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SENSIBLE TRAFFIC ALTERNATIVES AND
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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

CIVIL NO. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF;
SUMMONS

| [IMANAGEDB:501633-6](#)

AR00151917

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.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff SENSIBLE TRAFFIC ALTERNATIVES AND RESOURCES,
LTD., [dba The Alliance For Traffic Improvement](#) (“ATI” or “Plaintiff”), by and
through its attorneys, alleges against Defendants FEDERAL TRANSIT
ADMINISTRATION OF THE U.S. DEPARTMENT OF TRANSPORTATION
 (“FTA”); the ADMINISTRATOR OF THE FEDERAL TRANSIT
ADMINISTRATION OF THE U.S DEPARTMENT OF TRANSPORTATION
 (“Administrator”); DEPARTMENT OF TRANSPORTATION SERVICES OF
THE CITY & COUNTY OF HONOLULU (“DTS”); the DIRECTOR OF THE
DEPARTMENT OF TRANSPORTATION SERVICES OF THE CITY &
COUNTY OF HONOLULU (“Director”); 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**”), as follows:

I. INTRODUCTION

This complaint seeks an order compelling: (1) FTA and its Administrator to comply with the National Environmental Policy Act (“**NEPA**”), 42 U.S.C. §§ 4321 *et seq.*; and (2) DTS and its Director to comply with the Hawai‘i Environmental Policy Act (“**HEPA**”), Haw. Rev. Stat. ch. 343, before proceeding with plans to fund, construct, and operate the Initial Operating Segment (“**IOS**”), which Defendants erroneously represent to be part of the Primary Corridor Transportation Project (the “**Project**”).

The Project is a rapid-transit project for the island of O‘ahu. The City originally presented three alternatives for the Project. The alternative that the City has selected to pursue consists of a bus-rapid transit (“**BRT**”) system. This alternative is known as the “Locally Preferred Alternative” (“**LPA**”). Subsequently, the LPA was amended to become the “**Refined LPA**.” The Refined LPA was the “action” discussed and analyzed in a supplemental draft of the environmental impact statement (“**EIS**”) prepared by FTA and DTS pursuant to HEPA and NEPA. The Refined LPA was also the “action” discussed and analyzed in the final EIS prepared by DTS to comply with HEPA (the

“State FEIS”). The Refined LPA consisted of an extensive transportation system designed to serve urban Honolulu as well as regions beyond, such as Kapolei. The State FEIS described the benefits of the Refined LPA, such as projected time savings of 24.9 minutes for travel between downtown Honolulu and Kapolei (in comparison to the alternative of implementing existing transportation-related projects and maintaining levels of bus service).

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~~In the final EIS prepared pursuant to NEPA (the “Federal FEIS”), however, the concept of the IOS surfaced for the first time. Unlike the Refined LPA, the IOS serves only very limited portions of urban Honolulu, not outer regions such as Kapolei. In certain portions of the Federal FEIS, FTA and DTS describe maintain in the Federal FEIS that the the IOS is merely the first phase of the Refined LPA. However, other portions of as presented in the Federal FEIS suggest that, the IOS is actually a stand-alone “action” independent of the Refined LPA. According to the Federal FEIS, the IOS could be built and operated without ever constructing and operating the Refined LPA.~~

~~ever coming into existence.—Plaintiff opposes the IOS because it would increase congestion in urban Honolulu, waste taxpayers’ money, cause undesirable environmental impacts, and injure the Plaintiff’s economic interests of Plaintiff’s members. Further, the purported benefits of the Refined LPA are materially different than the purported benefits of the IOS, which, as discussed below, have~~

never been presented to the public for comment in accordance with the procedures set forth in NEPA and HEPA.

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FTA has accepted the Federal FEIS as to the IOS alone. It has not accepted the Federal FEIS as to the Refined LPA, and until it has, any work on the Refined LPA – including the IOS, if it is a phase of the Refined LPA – is unlawful. Moreover, assuming that the IOS is merely a phase of the Refined LPA and not an action independent of it, NEPA and HEPA do not allow individual phases of the Refined LPA to be evaluated independent of each other. Such constitutes *improper segmentation* in violation of NEPA and HEPA. Alternatively, if the IOS is construed as an independent action, FTA’s acceptance of the IOS alone is based on the erroneous assumption that the environmental impacts of the IOS can properly be reviewed in isolation. FTA’s approach violates the requirement under NEPA and HEPA that *cumulative impacts* of multiple independent but related actions (i.e., the IOS and the Refined LPA) be analyzed in an EIS.

The procedure by which Defendants presented the IOS violates NEPA and HEPA. It was unlawful for Defendants to submit two FEIS’s – one pursuant to HEPA and the other pursuant to NEPA – instead of a single FEIS as required by HEPA and NEPA. The two FEIS’s were materially inconsistent with each other, particularly given that the Federal FEIS discussed the IOS and the State FEIS did not. By the time the IOS was discussed for the first time in the Federal EIS, the

Governor of the State of Hawai‘i (“**Governor**”) had already accepted the State FEIS. Thus, the Governor reviewed and accepted the State FEIS without the benefit of knowing that the City would commence construction and operation of the IOS regardless of whether the Refined LPA would ever be implemented. Moreover, the submission of multiple FEIS’s at different times and pursuant to a multi-track process has confused members of the public, such as ATI, desiring to review, analyze, and comment on the particular action proposed to be constructed as part of the Project, ~~such as STAR~~, and has enabled Defendants to escape their duty to respond to comments on the IOS because the IOS was never identified in the draft comment phase. Thus, neither the State FEIS nor the Federal FEIS responded to any comments about the IOS, as the concept of the IOS was not previously presented to the public.

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In addition to the procedural violations committed by Defendants, the Federal FEIS is substantively flawed. The discussion of the IOS is based on erroneous and misleading data regarding its costs and benefits, and ignores important local land use laws such as the Primary Urban Center Development Plan for Honolulu’s urban core.

Despite their violations of NEPA and HEPA, Defendants are proceeding with construction and operation of the IOS, including the encumbrance of federal and City funds for the IOS. The instant lawsuit seeks a judicial declaration that

Defendants' actions are unlawful and seeks enjoinder of progress on the IOS until the requirements of NEPA and HEPA are satisfied.

II. JURISDICTION AND VENUE

1. This lawsuit is based on NEPA, 42 U.S.C. §§ 4321 et seq.; the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701 et seq.; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; HEPA, Haw. Rev. Stat. ch. 343; and Haw. Rev. Stat. § 632-1 (declaratory relief under Hawai‘i law). The court has subject matter jurisdiction over the claims for relief set forth in this complaint pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (actions arising under the laws of the United States), 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform his duty), 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy), and 28 U.S.C. § 1367 (supplemental jurisdiction).

2. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because this is a civil action in which the officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority, a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, and Plaintiff legally resides in this district. Venue also lies in this judicial district by virtue of 28 U.S.C. § 1391(b) because

this is a civil action that is not founded solely on diversity and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

III. PARTIES

A. Plaintiff

3. Plaintiff ATI is a [Hawai'i non-profit corporation](#). [Its membership consists of n-organization-of](#) individuals and businesses whose mission is to seek cost-effective solutions to reduce traffic congestion on O'ahu. ATI's membership includes individuals and businesses who are [concerned about the negative impacts on the environment caused by implementation of a BRT system in Honolulu, who are](#) engaged in the business of tourism in Hawai'i, and whose economic interests are affected by the state of traffic congestion on O'ahu's roadways. The interests of ATI and its members are affected by the development, construction and operation of the Refined LPA and/or the IOS.

B. Defendants

4. Defendant FTA is a division of the U.S. Department of Transportation.

5. If ordered by the Court, the Administrator of FTA has the authority and ability to remedy the harm inflicted by Defendants' actions.

6. Defendant DTS is a Department of the City created under Article VI, chapter 17, of the 1973 Revised Charter of the City & County of Honolulu (2000 Edition) (the “**Charter**”).

7. If ordered by the Court, the Director of DTS has the authority and ability to remedy the harm inflicted by Defendants’ actions.

8. Upon information and belief, Defendants JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL ENTITIES 1-10 (collectively, “**Doe Defendants**”) are persons, corporations, entities, or governmental entities whose names, identities, capacities, activities, and/or responsibilities are presently unknown to Plaintiff or its attorneys, despite diligent and good faith efforts to obtain information. Plaintiff asks leave of the Court to amend this Complaint with the true identities of these fictitiously named Defendants when they become known to Plaintiff along with the nature of their liability.

IV. STATUTORY FRAMEWORK

A. NEPA

9. NEPA is the basic national charter for protection of the environment. Its fundamental purpose is to ensure that the environmental impacts of federal agency actions are scrutinized before such actions are carried out and environmental damage occurs. 40 C.F.R. § 1500.1.

10. NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “Major Federal action” subject to NEPA includes “actions with effect that may be major and which are potentially subject to Federal control and responsibility,” as well as “new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures.” 40 C.F.R. § 1508.18. The “human environment” includes “the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14. Effects that must be considered in an EIS include ecological, aesthetic, historic, cultural, economic, social, or health effects, whether direct or indirect, or cumulative. 40 C.F.R. § 1508.8.

11. When an agency does not know whether it must prepare an EIS, it must prepare an Environmental Assessment (“EA”) to help it make the determination of whether to prepare an EIS. 40 C.F.R. § 1501.4(b). An EA is a concise public document that contains brief discussions of the need for the proposal, alternatives thereto, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. 40 C.F.R. § 1508.9.

12. After preparation of an EA, if major Federal action significantly affects the quality of the human environment, an EIS must be prepared.

13. An EIS is a detailed statement that must discuss, among other things, the environmental impact of the proposed federal action, any adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

14. The Council on Environmental Quality (“CEQ”) is an entity established within the Executive Office of the President by Title II of NEPA. 42 U.S.C. § 4342. Congress charged CEQ with the responsibility for ensuring that all federal agencies implement and comport with NEPA. 42 U.S.C. § 4344. In furtherance of this responsibility, CEQ publishes regulations (the “**CEQ Regulations**”) that instruct federal agencies on compliance with NEPA's procedures to achieve its goals. See 40 C.F.R. §§ 1500.1 et seq. The CEQ Regulations are mandatory and binding on all federal agencies, including FTA.

15. The CEQ Regulations state that, with the exception of proposals for legislation, EIS's shall be prepared in two stages: (1) preparation of a Draft EIS

(“DEIS”), and (2) preparation of a Final EIS (“FEIS”). 40 C.F.R. § 1502.9. A DEIS is subject to public comment. 40 C.F.R. §§ 1502.9(a), 1503.1. A FEIS must respond to comments on the DEIS. 40 C.F.R. § 1502.9(b).

16. Federal agencies are not required by NEPA or the regulations promulgated thereunder to respond to comments on an FEIS.

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~~16.17.~~A DEIS or FEIS must be supplemented if the federal agency makes substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. A supplemental DEIS (“SDEIS”) or supplemental FEIS (“SFEIS”) is prepared, circulated, and filed in the same fashion as a DEIS and FEIS. 40 C.F.R. § 1502.9(c).

~~17.18.~~The CEQ Regulations require that an EIS consider “cumulative” actions. 40 C.F.R. § 1508.25(a)(2). A “cumulative” action is one “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2).

~~18.19.~~The CEQ Regulations state that federal agencies “shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are

specifically barred from doing so by some other law.” 40 C.F.R. § 1506.2(c). Such cooperation includes “to the fullest extent possible[,] joint environmental impact statements.” Id.

~~19-20.~~ CEQ Regulations require that, “[w]here 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.” Id. (Emphasis added.)

~~20-21.~~ The CEQ Regulations require an EIS to “discuss any inconsistency of a proposed action with any *approved* State or local plan or laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.” 40 C.F.R. § 1506.2(d) (emphasis added).

~~21-22.~~ CEQ Regulations require each federal agency, as necessary, to adopt supplemental procedures to implement NEPA. 40 C.F.R. § 1507.3. The supplemental NEPA regulations applicable to the FTA are set forth in 23 C.F.R. pt. 771. See 49 C.F.R. § 622.101 (the “**FTA Regulations**”).

~~22-23.~~ CEQ Regulations state that a “record of decision” (“**ROD**”) is the instrument by which a federal agency accepts an EIS. See 40 C.F.R. § 1505.2.

~~23-24.~~ Where an agency has not issued a ROD for a proposed major Federal action, CEQ Regulations prohibit the agency from doing work on the proposed action that would have an adverse environmental impact or limit the choice of reasonable alternatives. See 40 C.F.R. § 1506.1(a).

~~22-25.~~ The FTA Regulations state the policy of the FTA that, “[t]o *the fullest extent possible*, all environmental investigations, reviews, and consultations be coordinated *as a single process*, and compliance with all applicable environmental requirements be reflected in the *environmental document* required by this regulation.” 23 C.F.R. § 771.105 (emphasis added).

~~23-26.~~ It is the policy of the FTA that “[a]lternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, *State, and local environmental protection goals*.” 23 C.F.R. § 771.105(b) (emphasis added).

