alternative, and adds Regional and In-Town BRT elements. The Regional BRT element includes a continuous H-1 BRT Corridor from Kapolei to Downtown comprised of a new PM zipper land and new express lanes to form an uninterrupted transitway. The In-Town BRT component consists of a high capacity transit spine from Middle Street to downtown Honolulu, a University Branch from downtown Honolulu to UH-Manoa, and a downtown Honolulu to Kakaako/Waikiki Branch.

Roadway elements would be converted for use as Regional and In-Town BRT transitways. In general, the areas that would be converted to transitways are existing general-purpose lanes, shoulders, and medians. The BRT Alternative purportedly incorporates a very high level of transit service to draw people out of single-occupant automobiles.

See MIS/DEIS at S-5. The MIS/DEIS was submitted pursuant to NEPA and HEPA. Id. at cover page.

Shortly after the MIS/DEIS was submitted, the Honolulu City Council (the “**Council**”) adopted Resolution 00-249 selecting the BRT Alternative as the “locally preferred alternative” (“**LPA**”). Subsequently, however, DTS recommended to the Council that it amend portions of the In-Town BRT component of the LPA. On August 1, 2001, the Council adopted Resolution 01-208, CD1, FD1, amending the LPA pursuant to DTS’s recommendations.² See Reso. 01-208, CD1, FD1 (attached hereto as Ex. “2”) (as amended, the LPA is hereafter referred to as the “**Refined LPA**”).

In connection with the Refined LPA, FTA and DTS submitted a Supplemental Draft Environmental Impact Statement (“**SDEIS**”) for the Project in

² The amendments deleted an on-ramp to the H-1 BRT Corridor, deleted a transit center, realigned certain branch lines of the In-Town BRT or portions thereof, and added a “Kakaako Makai” branch line in the Aloha Tower and Kakaako Makai areas to the In-Town BRT. Reso. 01-208, CD1, FD1 at 2-3.

March 2002. See Ex. “3” attached hereto. As with the MIS/DEIS, the SDEIS was submitted pursuant to NEPA and HEPA.

The SDEIS touted the benefits of the Refined LPA. Key examples of transportation performance improvement attributed to the Refined LPA include:

- A 72% increase in transit capacity and frequency of transit service over 1997 levels;
- A 63% increase in transit boardings over 1991 levels;
- Improvement of the person carry ability within urban Honolulu by an average of 11% over the No-Build Alternative;
- Achieving the best level of transit service at key intersections in urban Honolulu compared to the other alternatives; and
- Reduction in parking demand in the Primary Urban Core (i.e., urban Honolulu) due to the Refined LPA’s ability to encourage people to use public transit rather than drive private vehicles.

Id. at 4-1 to 4-2.

When the transportation impacts are analyzed according to the individual components of the Refined LPA, it is clear that the benefits primarily flow from the Regional BRT. For instance, the projected transit travel time in the year 2025 from downtown Honolulu to Kapolei is 53.7 minutes under the No-Build Alternative, 45.5 minutes under the TSM Alternative, and 36.8 minutes

under the Refined LPA. Id. at 4-7, Table 4.1-6. In other words, the Refined LPA achieves time savings of 16.9 minutes over the No-Build Alternative and 8.7 minutes over the TSM Alternative for the trip from downtown to Kapolei. See id. The projected time savings achieved by the In-Town BRT are not nearly so dramatic. See id. For a trip from downtown to Waikiki (areas serviced exclusively by the In-Town BRT), the projected transit travel time in 2025 is 18.7 minutes under the No-Build Alternative, 15.8 minutes under the TSM Alternative, and 15.7 minutes under the Refined LPA. See id. This equals time savings of 3 minutes compared to the No-Build Alternative and 0.1 minutes compared to the TSM Alternative. See id.

After submission of the SDEIS, the environmental review procedure taken by FTA and DTS took a peculiar turn. Because the MIS/DEIS and the SDEIS were each submitted as a single document to meet the requirements of both NEPA and HEPA, there was a legitimate expectation that the final

environmental impact statement (“FEIS”) would be a joint document as well.³ That did not happen. Instead, *two* FEIS’s were submitted at different times. Essentially, FTA and DTS bifurcated the environmental review process into separate tracks – one under NEPA and one under HEPA. The first FEIS was issued in November 2002 by DTS to meet the requirements of HEPA only (the “State FEIS”). See Ex. “4” attached hereto. The State FEIS did not list FTA as a submitting agency. According to the December 8, 2002 edition of the Environmental Notice, a public newsletter published by the Hawai‘i Office of Environmental Quality Control (“OEQC”), then-Governor Benjamin J. Cayetano

³ NEPA regulations state, in pertinent part:

Where State laws or local ordinances have environmental impact statement requirements in addition to but not in Conflict with those in NEPA, Federal agencies shall cooperate in fulfilling those requirements as well as those of Federal laws so that **one document** will comply with all applicable laws.

40 C.F.R. § 1506.2(c) (emphasis added). Similarly, HEPA provides, in pertinent part:

Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and the agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include **joint environmental impact statements with concurrent public review and processing at both levels of government** so that **one document** shall comply with all applicable laws.