~~24-27.~~ The FTA Regulations require preparation of a DEIS when the FTA determines “that the action is likely to cause significant impacts on the environment.” 23 C.F.R. § 771.123. For a period of not less than 45 days, comments on the DEIS are accepted. 23 C.F.R. § 771.123(i).

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~~25-28.~~ The FTA Regulations require supplementation of an EIS when: (1) changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) new information or circumstances relevant to environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS. 23 C.F.R. § 771.130.

~~26-29.~~ Under the FTA Regulations, an FEIS is to be prepared after the DEIS has been circulated and comments thereto are considered. The FEIS shall identify the preferred alternative, evaluate all reasonable alternatives considered, discuss substantive comments received on the DEIS and responses thereto, summarize public involvement, describe the mitigation measures that are to be incorporated into the proposed action, and document compliance, to the extent possible, with all applicable environmental laws and Executive orders, or provide reasonable assurance that their requirements can be met. 23 C.F.R. § 771.125.

~~27-30.~~ The FTA Regulations provide that no sooner than 30 days after publication of the notice of the availability of the FEIS in the Federal Register or 90 days after publication of a notice for the DEIS, whichever is later, the FTA will complete and sign a ROD. Among other things, the ROD should present the basis for the decision on the EIS and summarize any mitigation measures that will be incorporated. 23 C.F.R. § 771.127.

B. HEPA

~~28.~~31. 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.

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~~29.~~32. HEPA also recognizes that “the quality of humanity’s environment is critical to humanity’s well being, [and] that humanity’s activities have broad and profound effects upon the interrelations of all components of the environment.” Haw. Rev. Stat. 343-1.

~~30.~~33. An EIS is required under HEPA if “the proposed action may have a significant effect on the environment.” Haw. Rev. Stat. § 343-5(b).

~~31.~~34. A “significant effect” is defined under HEPA as “the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.” Haw. Rev. Stat. § 343-2.

~~32.~~35. An “environmental assessment” is defined under HEPA as “a written evaluation to determine whether an action may have a significant effect.” Haw. Rev. Stat. § 343-2.

~~33-36.~~ An “environmental impact statement” is defined under HEPA as “an informational document prepared in compliance with the rules adopted under HRS section 343-6 and which discloses the environmental effects of a proposed action, including effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” Haw. Rev. Stat. § 343-2.

~~34-37.~~ HEPA is administered by the State of Hawai‘i’s Environmental Council (“EC”). EC is authorized to promulgate rules to implement HEPA. Haw. Rev. Stat. § 343-6.

~~35-38.~~ EC has promulgated rules (“EC Rules”) that require state agencies to evaluate “the overall and cumulative effects of an action.” Haw. Admin. R. § 11-200-12(a). These rules further provide that the determination of whether an action may have a significant effect on the environment shall be based upon consideration of “every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.” Haw. Admin. R. § 11-200-12(b).

~~36-39.~~ HEPA requires maximum cooperation between state and federal agencies in the environmental process. HEPA states:

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 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*. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that *one document* shall comply with all applicable laws.

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

37.40. The EC Rules provide:

When the situation occurs where a certain action will be subject both to the National Environmental Policy Act of 1969 (Public Law 91-190, as amended by Public Law 94-52 and Public Law 94-83; 42 U.S.C. § 4321-4347) and chapter 343, HRS, the following shall occur:

...

(2) The National Environmental Policy Act requires that draft statements be prepared by the responsible federal agency. When the responsibility of preparing an EIS is delegated to a state or county agency, this chapter shall apply in addition to federal requirements under the National Environmental Policy Act. The office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. This cooperation, to the fullest extent possible, *shall include joint environmental impact statements with concurrent public review and processing at both levels of government*. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling the requirements so that *one document* shall comply with all applicable laws.

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Haw. Admin. R. § 11-200-25 (emphasis added).

~~38-41.~~ The EC Rules provide that a supplemental EIS (“SEIS”) is required for an action if an EIS for the action has been accepted, and the action has changed substantively in size, scope, intensity, use, location or timing, among other things.

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Haw. Admin. R. § 11-200-26 (emphasis added).

V. BACKGROUND FACTS

~~39-42.~~ Notice was given in the September 8, 2000 issue of the Environmental Notice published by the State of Hawai‘i, Office of Environmental Quality Control (“OEQC”), and the September 8, 2000 issue of the Federal Register that a “Major Investment Study/Draft Environmental Impact Statement” for the Project (“MIS/DEIS”) was available. The MIS/DEIS was submitted by FTA pursuant to NEPA and by DTS pursuant to HEPA. The applicant for the Project was DTS, and the accepting authorities were the Governor under HEPA and FTA under NEPA.

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~~40-43.~~ According to the MIS/DEIS, the City explored three alternatives for the Project:

- (1) The **No-Build Alternative**, which includes transportation-related projects expected to be implemented in the next three years and expansion of bus service in growing areas, such as Kapolei, to maintain existing service levels;

- (2) The **Transportation System Management (“TSM”) Alternative**, which features the reconfiguration of the present bus route network to a hub-and-spoke system and some highway elements designed to improve bus service; and
- (3) The **Bus Rapid Transit (“BRT”) Alternative**, which builds on the hub-and-spoke bus system in the TSM Alternative by adding a continuous H-1 BRT corridor from Kapolei to downtown Honolulu and an In-Town BRT system in urban Honolulu. The BRT Alternative consists of a Regional BRT component that runs from Kapolei to downtown Honolulu, and an In-Town BRT component that runs from Middle Street to Iwilei, downtown Honolulu to UH-Manoa, and downtown Honolulu to Kakaako/Waikiki.

[41.44.](#) Individual members of ATI timely submitted comments in response to the MIS/DEIS.

[42.45.](#) On or about November 29, 2000, the City Council of Honolulu (the “**Council**”) adopted Resolution 00-249 selecting the BRT Alternative as the “locally preferred alternative” (“**LPA**”).

[43.46.](#) After the Council’s adoption of Resolution 00-249, DTS recommended changes to the LPA. On or about August 1, 2001, the Council

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adopted Resolution 01-208, CD1, FD1, agreeing with DTS' recommended changes to the LPA and amending the LPA pursuant to those recommendations.