Haw. Rev. Stat. § 343-5(f) (emphasis added).

accepted the State FEIS on November 29, 2002.⁴ See Ex. “5” attached hereto. Several facts call the propriety of the acceptance into question. Although the acceptance date was November 29, 2002, the deadline for submission of notices to OEQC for publication in the December 8, 2002 edition of the Environmental Notice was November 26, 2002. See Ex. “6” attached hereto. Acceptance of the State FEIS was also one of Governor Cayetano’s last official acts before he left office on December 3, 2002. His successor, Governor Linda Lingle, is known to hold reservations about implementing the BRT concept in Hawai‘i. See Crystal Kua, “Indecision on transit plan risks \$11 million,” Honolulu Star-Bulletin, Jan. 14, 2003 (attached hereto as Ex. “7”) at 2 (stating that “Lingle has expressed her opposition to bus rapid transit”); Crystal Kua & Richard Borreca, “Light-rail plan gets ho-hum reaction,” Honolulu Star-Bulletin, Jan. 16, 2003 (attached hereto as Ex. “8”) at 2 (stating that “Lingle does not support the mayor’s BRT proposal.”); Ben DiPietro, “Mayor moving ahead with BRT,” Pacific Business News, Jan. 17 2003 (attached hereto as Ex. “9”) at 1.

The second FEIS was submitted by FTA and DTS in August 2003 to meet the requirements of NEPA alone (the “**Federal FEIS**”). See Ex. “10” to Complaint. The Federal FEIS is markedly different from the MIS/DEIS,

⁴ When a project involves use of State land, the Governor is the accepting authority for a FEIS prepared pursuant to HEPA. See Haw. Rev. Stat. § 343-5(b)(1).

the SDEIS, and the State FEIS in that it “places special attention to the Initial Operating Segment (IOS).” This was the *first time* that an EIS ever mentioned the IOS. Id. at IOS-1. The IOS is unlike *any* of the alternatives discussed in the preceding EIS’s. See id. at IOS-2. It does not encompass the Regional BRT component of the Refined LPA. It is more restricted in scope than even the In-Town BRT. See id. The Federal FEIS describes the IOS as a 5.6 mile stretch between Iwilei and Waikiki FTA constituting “the section of the [Refined] LPA that will be constructed first.” Id. at IOS-1.

Inasmuch as the IOS is described in the Federal FEIS as part of the Refined LPA, it appears to be a stand-alone alternative for the Project. The Federal FEIS discloses that the IOS is “not identical to the Iwilei-Waikiki Branch [of the In-Town BRT] that will be in place ultimately,” and lists primary differences between the two. Id. at IOS-7. The Federal FEIS touts the IOS as a “viable . . . stand-alone BRT route.” Id. Moreover, the impacts of the IOS are measured as of *2006* (the first full year in which the IOS will be in service) rather than *2025*, the year for which the Federal FEIS measures the Refined LPA’s environmental impacts. Id. at IOS-2. And, in an unprecedented move, the Federal FEIS revealed that FTA would issue a Record of Decision (“ROD”) – a document recording a federal agency’s decision with respect to an EIS – *as to the IOS alone* and reserve decision on the remainder of the Refined LPA until later. Id. at S-1.

On October 23, 2003, FTA issued a ROD accepting the Federal FEIS as to the IOS alone (the “**2003 ROD**”). See Ex. “11” attached hereto.

Taken alone, the IOS is baffling. It excludes the Regional BRT component, which is integral to the Refined LPA’s ability to impact transportation performance positively. It is also not the mirror image of the In-Town BRT. The logic of its configuration is difficult to grasp until one takes note of the Project’s political undercurrents. During the commenting period for the SDEIS, the State Department of Transportation objected to the Regional BRT for various engineering and budgetary reasons. See Ex. “4” at Vol. 2, Chapter 7, pp. 18-32 (beginning with letter from State Dep’t of Transp. dated Nov. 3, 2000, and ending with letter from DTS dated Nov. 13, 2002). This dealt a serious blow to DTS because DTS needed the State’s approval of the Refined LPA in order to secure federal funding for it. See 23 C.F.R. § 771.109(d).⁵ Accordingly, DTS could not proceed with implementation of the Refined LPA in its entirety or the Regional BRT component alone. On the other hand, DTS was not able to secure federal

⁵ Section 771.109(d) of the Code of Federal Regulations, Title 23, provides:

When entering into Federal-aid project agreements pursuant to 23 U.S.C. § 110, it shall be the responsibility of the State highway agency to ensure that the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures listed in approved environmental documents unless the State requests and receives written Federal Highway Administration approval to modify or delete such modification features.

funding to build the In-Town BRT alone. The Refined LPA will be funded with a total of \$242 million under the FTA New Starts program; of that, \$121.6 million is for the In-Town BRT component.⁶ See Ex. “7” to Compl. at 6-2, 6-13. The New Starts program is the federal government’s primary financial resource for supporting locally-planned, implemented, and operated fixed guideway systems. See 49 U.S.C. § 5309(e); see also Planning, Development, and Funding for New Starts Projects (last visited Nov. 6, 2003), at <http://www.fta.dot.gov/library/policy/ns/ns.htm>. (attached hereto as Ex. “12”). However, in order for a fixed guideway system project to qualify for New Starts funding, it must meet certain criteria, including cost effectiveness. See 49 U.S.C. § 5309(e)(1)(B) (stating that proposed New Starts project must be “justified based on a comprehensive review of its . . . cost effectiveness.”).