~~44.47.~~ Resolution 01-208, CD1, FD1 amended the LPA as follows:

- (1) deleting the Kaonohi Street ramps to the H-1 BRT Corridor and the Kamehameha Drive-In site as the Pearl City/Aiea Transit Center;
- (2) Realigning the University branch line of the in-town BRT system through the substitution of Pensacola Street for Ward Avenue as the connection between South King Street and Kapiolani Boulevard. The realigned portion of the line proceeds from the Richards Street/South King Street intersection in the Koko Head direction on South King Street until Pensacola Street and then in the makai direction on Pensacola Street until Kapiolani Boulevard;
- (3) Adding to the in-town BRT system of the LPA a "Kakaako Makai" branch line into the Aloha Tower and Kakaako makai areas. The new branch line begins at the Iwilei Transit Center, travels Koko Head onto Iwilei Road, turns Koko Head onto North King Street, and proceeds to the Hotel Street Transit Mall. It then proceeds in the makai direction onto Channel Street. The branch then turns in the Koko Head direction onto Ilalo Street and then turns in the mauka direction onto Ward Avenue and proceeds until Auahi Street. From this point, the branch follows the LPA Kakaako/Waikiki routing to its terminus in Waikiki. In the reverse direction, the Kakaako Makai branch travels Ewa in reverse of the Koko Head direction; except that, at the intersection of Bishop Street/Nimitz Highway, the branch turns Koko Head onto Nimitz Highway, then mauka onto Richards Street, and then follows the LPA Kakaako/Waikiki branch to the Iwilei Transit Center, where the new branch ends.

Id. at 2-3. As amended, the LPA is ~~hereinafter~~ referred to herein as the “Refined LPA”.

48. The Refined LPA consists of a Regional BRT component and an In-Town BRT component. The Regional BRT component runs from Kapolei to downtown Honolulu. The In-Town BRT component consists of various routes throughout urban Honolulu.

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~~45-49.~~ Notice was given in the March 23, 2002 issue of the OEQC’s Environmental Notice and the March 22, 2002 issue of the Federal Register that a “Supplemental Draft Environmental Impact Statement” for the Project (“SDEIS”) was available. The SDEIS was submitted by FTA pursuant to NEPA and by DTS pursuant to HEPA. The applicant for the Project was DTS, and the accepting authorities were the Governor under HEPA and FTA under NEPA.

46-50. The SDEIS was prepared purportedly to identify and discuss environmental impacts of the Refined LPA.

51. The SDEIS does not mention the IOS.

52. The SDEIS does not identify and discuss the environmental impacts of the IOS.

53. The public comment period for the SDEIS ended on May 7, 2002.

54. Individual members of ATI timely submitted comments in response to the SDEIS.

47-55. In June 2002, the Council passed, and the Mayor of the City & County of Honolulu approved, Ordinance 02-33. Ordinance 02-33 relates to the City's Executive Capital Budget and Program for Fiscal Year July 1, 2002 to June 30, 2003. Ordinance 02-33 appropriates a total of \$31 million for a mass transit project entitled "BRT Iwilei to Waikiki Alignment." Ordinance 02-33 described this appropriation, in pertinent part, as follows:

Acquire right-of-way, design and construct roadway and system infrastructure improvements to support BRT between Iwilei and Waikiki 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.

Ordinance 02-33 at UT-1.

48-56. Notice was given in the December 8, 2002 issue of the OEQC's Environmental Notice that a Final Environmental Impact Statement for the Project (i.e., the State FEIS) had been submitted by DTS pursuant to HEPA. The notice stated that ~~the~~ Governor Benjamin J. Cayetano accepted the State FEIS on November 29, 2002, 3 days after the deadline to submit notices of EIS's to OEQC for publication in the December 8, 2002 issue of the Environmental Notice. The notice also stated that FTA planned "to release a second FEIS in the near future that would be in compliance with the National Environmental Policy Act."

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57. Governor Cayetano's term as Governor of the State of Hawai'i ended on December 3, 2002.

58. One of Governor Cayetano's last official acts as Governor was acceptance of the State FEIS.

59. Governor Linda Lingle, who took office as Governor on December 3, 2002, has been reputed to no support implementation of a BRT system in Honolulu or the State of Hawai'i.

49-60. The State FEIS stated that it was prepared in compliance with HEPA, and that a separate NEPA FEIS was being prepared.

50-61. Notice was given in the August 8, 2003 issue of the Federal Register that FTA submitted a Final Environmental Impact Statement for the Project (i.e., the Federal FEIS).

51-62. The Federal FEIS stated that it was submitted by FTA and DTS, and ~~that~~ that it was prepared in compliance with NEPA. The Federal FEIS does not state that it is prepared in compliance with HEPA.

63. The contents of the Federal FEIS are not identical to the contents of the State FEIS.

52-64. Unlike the State FEIS, the Federal FEIS ~~contains~~ ~~discusses~~ ~~section of~~ the IOS. According to one portion of the Federal FEIS, the IOS is the section of the Refined LPA that will be constructed first, and that it consists of a 5.6 mile

section running between Iwilei and Waikiki along the Kakaako Makai alignment.

Plaintiff contends that

~~55-65.~~ However, another portion of the Federal FEIS described the IOS as a stand-alone “action” within the meaning of HEPA and NEPA rather than merely a section of the Refined LPA. The Federal FEIS stated that the IOS “is viable as a stand-alone BRT route” The Federal FEIS also identifies differences between the IOS and the Iwilei-Waikiki Branch of the Refined LPA as it will exist in 2025.

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66. The IOS does not accomplish the purpose and need of the Project relating to improving the transportation linkage between Kapolei and urban Honolulu.

67. Environmental impacts for the IOS purportedly are stated within each chapter of the Federal FEIS as well as in a self-contained chapter in the Federal FEIS.

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68. Because the IOS was not mentioned in the SDEIS that was made available for public comment in March 2002, the Federal FEIS does not respond to any comments regarding the IOS.

~~53-69.~~ The Federal FEIS states that construction for the IOS will consist of concrete lanes, signal priority, widening of sections of Ala Moana Boulevard and

Kalia Road, 13-inch high raised platforms, benches, and canopies. The IOS will use hybrid diesel-electric vehicles which operate at-grade in exclusive or semi-exclusive lanes.

[54-70](#). The Federal FEIS states that, “[i]f deemed appropriate, FTA will issue a Record of Decision (ROD) for the IOS. The remainder of the Refined LPA will be the subject of a separate ROD at a future time.”

[55-71](#). Because the IOS will be operational before the Refined LPA is operational, the Federal FEIS uses the year 2006 to measure impacts of the IOS as opposed to the year 2025, which the Federal FEIS uses for reviewing impacts of the Refined LPA in its entirety.

[56-72](#). The Federal FEIS states that the purpose of the Project and needs related to Kapolei would not be accomplished by the IOS because the IOS does not include the Regional BRT providing service to and from Kapolei.

[57-73](#). The IOS is anticipated to require less than \$25 million in financial assistance from FTA.