The In-Town BRT could not meet the cost effectiveness test given the insignificant time savings it generated. Compounding the challenges to the

⁶ FTA regulations define “fixed guideway system” as:

a mass transportation facility which utilizes and occupies a separate right-of-way, or rail line, for the exclusive use of mass transportation and other high occupancy vehicles, or uses a fixed catenary system and a right of way usable by other forms of transportation. This includes, but is not limited to, rapid rail, light rail, commuter rail, automated guideway transit, people movers, ferry boat service, and fixed-guideway facilities for buses (such as bus rapid transit) and other high occupancy vehicles.

49 C.F.R. § 611.5 (emphasis added).

Refined LPA were budgetary concerns. By statute, federal appropriations for Department of Transportation grants under § 5309 are made for fiscal years 1998 through 2003. See § 5309(m)(1).⁷ Honolulu Mayor Jeremy Harris publicly expressed frustration at the political deadlock that put federal funding for the Project in jeopardy:

It takes five to six years to go through the federal process to become eligible for federal funds and 90-10 federal match is no longer available. You're lucky if you're going to get 50-50 We have to realize we can't put off doing something any longer for the sake of another study.

Ex. "9" at 1. On another occasion, Mayor Harris stated: "It's been impossible to sustain political consensus long enough to get through the whole planning process,

⁷ A little less than a week ago the funding period was extended to the end of February 2004. Subsection (m)(1) of § 5309 was amended by P.L. 108-88 (approved Nov. 6, 2003) to read as follows:

(m) Allocating amounts.—

(1) In general.--Of the amounts made available by or appropriated under section 5338(b) for grants and loans under this section for each of fiscal years 1998 through 2003 and for the period of **October 1, 2003, through February 29, 2004**—

- (A) 40 percent shall be available for fixed guideway modernization;
- (B) 40 percent shall be available for capital projects for new fixed guideway systems and extensions to existing fixed guideway systems; and
- (C) 20 percent shall be available to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities.

49 U.S.C. § 5309(m)(1) (amended by Pub. L. No. 108-88, § 8, 117 Stat. 1110 (2003)) (emphasis added).

the bureaucratic process that you have go [sic] through if you're going to use federal funds" Crystal Kua, "Transit group has its first meeting," Honolulu ATI-Bulletin, Mar. 8, 2003 (attached hereto as Ex. "13") at 2.

The concept of the IOS likely was born amidst this pressure. The IOS fits neatly into an exemption under the New Starts program. Projects⁸ for new fixed guideway systems involving less than \$25 million in federal funding are exempt from the New Starts criteria. See § 5309(e)(8)(A). Pursuant to this exemption, the IOS could qualify for New Starts funding without meeting the cost-effectiveness criterion. Once the IOS is built, it would serve as the "foot in the door" to eventual build out of the In-Town BRT or the Refined LPA in its entirety. And by truncating the HEPA and NEPA review processes, DTS was consequently able to secure acceptance of an FEIS for HEPA purposes before a Governor who was hostile to the BRT concept took office.

Now that DTS has obtained the ROD for the IOS, DTS is quickly working to begin construction of the IOS. DTS has taken steps to encumber funds for the IOS. DTS's haste must be curtailed. DTS and FTA have flouted the requirements of NEPA and HEPA in their zeal to make the IOS a reality. They

⁸ A "project" is defined "with respect to a new fixed guideway system or extension to an existing fixed guideway system, a minimum operable segment of the project." 49 U.S.C. § 5309(q).

must be enjoined from moving forward with the IOS until their violations of NEPA and HEPA are rectified.

III. STANDARD OF REVIEW

A motion for a preliminary injunction should be granted if the movant demonstrates “either 1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.” Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003) (alteration in original) (quoting Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003)). “These are not two tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.” Id. (quoting Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988)). “[T]he critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly.” Benda v. Grand Lodge of Int’l Ass’n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978).

IV. ARGUMENT

A. PLAINTIFF IS LIKELY TO PREVAIL ON ITS CLAIMS THAT FTA AND DTS VIOLATED NEPA AND HEPA

Defendants should be enjoined from constructing and operating the IOS until their violations of NEPA and HEPA are cured. Although Defendants have issued two FEIS's, both documents are mere pro forma attempts to satisfy NEPA and HEPA. They utterly fail to satisfy the requirement that an EIS "provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information." Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974). Far from encouraging public dialogue on the environmental impacts of the IOS, FTA and DTS have manipulated the environmental review process with the effect of curtailing public review of the IOS.

No matter how the IOS is conceptualized, Defendants have violated NEPA and HEPA. If the IOS is construed as part of the Refined LPA (as the Federal FEIS represents it to be), then its construction must be enjoined because FTA has not accepted an FEIS as to the entire Refined LPA. NEPA regulations prohibit federal agencies from taking a major Federal action for which no EIS has been accepted by the agency. See 40 C.F.R. § 1506.1. NEPA also prohibits a federal agency from dividing a project into smaller segments to evade environmental review. If, however, the IOS is construed as an alternative separate

from the Refined LPA, then NEPA and HEPA require Defendants to prepare a supplemental draft EIS for the IOS so that the public is afforded an opportunity to review and comment on the IOS. As demonstrated below, Plaintiff is likely to prevail on its claims.