[58-74](#). Pursuant to 49 U.S.C. § 5309(e), the criteria for FTA approval of capital investment in a fixed guideway system such as the Refined LPA is not applicable to projects for which the financial assistance provided by FTA is less than \$25 million. See 49 U.S.C. § 5309(e)(6)(A)(ii).

~~59-75.~~ On October 23, 2003, FTA issued a ROD accepting the Federal FEIS, but only as to the IOS (the “2003 ROD”).

~~63-76.~~ Until FTA has issued a ROD as to the Refined LPA (to the extent it does not overlap with elements of the IOS), FTA has not accepted an EIS for the Refined LPA within the meaning of NEPA.

VI. FIRST CLAIM FOR RELIEF

(NEPA – Proceeding With Major Federal Action Without Issuance of a ROD)

~~64-77.~~ Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

~~65-78.~~ The Refined LPA is a major Federal action within the meaning of NEPA.

~~66-79.~~ The 2003 ROD accepts the Federal FEIS as to the IOS alone, and makes no determination on the Federal FEIS as to the Refined LPA in its entirety.

~~67-80.~~ No ROD has been issued for the Refined LPA in its entirety.

~~68-81.~~ The IOS is represented in the Federal FEIS as a phase of the Refined LPA.

~~69-82.~~ Construction, operation, and maintenance of the IOS therefore constitutes action taken on the Refined LPA prior to the issuance of a ROD for the Refined LPA. Such action results in adverse environmental impacts and/or limits

the choice of reasonable alternatives in violation of 40 C.F.R. § 1506.1(a). As a result, FTA is in violation of NEPA.

~~70-83.~~ FTA's violation of 40 C.F.R. § 1506.1(a) is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

~~71-84.~~ An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to refrain from work on the Refined LPA before issuing a ROD that accepts an FEIS as to the Refined LPA in its entirety.

VII. SECOND CLAIM FOR RELIEF

(NEPA – Failure to Prepare DEIS or SDEIS)

85. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

86. The Federal FEIS contains discussion of the IOS.

87. Neither the MIS/DEIS, SDEIS, nor the State FEIS contain discussion of the IOS.

88. Compared to the Refined LPA or any aspect thereof discussed in the SDEIS, the IOS represents a substantial change from the Refined LPA that raises new environmental concerns and presents significant new circumstances or

information relevant to environmental concerns bearing on the Refined LPA and its impacts that were not discussed in the MIS/DEIS or SDEIS. Differences between the IOS and the Refined LPA include, but are not limited to, the following:

- The IOS establishes different routes and covers different geographic areas in Honolulu as compared to the Refined LPA, including the In-Town BRT component thereof. The Federal FEIS admittedly states that the “IOS . . . is not identical to the Iwilei -- Waikiki Branch [of the Refined LPA] that will be in place ultimately[,]” and lists some of the differences between the IOS and Iwilei -- Waikiki Branch of the Refined LPA.
- The environmental impacts of the IOS are measured as of the year 2006 whereas the environmental impacts of the Refined LPA are measured as of the year 2025.
- The environmental impacts of the IOS as discussed in the Federal FEIS are different from the environmental impacts of the Refined LPA as discussed in the SDEIS.
- The benefits to be derived from the IOS as discussed in the Federal FEIS are different from the benefits to be derived from the Refined LPA as discussed in the SDEIS.

89. Under the CEQ Regulations and the FTA Regulations, FTA is required to discuss and analyze the environmental impacts of the IOS in a new DEIS or a second SDEIS. See 40 C.F.R. § 1502.9(c); 23 C.F.R. § 771.130.

90. Rather than submit a new DEIS or a second SDEIS discussing the IOS, FTA discussed the IOS in an EIS for the first time in the Federal FEIS in violation of NEPA, the CEQ Regulations, and the FTA Regulations.

91. As a result of FTA's failure to discuss the IOS in a DEIS or SDEIS, Plaintiff has been denied the opportunity to comment on the environmental impact of the IOS as it is entitled to do so under NEPA.

92. FTA's violation of the requirement to discuss the IOS in a new DEIS or SDEIS is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

93. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to submit a new DEIS or SDEIS containing discussion and analysis of the environmental impacts of the IOS.

VIII. THIRD CLAIM FOR RELIEF

(HEPA – Failure to Prepare DEIS or SDEIS)

94. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

95. Under HEPA and the EC Rules, DTS is required to discuss and analyze the environmental impacts of the IOS in a new DEIS or SDEIS. See Haw. Admin. R. § 11-200-26.

96. The EC Rules provide that a supplemental EIS (“SEIS”) is required for an action if an EIS for the action has been accepted, and the action has changed substantively in size, scope, intensity, use, location or timing, among other things. Haw. Admin. R. § 11-200-26.

97. The IOS is either a new action unlike any action discussed in the MIS/DEIS or SDEIS, or State FEIS or a substantive change in the Refined LPA in terms of size, scope, intensity, use, location, and time, among other things, that necessitates submission of a SDEIS.

98. Rather than submit a new DEIS or SDEIS discussing the environmental impacts of the IOS, DTS discussed the IOS in an EIS for the first time in the Federal FEIS in violation of HEPA and the EC Rules.

99. As a result of DTS's failure to discuss the IOS in a DEIS or SDEIS, Plaintiff has been denied the opportunity to comment on the environmental impacts of the IOS as it is entitled to do so under HEPA.

100. An actual controversy has arisen and now exists between Plaintiff and DTS/DIRECTOR concerning their duties under HEPA to submit a new DEIS or SDEIS containing discussion and analysis of the environmental impacts of the IOS.

IX. FOURTH CLAIM FOR RELIEF

(NEPA – Failure to Consider Cumulative Impacts)

101. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

102. The CEQ Regulations require that an EIS consider cumulative actions. See 40 C.F.R. § 1508.25(a)(2).

103. The Federal FEIS analyzes the environmental impacts of the IOS in isolation. For instance, the environmental impacts of the IOS are evaluated as of 2006, when the IOS is projected to be operational, instead of 2025, when the Refined LPA in its entirety is projected to be operational.

104. In isolating the IOS from the rest of the Project for purposes of review under NEPA, FTA has failed to consider the cumulative impacts of the IOS and the Refined LPA in the Federal FEIS.

105. FTA has violated NEPA's requirements in failing to consider cumulative impacts. Such violation is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court. The Federal FEIS should therefore be declared unlawful and set aside by this Court.

106. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to discuss cumulative impacts of the IOS and the Refined LPA in an EIS.

X. FIFTH CLAIM FOR RELIEF

(NEPA – Improper Segmentation – New Starts Circumvention)

~~72.~~107. Plaintiff repeats and realleges the foregoing paragraphs in this Complaint.