1. NEPA and HEPA – An Overview

a. NEPA

“The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a);⁹ Churchill County v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001). NEPA requires a federal agency to prepare a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The purpose of NEPA “is not to generate paperwork,” but “to help public officials make decisions that are based on understanding of the environmental consequences and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c). NEPA “ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental

⁹ Congress established the Council on Environmental Quality (“CEQ”) with responsibility of ensuring that all federal agencies implement and comport with NEPA. 42 U.S.C. § 4342. In furtherance of this responsibility, CEQ publishes regulations that instruct federal agencies on what they must do to comply with NEPA’s procedures and to achieve its goals. See 40 C.F.R. §§ 1500.1 *et seq.* Individual federal agencies also publish their own specific regulations pertaining to compliance with NEPA. The FTA’s NEPA regulations are found in 23 C.F.R. part 771.

impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (alterations in original and internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

NEPA requires the preparation of an EIS for proposed actions that will “significantly affect” the environment. See id.; 42 U.S.C. § 4332(2)(C). The EIS process occurs in two stages: (1) preparation of a Draft EIS (“**DEIS**”), and (2) preparation of a Final EIS (“**FEIS**”). § 1502.9. A DEIS is subject to public comment, and the FEIS must respond to comments on the DEIS. §§ 1502.9, 1503.1. No similar requirement to respond exists with respect to comments on an FEIS. An EIS must be supplemented if the federal agency makes substantial changes in the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts. § 1502.9(c).

b. HEPA

Similar to NEPA, the purpose and intent of HEPA is “to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.” Haw. Rev. Stat. § 343-1. HEPA is triggered whenever

an agency or an applicant proposes an action which falls within one of eight categories set forth in Hawai‘i Revised Statutes § 343-5(a). Under HEPA, an EIS is required if “the proposed action may have a significant effect on the human environment.” Id. § 343-5(b).

Like NEPA’s EIS process, the EIS process under HEPA consists of two stages. See § 11-200-14. First, a DEIS is prepared and submitted for review and comments. Id. Second, an FEIS consisting of revisions to the DEIS is prepared. § 11-200-18. The FEIS is required to incorporate the agency’s or applicant’s responses to the substantive questions, comments, or recommendations received in the review and consultation processes. Id. HEPA requires supplementation of an EIS if an EIS for the action has been accepted, and the action subsequently changes substantively in size, scope, intensity, use, location or timing, among other things. § 11-200-26.

2. Implementation of the IOS Violates NEPA Because FTA Has Not Issued a ROD for the Refined LPA, and Until It Does, NEPA Prohibits It From Limiting the Choice of Reasonable Alternatives

Assuming arguendo that the IOS is merely the first phase of the Refined LPA, NEPA prohibits implementation of the IOS until FTA has accepted an EIS as to the entire Refined LPA. FTA has not accepted an EIS for the entire Refined LPA because the 2003 ROD accepts the Federal FEIS *only as to the IOS*. This is significant because “[i]ssuance of the ROD represent[s] final agency action

and complete[s] the NEPA process.” Mooreforce, Inc. v. United States Dep’t of Transp., 243 F. Supp. 2d 425, 430 (M.D.N.C. 2003). A ROD is the instrument by which a federal agency accepts an EIS. See 40 C.F.R. § 1505.2. Thus, until a federal agency issues a ROD accepting an EIS, it has not accepted an EIS. Because the 2003 ROD does not extend to the Refined LPA in its entirety, no EIS for the Refined LPA has been accepted by FTA.

Where an agency has not issued a ROD for a major Federal action,¹⁰ NEPA regulations *prohibit* work on the action that prejudices the agency’s ultimate decision to accept or reject the EIS for the action:

- (a) Until an agency issues a *record of decision* as provided in § 1505.2 (except as provided in paragraph (c) of this section), *no action concerning the proposal shall be taken* which would:
 - (1) Have an adverse environmental impact; or
 - (2) *Limit the choice of reasonable alternatives.*

§ 1506.1(a) (emphasis added).¹¹

¹⁰ It cannot be disputed that the Refined LPA is a major Federal action.

¹¹ Paragraph (c) of § 1506.1 provides:
While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies, shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and

Courts have enforced this regulation to enjoin federal agencies from proceeding with segments of highway projects where the agency has not accepted an EIS for the entire project. In Arlington Coalition of Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972), the U.S. Department of Transportation (“DOT”) began construction of the Arlington I-66 highway project without preparing an EIS. Because an EIS for the project was pending, it was conceivable that the DOT could decide to alter the proposed route for the Arlington I-66 or abandon the project altogether. Until the DOT committed to a decision on the environmental impact of the project, construction for the project could not continue because it would prejudice the DOT’s ultimate decision.

The Fourth Circuit explained that in the process of determining whether to alter or abandon the project based on information in the EIS, the DOT “may, of course, take into account previous investment in the proposed route.” Id. at 1333. The court noted that “[f]urther investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely.” Id. Therefore, if investment in the proposed route were to continue before the DOT made a decision based on the EIS, “the options open to the [DOT] would diminish, and at some point [its]

(3) Will not prejudice the ultimate decision on the program.
Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.
§ 1506.1(c).

consideration would become a *meaningless formality*.” Id. (emphasis added). Accordingly, the court issued an injunction against work on the Arlington I-66 pending preparation and consideration of the environmental report. Id. at 1334.