108. The State administration does not support the Regional BRT component of the Refined LPA.

109. The Project will be partially funded under FTA's Section 5309 New Starts Program ("New Starts").

110. Approval of FTA funding for New Starts projects is evaluated pursuant to criteria stated in 49 U.S.C. § 5309(e) (the "New Starts Criteria").

which include cost-effectiveness of the New Starts project in question. See 49 U.S.C. § 5309(e)(2)(B); 49 C.F.R. §§ 611.9(b)(4), 611.13 app. A.

111. New Starts projects that involve less than \$25 million in financial assistance from FTA and that are self-contained are exempt from the New Starts Criteria. See 49 U.S.C. § 5309(e)(6)(A)(ii).

112. If the IOS is in fact a self-contained New Starts project rather than part of a larger New Starts project, it is exempt from the New Starts Criteria because it involves less than \$25 million in financial assistance from FTA.

113. The In-Town BRT portion of the Refined LPA by itself does not meet the New Starts Criteria, including, inter alia, the criterion of cost-effectiveness.

114. In order to commence construction and operation of the In-Town BRT without meeting the New Starts Criteria, including, inter alia, the criterion of cost-effectiveness, Defendants repackaged elements of the In-Town BRT as the IOS and considered the environmental impacts and merits of the IOS separate from the Refined LPA.

115. Isolation of the IOS from the Refined LPA for the purpose of environmental review under NEPA is designed to circumvent evaluation of the entire Project, including the Refined LPA and the IOS, pursuant to the New Starts Criteria and constitutes improper segmentation under NEPA.

116. FTA's improper segmentation of the Project for purposes of environmental review under NEPA constitutes a violation of NEPA, and is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court. The Federal FEIS should therefore be declared unlawful and set aside by this Court.

117. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to refrain from improper segmentation of the Project and to evaluate the Project in its entirety under the New Starts Criteria.

VI.XI. SIXTHFIRST CLAIM FOR RELIEF

(NEPA – Failure to Prepare a Joint EIS)

~~60~~.118. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

~~61~~.119. There are two FEIS's for the Project – the State FEIS submitted by DTS covering the Refined LPA and the Federal FEIS covering the Refined LPA and the IOS submitted by FTA and DTS – which are materially inconsistent with each other. As an illustration, the Federal FEIS contains discussion of the IOS, whereas the State FEIS does not.

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62-120. FTA has violated the CEQ Regulations requiring federal agencies to “cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements,” and to prepare “joint environmental impact statements . . . so that one document will comply with all applicable laws.” 40 C.F.R. § 1506.2(c).

63-121. FTA has violated FTA Regulations requiring that, “[t]o the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the **environmental document** required by this regulation.” 23 C.F.R. § 771.105 (emphasis added).

64-122. The preparation of multiple FEIS’s that are inconsistent with each other, rather than a single, joint EIS, confused members of the public who would have a desire to comment on the IOS, such as ATI, as to the environmental review process that would be followed.

65-123. Because the IOS was not discussed in a joint EIS as required by NEPA, the Governor accepted the State FEIS without being informed that the IOS would be built and operated regardless of whether the Refined LPA was ever implemented. The Governor is entitled to evaluate such information in an EIS before deciding whether to accept an EIS for the Project pursuant to HEPA.

66-124. FTA's violations of the CEQ Regulations and the FTA Regulations constitute violations of NEPA and are arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

67-125. FTA's failure to comply with the CEQ Regulations and the FTA Regulations renders the Federal FEIS invalid pursuant to NEPA. The Federal FEIS should therefore be declared invalid and set aside by this Court.

68-126. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to prepare a single joint FEIS with DTS for the Refined LPA and the IOS. FTA/ADMINISTRATOR are required by law to issue a single joint FEIS with DTS for the Refined LPA and the IOS immediately.

~~VII.~~XII. SEVENTH~~SECOND~~ CLAIM FOR RELIEF

(HEPA – Failure to Prepare a Joint EIS)

69-127. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

70-128. There are two FEIS's for the Project – the State FEIS submitted by DTS covering the Refined LPA and the Federal FEIS covering the Refined LPA and the IOS submitted by FTA and DTS – which are materially inconsistent with

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each other. As an illustration, the Federal FEIS contains discussion of the IOS, whereas the State FEIS does not.

71-129. The preparation of the Federal FEIS separate and apart from the State FEIS violates HEPA's requirement that state and county agencies "cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements [including] **joint environmental impact statements . . . so that one document shall comply with all applicable laws.**"

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

72-130. The preparation of the Federal FEIS separate and apart from the State FEIS violates the EC Rules requiring state and county agencies to "cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements [including] **joint environmental impact statements . . .**" Haw. Admin. R. § 11-200-25 (emphasis added).

73-131. The preparation of multiple FEIS's that are inconsistent with each other, rather than a single, joint EIS, confused members of the public who would have a desire to comment on the IOS, such as ATI, as to the environmental review process that would be followed.

74-132. Because the IOS was not discussed in a joint EIS as required by NEPA, the Governor accepted the State FEIS without being informed that the IOS would be built and operated regardless of whether the Refined LPA was

ever implemented. The Governor is entitled to evaluate such information in an EIS before deciding whether to accept an EIS for the Project pursuant to HEPA.

75-133. DTS' failure to comply with HEPA and the EC Rules constitutes a violation of HEPA and renders the Federal FEIS invalid pursuant to HEPA. DTS' violation of HEPA should be declared unlawful, and the Federal FEIS should be declared invalid and set aside by this Court.

76-134. Because the IOS was not discussed in a joint EIS as required by HEPA, Plaintiff is entitled to a judicial declaration that no EIS discussing the environmental impacts of the IOS has been accepted by the Governor, and that HEPA requires preparation of such an EIS and acceptance of the same by the Governor before development, construction, and operation of the IOS may commence.

77-135. An actual controversy has arisen and now exists between Plaintiff and DTS/DIRECTOR concerning their duties under HEPA to prepare a single joint FEIS with FTA for the Refined LPA and the IOS. DTS/DIRECTOR are required by law to issue a single joint FEIS with FTA for the Refined LPA and the IOS immediately.

VIII.XIII. THIRDEIGHTH CLAIM FOR RELIEF

(NEPA – Failure to Coordinate Environmental Review of the Project as a Single Process (Multiple FEIS’s))

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78-136. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

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79-137. FTA and DTS have issued two FEIS’s for the Refined LPA, each of which are materially different. The State FEIS was issued purportedly to comply with HEPA. The Federal FEIS was issued purportedly to comply with NEPA.

80-138. FTA Regulations require that “[t]o the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a **single process . . .**” 23 C.F.R. § 771.105 (emphasis added).