Similarly, in Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir. 1987), the court enjoined construction of a highway proposed to pass through a Seneca Creek State Park pending action on a final EIS by the Secretary of the Interior and possibly other federal agencies. The Fourth Circuit observed that “compliance with NEPA is required before any portion of the road is built. This conclusion effectuates the purpose of NEPA.” Id. at 1042. The danger in allowing construction to continue, the court noted, was that the “decision of the Secretary of the Interior to approve the project, and the decision of any other Secretary whose authority may extend to the project, would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS.” Id. The completed segments threatened to “stand like gun barrels pointing into the heartland of the park . . .” Id. (internal quotation marks omitted) (quoting Named Individual Members of the San Antonio Conservation Soc’y v. Texas Hwy. Dep’t, 400 U.S. 968, 971 (1970)) (Black, J., dissenting from denial of certiorari). “It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent.” Id. The court issued an injunction against further construction on the highway pending final action by

the Secretary of the Interior on a final EIS because it was “committed to the proposition that when a major federal action is undertaken, *no part* may be constructed without an EIS.” Id. (emphasis added).

Arlington and Maryland Conservation Council make clear that continued work on the IOS violates NEPA. FTA has not made a final decision to accept the Federal FEIS for the entire Refined LPA. Therefore, it may not commence work on *any* phase of the Refined LPA, including the IOS. To do otherwise would prejudice FTA’s ultimate decision with respect to the Federal FEIS. FTA may decide that alterations to the Refined LPA are needed. It may select the TSM Alternative. It may even decide that the No Build Alternative is the most prudent course of action. But in the face of a capital investment of \$19.85 million in FTA funds sunk into the IOS – nearly 10% of the \$242 million in New Starts funding for the Refined LPA, see Ex. “10” at 6-2, IOS-20 – FTA would likely view alternatives to the Refined LPA with a jaundiced eye. The prejudice is intensified by the fact that the IOS entails considerable alterations to infrastructure and traffic patterns. Construction of the IOS will consist of concrete lanes, signal priority, widening of sections of Ala Moana Boulevard and Kalia Road, and erection of transit stops that include a 13-inch high raised platform, benches, and canopies. See id. at IOS-1.

Moreover, certain lanes of traffic in urban Honolulu will be converted to exclusive or semi-exclusive use for the IOS. See id. at IOS-15 and Table IOS.2-1. Once these improvements and modifications are in place, it will be difficult to justify halting construction of the remainder of the Refined LPA. Clearly, the IOS is designed to get a “foot in the door” to implementing the BRT concept on a full-scale basis in Honolulu without having to justify full-scale impacts of such an endeavor. The Federal FEIS itself describes the IOS as “a building block for additional branches” Id. at IOS-7. This violates NEPA regulations. See § 1506.1(a). Implementation of the IOS before a ROD issues for the Refined LPA will “limit the choice of reasonable alternatives,” and must be enjoined.

3. The Isolation of the IOS from the Refined LPA Constitutes Segmentation of the Refined LPA For an Improper Purpose in Violation of NEPA

As discussed, the IOS is a creature of political considerations. It was conceived out of the mounting concern of the Mayor and his administration that political opposition to the BRT concept would prevail, thereby causing the City to forfeit the federal funding appropriated for the Refined LPA. See Ex. “9”; Ex. “13” at 2. The IOS is a mechanism to salvage the Refined LPA and federal funds. As such, the IOS aids the Refined LPA in evading the full brunt of environmental review required by NEPA and HEPA.

Defendants describe the IOS as merely a phase of the Refined LPA subsumed under the larger project. Given the political influences contributing to the creation of the IOS, such agency portrayal of the IOS is not deserving of deference. See D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245-46 (D.C. Cir. 1972) (reversing agency determination to approve construction of a bridge because it was based on extraneous political pressure); Town of Orangetown v. Ruckelhaus, 579 F. Supp. 15, 20 (S.D.N.Y. 1984) (decisions of administrative agencies may be challenged if “unlawful factors have tainted the agency’s exercise of its discretion[,]” including improper political considerations); Spiller v. Walker, No. A-98-CA-255-SS, 2002 WL 1609722 at * 9 (W.D. Tex. July 19, 2002) (refusing to defer to agency’s expertise in a FONSI because political influence from the White House added “a certain stench” to the FONSI).

Further, an agency’s actions are “not viable if the proof discloses that the agency proceeded to perform its environmental tasks with less than ‘good faith objectivity.’” Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 492 F.2d 1123, 1129 (5th Cir. 1974). The creation of the IOS is plainly an exercise in improper segmentation in violation of NEPA. “‘Segmentation’ or ‘piecemealing’ is an attempt by an agency to divide artificially a ‘major Federal action’ into smaller components to escape the application of NEPA to some of its segments.” Save Barton Creek Ass’n v. Federal Hwy.

Admin. (FHWA), 950 F.2d 1129, 1140 (5th Cir. 1992). “As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements.” Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981). The Ninth Circuit has held that “[p]iecemealing proposed highway improvements in separate environmental statements should be avoided.” Daly v. Volpe, 514 F.2d 1106, 1109 (9th Cir. 1975). Although the IOS and the Refined LPA are discussed in the same EIS (i.e., the Federal FEIS), by virtue of the fact that FTA is issuing a separate ROD for each action, they are functionally different segments discussed in separate statements.

Typically, segmentation is employed to avoid designation of a project as a “major Federal action” subject to NEPA. However, “[w]here there is no dispute about the existence of major federal participation, such as here, segmentation of a large project for other reasons, such as to exclude potentially objectionable environmental factors, is likewise unlawful.” Clairton Sportsmen’s Club v. Pennsylvania Turnpike Comm’n, 882 F. Supp. 455, 470 (W.D. Pa. 1995) (citing Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981)). The improper purpose here is to salvage the Refined LPA from demise at the hand of state lawmakers and public opposition to the BRT concept. This case is analogous to Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972),

where the Virginia State Highway Commission and the DOT segmented a 29.2 mile highway project in order to partake of federal financial allotments for that 21 mile segment, while at the same time circumventing the need to protect the remaining 8.3 mile segment by labeling it as a separate project. The court held that this was improper segmentation and a “bureaucratic exercise.” Id. at 124.

The Ninth Circuit has articulated a test for determining whether segmentation of a highway project is improper. Daly, 514 F.2d at 1110. Under this test, segmentation is proper if: (1) the length of the segment connects logical termini; (2) the segment has independent utility; (3) the length of the segment selected assures adequate opportunity for consideration of alternatives; and (4) the segment fulfills important state and local needs. See id. The Federal Highway Administration has promulgated a rule regarding segmentation that substantially incorporates these factors. See 23 C.F.R. § 771.111(f).¹² In the context of a

¹² FHWA’s EIS rules consider the following factors to determine if segmentation of a highway project in an EA or EIS is improper:

- (1) whether the segment connects logical termini and is of sufficient length to address environmental matters on a broad scope;
- (2) whether the segment has independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements are made; and
- (3) whether the segment restricts consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f)

project within a single metropolitan area (as opposed to projects joining cities), courts focus more on the factor of independent utility. Save Barton Creek, 950 F.2d at 1140. A segment can have independent utility if it meets the needs identified by the agency and does not depend on a larger action for its justification. Clairton Sportsmen's Club, 882 F. Supp. at 475. "The proper question is whether one project will serve a significant purpose even if a second related project is not built." Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 69 (D.C. Cir. 1987).

The IOS does not have independent utility. Between its end points in Downtown (Aala Park stop on Beretania Street) and Waikiki (Kawahulu Avenue stop) via the Ala Moana Boulevard corridor, the IOS will have travel time of between 28 and 33 minutes, including average wait and walk times. See Ex. "10" at S-2. Of this, between 25 and 30 minutes are in-vehicle time. See id. This compares to travel time between these same points using either the existing Route 19, Route 20, or Route 42 local buses of approximately 38 to 48 minutes. See id. However, the Federal FEIS does not mention that the existing Route B CityExpress! bus between Aala Park and Kapahulu takes only 22 minutes, see Ex. "14" attached hereto, or that the existing Route 2 bus takes only 34 minutes for the same trip. See Ex. "15" attached hereto. The time savings realized by the IOS *are minimal or non-existent.*

A segment can also have independent utility if it meets the needs identified by the federal agency and does not depend on a larger action for its justification. See Clairton Sportsmen’s Club, 882 F. Supp. at 475. Here, one of the purposes and needs identified for the Project is to “[i]mprove the transportation linkage between Kapolei, which is designated as a ‘new city’ in Honolulu’s Urban Core.” Ex. “10” to Complaint at IOS-2. Yet, the Federal FEIS admittedly states that “[b]ecause the IOS does not include the Regional BRT providing service to and from Kapolei, *the purpose and need related to Kapolei would not be accomplished by the IOS.*” Id. (emphasis added). It is unsurprising that the IOS does not meet one of the most critical goals of the Project—its purpose is not to fulfill the needs identified by the Project, but to ensure that the BRT concept is implemented in Honolulu regardless of whether a BRT system meets those needs.

Further, the selection of the IOS forecloses discussion of other alternatives for the Project. As discussed, see supra at 24-25, the capital investments and alterations in infrastructure for the IOS present a strong disincentive to adopt an alternative other than the Refined LPA. Segmentation of the Refined LPA for this purpose is improper, and should be enjoined.

4. Alternatively, the IOS Constitutes a Separate Alternative For Which a Supplemental EIS is Required Under NEPA and HEPA

An alternative conceptualization of the IOS is as a stand-alone alternative. This view finds support in the Federal FEIS. Although the Federal

FEIS describes the IOS as a “phase” of the Refined LPA, it also states that the IOS “is viable as a stand-alone BRT route” Id. Assuming the IOS is a stand-alone alternative, Defendants have violated NEPA and HEPA by failing to prepare a supplemental EIS (“SEIS”) to discuss the IOS as a new alternative.

NEPA requires supplementation of an EIS if there are substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. See 40 C.F.R. § 1502.9(c). HEPA similarly requires supplementation of an EIS if the proposed action changes substantively in size, scope, intensity, use, location or timing, among other things. See Haw. Admin. R. § 11-200-26.

The introduction of a new proposed alternative creates a mandatory duty for an agency to prepare a supplemental draft EIS. Dubois v. United States Dep’t of Agric., 102 F.3d 1273, 1291-92 (1st Cir. 1996). As the CEQ has explained, an additional alternative that has not been disseminated previously in a DEIS may be adopted in a FEIS, without further public comment, only if it is “qualitatively within the spectrum of alternatives that were discussed” in the prior draft; otherwise a supplemental draft is needed. Id. at 1292 (citing Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18026, #29b (1981)). This rule stems from the principle that the consideration of

alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. It is “absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as ‘the linchpin of the entire impact statement.’” NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); see also All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992) (a thorough discussion of the alternatives is “imperative”).