81-139. FTA has violated FTA Regulations by failing to cooperate with DTS to issue a single FEIS for the Refined LPA and the IOS, and by issuing multiple FEIS’s for the Refined LPA and the IOS, the second of which (i.e., the Federal FEIS) contains significant new circumstances and information that did not appear in the first (i.e., the State FEIS). FTA has thereby improperly truncated the environmental review process for the Refined LPA and the IOS.

82-140. The truncation of the environmental review process for the Refined LPA and the IOS confused members of the public who would have a desire to comment on the IOS, such as ATI, as to the environmental review process that would be followed.

83-141. FTA's violation of FTA Regulations is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

84-142. FTA's violation of FTA Regulations renders the Federal FEIS invalid pursuant to NEPA. The Federal FEIS should therefore be declared invalid and set aside by this Court.

85-143. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to cooperate with DTS to coordinate environmental review of the Project as a single process under NEPA and HEPA.

IX.XIV. NINTHFOURTH CLAIM FOR RELIEF

**(NEPA – Failure to Coordinate Environmental Review
of the Project as a Single Process (Multiple ROD's))**

86-144. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

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87-145. The Federal FEIS states: “If deemed appropriate, ~~that~~ FTA will issue a Record of Decision (ROD) for the IOS. ~~separate ROD’s for the IOS and~~ ~~“{t}The remainder of the Refined LPA will be the subject of a separate ROD at a future time.”~~”

88-146. FTA issued the 2003 ROD, which accepted the Federal FEIS with respect to the IOS alone.

89-147. A ROD documents the basis for ~~the~~ FTA’s decision on an EIS. See 23 C.F.R. § 771.127.

90-148. Because the Federal FEIS discusses both the IOS and the Refined LPA, the ROD for the Federal FEIS should address both the IOS and the Refined LPA. FTA acted in violation of NEPA and the FTA Regulations requiring that “all environmental investigations, reviews, and consultations be coordinated as a single process,” 23 C.F.R. § 771.105, by issuing a ROD for the IOS alone and reserving decision on the “remainder of the Refined LPA” until a later date.

91-149. FTA’s failure to coordinate environmental review of the Refined LPA and the IOS under a single process confused members of the public who would have a desire to comment on the IOS, such as ATI, as to the environmental review process that would be followed.

92-150. FTA’s violation of NEPA and FTA Regulations is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required

by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

93-151. FTA's violation of FTA Regulations renders the 2003 ROD invalid pursuant to NEPA. The 2003 ROD should therefore be declared invalid and set aside by this Court.

94-152. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to coordinate environmental review of the Project as a single process. FTA/ADMINISTRATOR should be ordered to issue a single ROD documenting FTA's basis for a decision as to both the IOS and the Refined LPA.

X.XV. TENTHFIFTH CLAIM FOR RELIEF

(HEPA – Failure to Coordinate Concurrent Public Review and Processing of EIS)

95-153. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

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96-154. FTA and DTS have issued two FEIS's for the Project, each of which are materially different. The State FEIS was issued purportedly to comply with HEPA. The Federal FEIS was issued purportedly to comply with NEPA.

97-155. When an action is subject to HEPA and NEPA, the EC Rules require state and county agencies to cooperate with federal agencies "to the fullest

extent possible” in preparing a joint EIS, which “shall include . . . *concurrent public review and processing* at both levels of government.” Haw. Rev. Stat. § 343-5(f); see also Haw. Admin. R. § 11-200-25 (emphasis added).

98-156. DTS has violated the EC Rules by issuing multiple FEIS’s for the Project at different times, thereby frustrating concurrent public review and processing of the EIS for the Project at both the state and federal levels of government.

99-157. DTS’s failure to coordinate environmental review of the Refined LPA and the IOS under a single process confused members of the public who would have a desire to comment on the IOS, such as ATI, as to the environmental review process that would be followed.

100-158. DTS’s violation of the EC Rules constitutes a violation of HEPA and renders the Federal FEIS invalid pursuant to HEPA. DTS’s violation should be declared unlawful, and the Federal FEIS should therefore be declared invalid and set aside by this Court.

101-159. An actual controversy has arisen and now exists between Plaintiff and DTS/DIRECTOR concerning their duties under HEPA to provide for concurrent public review and processing of the EIS for the Project.

XI. SIXTH CLAIM FOR RELIEF

(NEPA — Failure to Prepare DEIS or SDEIS)

~~102. Plaintiff repeats and realleges the foregoing paragraphs of this~~

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~~Complaint.~~

~~103. The Federal FEIS contains discussion of the IOS.~~

~~104. Neither the MIS/DEIS nor the SDEIS contain discussion of the IOS.~~

~~105. Compared to the Refined LPA or any aspect thereof discussed in the SDEIS, the IOS represents a substantial change from the Refined LPA that raises new environmental concerns and presents significant new circumstances or information relevant to environmental concerns bearing on the Refined LPA and its impacts that were not discussed in the MIS/DEIS or SDEIS. Differences between the IOS and the Refined LPA include, but are not limited to, the following:~~

- ~~▪ The IOS establishes different routes and covers different geographic areas in Honolulu as compared to the Refined LPA, including the In-Town BRT component thereof. The Federal FEIS admittedly states that the “IOS . . . is not identical to the Iwilei — Waikiki Branch [of the Refined LPA] that will be in place ultimately[,]” and lists some of the differences between the IOS and Iwilei — Waikiki Branch of the Refined LPA. Ex. “7” at IOS-7.~~

~~▪The environmental impacts of the IOS are measured as of the year 2006 whereas the environmental impacts of the Refined LPA are measured as of the year 2025.~~

~~▪The environmental impacts of the IOS as discussed in the Federal FEIS are different from the environmental impacts of the Refined LPA as discussed in the SDEIS.~~

~~▪The benefits to be derived from the IOS as discussed in the Federal FEIS are different from the benefits to be derived from the Refined LPA as discussed in the SDEIS.~~

~~106. Under the CEQ Regulations and the FTA Regulations, FTA is required to discuss and analyze the environmental impacts of the IOS in a new DEIS or a second SDEIS. See 40 C.F.R. § 1502.9(c); 23 C.F.R. § 771.130.~~

~~107. Rather than submit a new DEIS or a second SDEIS discussing the IOS, FTA discussed the IOS in an EIS for the first time in the Federal FEIS in violation of NEPA, the CEQ Regulations, and the FTA Regulations.~~

~~108. As a result of FTA's failure to discuss the IOS in a DEIS or SDEIS, Plaintiff has been denied the opportunity to comment on the environmental impact of the IOS as it is entitled to do so under NEPA.~~