Under Ninth Circuit law, if the alternative selected in the FEIS is different from the alternatives presented in the DEIS, a supplemental draft EIS is required if (1) “the alternative finally selected by [the agency] was within the range of alternatives the public could have reasonably anticipated [the agency] to be considering,” and (2) if “the public's comments on the draft EIS alternatives also apply to the chosen alternative and inform [the agency] meaningfully of the public's attitudes toward the chosen alternative.” California v. Block, 690 F.2d 753, 772 (9th Cir. 1982); see also Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci, 857 F.2d 505, 508-09 (9th Cir. 1988). If both of these criteria are established, the agency satisfies NEPA's goal of encouraging meaningful public participation during the decision making process without having to circulate a supplemental draft EIS. Half Moon Bay, 857 F.2d at 508-09.

The IOS fails both criteria. First, the IOS is not within the scope of alternatives presented in the MIS/DEIS, SDEIS, or the State FEIS. Because FTA is issuing separate RODs for the IOS and the Refined LPA, it could conceivably approve the IOS and reject the Refined LPA. If that occurs, only the IOS would be built. This is an alternative unlike any other presented in the EIS's preceding the Federal FEIS. The Refined LPA envisioned the Regional BRT and the In-Town BRT working in tandem. The alternative of building a diluted version of the In-Town BRT and abandoning the Regional BRT was never a contemplated possibility until the Federal FEIS was issued.

Second, because the IOS was never discussed in a draft EIS, the public has not had an opportunity to comment on it. "NEPA's public comment procedures are at the heart of the NEPA review process" and reflect "the paramount Congressional desire to internalize opposing viewpoints into the decision making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." Block, 690 F.2d at 770-71; Half Moon Bay, 857 F.2d at 508. That is because it is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal. Half Moon Bay, 857 F.2d at 508. "No such right exists upon issuance of a final EIS." Block, 690 F.2d at 771. "Consequently, an agency's failure to disclose a proposed action before the

issuance of a final EIS defeats NEPA's goal of encouraging public participation in the development of information *during* the decision making process.” Half Moon Bay, 857 F.2d at 508 (emphasis in original).

The public’s comments on the MIS/DEIS and the SDEIS were rendered with the belief that the Refined LPA would incorporate both the Regional BRT and In-Town BRT components. Since the concept of building only part of the Refined LPA was never raised to the level of public consciousness, the public’s comments could not apply to the IOS and “inform [FTA] meaningfully of the public’s attitudes toward the [IOS].” Block, 690 F.2d at 772. Therefore, both of the Block criteria are not satisfied. FTA must prepare a supplemental draft EIS for the IOS pursuant to NEPA.

The analysis is similar under HEPA. The IOS is a new alternative that differs substantively from all other alternatives presented in preceding the State FEIS in terms of “size, scope, intensity, use, location or timing” Haw. Admin. R. § 11-200-26. Since it does not incorporate the Regional BRT component, the IOS is far different in size, scope, and intensity than the Refined LPA. Its location extends only to parts of urban Honolulu, and its use is limited to transit within urban Honolulu. Its timing is also different because it will fully be in operation in 2005, whereas the Refined LPA will not be in operation until 2025.

Given these vast differences between the IOS and the Refined LPA, DTS should have prepared a supplemental draft EIS presenting the IOS as a new alternative.

B. ALLOWING DEVELOPMENT OF THE IOS TO MOVE FORWARD WOULD RESULT IN IRREPARABLE INJURY TO PLAINTIFF

“In mandating compliance with NEPA’s procedural requirements as a means of safeguarding against environmental harms, Congress has *presumptively determined* that the failure to comply with NEPA has detrimental consequences for the environment.” Davis v. Mineta, 302 F.3d 1104, 1114 (10th Cir. 2002) (emphasis added). In other words, where violations of NEPA are found, environmental harm is presumed. As demonstrated above, Plaintiff has demonstrated a high likelihood that Defendants are in violation of NEPA’s requirements.

Moreover, unless an injunction against construction and operation of the IOS issues, Defendants’ scheme to commit the public to a project that they never had an opportunity to review will succeed. The entire purpose of the IOS is to make irreversible commitments of resources to a form of BRT such that implementation of BRT on a wider scale becomes a fait accompli. Failing to enjoin Defendants’ efforts ensures their success.

The Council has already passed an Executive Capital Budget for Fiscal Year 2003 that appropriates \$31 million for construction of the Iwilei to Waikiki Alignment of the Refined LPA, which resembles the alignment of the

IOS. See Ex. “16” attached hereto at UT-1. However, the appropriation contains a proviso stating:

No funds will be expended or encumbered for construction *until the environmental processes are complete pursuant to HRS Chapter 343 and the national Environmental Policy Act*. Furthermore, no funds shall be expended or encumbered for construction until the issuance by the Federal Transit Administration of a *Record of Decision for the Project*.

Id. (emphasis added).

It appears that the City has construed the issuance of the 2003 ROD as satisfaction of the condition stated above, and accordingly, the City has moved forward to encumber the appropriated funds for construction of the IOS. However, the clear terms of the proviso have not been satisfied. The environmental processes under HEPA and NEPA are *not* complete, and no ROD has issued for the *Project*. Encumbrance of funds for construction of the IOS is unlawful so long as the HEPA and NEPA processes are incomplete.

The environmental harm that will ensue if Defendants are allowed to proceed with the IOS now is obvious. The IOS involves implementation of immediate changes that threaten to increase congestion in Honolulu. The data in the Federal FEIS show that the IOS performs poorly compared to the status quo while requiring a considerable commitment of resources that in turn will worsen congestion. Conversions of lanes into exclusive or semi-exclusive transit use for

the BRT buses and modification of traffic signals to give priority to BRT buses are two notable examples. These constitute impacts on the “human environment” within the meaning of NEPA¹³ and HEPA.¹⁴ The imminence of the environmental harm that will occur if construction of the IOS proceeds warrants the issuance of a preliminary injunction pending compliance with NEPA and HEPA.

C. THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF PLAINTIFF

The balance of hardships tips in favor of Plaintiff because there is no immediate need for adoption of a BRT system in Honolulu. As Mayor Harris put it in a recent Honolulu Advertiser article, “Honolulu residents have been waiting 35 years for a new mass transit system,” Mike Leidermann, “City Council to hear new rail transit proposal,” Honolulu Advertiser, Oct. 23, 2003 (attached hereto as Ex. “17”) at 1. There is no urgency demanding immediate construction of the IOS or Refined LPA without full compliance with the environmental review process. By contrast, the changes effected by the IOS (e.g., the conversions of lanes into exclusive use), as well as the policy incentives

¹³ The term “human environment” is defined in NEPA regulations “comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

¹⁴ The term “environment” is defined in HEPA regulations as “humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” Haw. Admin. R. § 11-200-2.

created by the IOS for continued work on the Refined LPA, are imminent. Accordingly, it is comparatively prudent to maintain the status quo rather than allow the IOS to proceed before environmental review of all reasonable alternatives is properly conducted.

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction should be granted.

DATED: Honolulu, Hawai'i, November 14, 2003.

CADES SCHUTTE LLP

KELLY G. LaPORTE
ELIJAH YIP
Attorneys for Plaintiff
SENSIBLE TRAFFIC
ALTERNATIVES, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

SENSIBLE TRAFFIC
ALTERNATIVES AND
RESOURCES, LTD., dba The
Alliance For Traffic Improvement, a
Hawai‘i non-profit corporation,

Plaintiff,

v.

FEDERAL TRANSIT
ADMINISTRATION OF THE U.S.
DEPARTMENT OF
TRANSPORTATION;
ADMINISTRATOR OF THE
FEDERAL TRANSIT
ADMINISTRATION OF THE U.S
DEPARTMENT OF
TRANSPORTATION;
DEPARTMENT OF
TRANSPORTATION SERVICES OF
THE CITY & COUNTY OF
HONOLULU; DIRECTOR OF THE
DEPARTMENT OF
TRANSPORTATION SERVICES OF
THE CITY & COUNTY OF
HONOLULU; JOHN DOES 1-10;
JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE
ENTITIES 1-10; and DOE
GOVERNMENT ENTITIES 1-10,

Defendants.

CIVIL NO. _____

CERTIFICATE OF COMPLIANCE
WITH LOCAL RULE 7.5

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.5

I hereby certify pursuant to Local Rule 7.5(b)(i) that the Memorandum in Support of Plaintiff's Motion for Preliminary Injunction contains 8,735 words according to Microsoft Word's word count program.

DATED: Honolulu, Hawai'i, November 14, 2003.

CADES SCHUTTE LLP

KELLY G. LaPORTE
ELIJAH YIP
Attorneys for Plaintiff
SENSIBLE TRAFFIC
ALTERNATIVES, LTD.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

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RESOURCES, LTD., dba The
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TRANSPORTATION SERVICES OF
THE CITY & COUNTY OF
HONOLULU; JOHN DOES 1-10;
JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE
ENTITIES 1-10; and DOE
GOVERNMENT ENTITIES 1-10,

Defendants.

CIVIL NO. _____

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served by hand delivery/U.S. mail, postage prepaid, on November 14, 2003 to the following person(s) at their last known address.

FEDERAL TRANSIT ADMINISTRATION
OF THE U.S. DEPARTMENT OF
TRANSPORTATION
Hawaii – Region 9
201 Mission Street
Suite 2210
San Francisco, CA 94105-1831

ADMINISTRATOR OF THE FEDERAL
TRANSIT ADMINISTRATION OF THE U.S
DEPARTMENT OF TRANSPORTATION
Hawaii – Region 9
201 Mission Street
Suite 2210
San Francisco, CA 94105-1831

DEPARTMENT OF TRANSPORTATION
SERVICES OF THE CITY & COUNTY OF
HONOLULU
650 South King Street
Third Floor
Honolulu, HI 96817

DIRECTOR OF THE DEPARTMENT OF
TRANSPORTATION SERVICES OF THE
CITY & COUNTY OF HONOLULU
650 South King Street
Third Floor
Honolulu, HI 96817

DATED: Honolulu, Hawai'i, November 14, 2003.

CADES SCHUTTE LLP

KELLY G. LaPORTE

ELIJAH YIP

Attorneys for Plaintiff

SENSIBLE TRAFFIC

ALTERNATIVES, LTD.

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