~~109. FTA's violation of the requirement to discuss the IOS in a new DEIS or SDEIS is arbitrary and capricious, an abuse of discretion, and/or without~~

~~observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.~~

~~110. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to submit a new DEIS or SDEIS containing discussion and analysis of the environmental impacts of the IOS.~~

~~XII. SEVENTH CLAIM FOR RELIEF~~

~~(HEPA — Failure to Prepare DEIS or SDEIS)~~

~~111. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.~~

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~~112. Under HEPA and the EC Rules, DTS is required to discuss and analyze the environmental impacts of the IOS in a new DEIS or SDEIS. See Haw. Admin. R. § 11-200-26.~~

~~113. The EC Rules provide that a supplemental EIS (“SEIS”) is required for an action if an EIS for the action has been accepted, and the action has changed substantively in size, scope, intensity, use, location or timing, among other things. Haw. Admin. R. § 11-200-26.~~

~~114. The IOS is either a new action unlike any action discussed in the MIS/DEIS or SDEIS, or a substantive change in the Refined LPA in terms of size,~~

~~scope, intensity, use, location, and time, among other things, that necessitates submission of a SDEIS.~~

~~115. Rather than submit a new DEIS or SDEIS discussing the environmental impacts of the IOS, DTS discussed the IOS in an EIS for the first time in the Federal FEIS in violation of HEPA and the EC Rules.~~

~~116. As a result of DTS's failure to discuss the IOS in a DEIS or SDEIS, Plaintiff has been denied the opportunity to comment on the environmental impact of the IOS as it is entitled to do so under HEPA.~~

~~117. An actual controversy has arisen and now exists between Plaintiff and DTS/DIRECTOR concerning their duties under HEPA to submit a new DEIS or SDEIS containing discussion and analysis of the environmental impacts of the IOS.~~

XIII. EIGHTH CLAIM FOR RELIEF

(NEPA — Failure to Consider Cumulative Impacts)

~~118. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.~~

~~119. The CEQ Regulations require that an EIS consider cumulative actions. See 40 C.F.R. § 1508.25(a)(2).~~

~~120. The Federal FEIS analyzes the environmental impacts of the IOS in isolation. For instance, the environmental impacts of the IOS are evaluated as of~~

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~~2006, when the IOS is projected to be operational, instead of 2025, when the Refined LPA in its entirety is projected to be operational.~~

~~121. In isolating the IOS from the rest of the Project for purposes of review under NEPA, FTA has failed to consider the cumulative impacts of the IOS and the Refined LPA in the Federal FEIS.~~

~~122. FTA has violated NEPA's requirements in failing to consider cumulative impacts. Such violation is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court. The Federal FEIS should therefore be declared unlawful and set aside by this Court.~~

~~123. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to discuss cumulative impacts of the IOS and the Refined LPA in an EIS.~~

~~XIV. NINTH CLAIM FOR RELIEF~~

~~(NEPA — Improper Segmentation — New Starts Circumvention)~~

~~124. Plaintiff repeats and realleges the foregoing paragraphs in this Complaint.~~

~~125. The Project will be partially funded under FTA's Section 5309 New Starts Program ("New Starts").~~

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~~126. Approval of FTA funding for New Starts projects is evaluated pursuant to criteria stated in 49 U.S.C. § 5309(e) (the “New Starts Criteria”), which include cost-effectiveness of the New Starts project in question. See 49 U.S.C. § 5309(e)(2)(B); 49 C.F.R. §§ 611.9(b)(4), 611.13 app. A.~~

~~127. New Starts projects that involve less than \$25 million in financial assistance from FTA and that are self-contained are exempt from the New Starts Criteria. See 49 U.S.C. § 5309(e)(6)(A)(ii).~~

~~128. If the IOS is in fact a self-contained New Starts project rather than part of a larger New Starts project, it is exempt from the New Starts Criteria because it involves less than \$25 million in financial assistance from FTA.~~

~~129. The In-Town BRT portion of the Refined LPA by itself does not meet the New Starts Criteria, including, *inter alia*, the criterion of cost-effectiveness.~~

~~130. In order to commence construction and operation of the In-Town BRT without meeting the New Starts Criteria, including, *inter alia*, the criterion of cost-effectiveness, Defendants repackaged elements of the In-Town BRT as the IOS and considered the environmental impacts and merits of the IOS separate from the Refined LPA.~~

~~131. Isolation of the IOS from the Refined LPA for the purpose of environmental review under NEPA is designed to circumvent evaluation of the~~

~~Refined LPA pursuant to the New Starts Criteria and constitutes improper segmentation under NEPA.~~

~~132.FTA's improper segmentation of the Project for purposes of environmental review under NEPA constitutes a violation of NEPA, and is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court. The Federal FEIS should therefore be declared unlawful and set aside by this Court.~~

~~133.An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to refrain from improper segmentation of the Refined LPA and to evaluate the Refined LPA in its entirety under the New Starts Criteria.~~

XV.XVI. ELEVENTH CLAIM FOR RELIEF

(NEPA – Failure to Consider Approved Local Plans or Laws)

~~134.160.~~ Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

~~135.161.~~ CEQ Regulations require federal agencies like FTA to discuss in an EIS any inconsistencies of a proposed action with approved state or local plans or laws, and where an inconsistency exists, to describe the extent to which

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the agency would reconcile its proposed action with the plan or law. See 40 C.F.R. § 1506.2(d).

~~136.162.~~ The City’s development plans establish eight geographical areas, see Rev. Ordinances of Honolulu (1990), chapter 24, one of which is the Primary Urban Center (“PUC”). The development plan for the PUC is commonly referred to as the “Primary Urban Center Development Plan” (“PUC-DP”).

~~137.163.~~ A portion of the corridor for the Refined LPA is partially located within the PUC. The corridor for the IOS is located entirely within the PUC.

~~138.164.~~ The PUC-DP establishes the following development priorities:

The planning, funding, and construction of public projects in the primary urban center shall be guided by the policies set forth in Section 24-1.9 of the development plan common provisions. In addition, public plans and programs shall support the following projects in the primary urban center in the priority shown:

- a) Infrastructure improvements to facilitate the future development of Waikiki, including facilities to support the convention center;
- b) Affordable housing projects;
- c) Upgrade existing infrastructure downtown;
- d) Industrial areas in Kalihi/Palama/Kalihi Kai;
- e) Honolulu waterfront development; and

f) Rapid transit system and stations: including infrastructure improvements along the transit line to support expanded activity at and around transit stations.

Rev. Ord. of Honolulu 1990 (2000 ed.), as amended, ch. 24, art. 2, sec. 24-2.3 (emphasis added).

~~139.165.~~ The Federal FEIS fails to discuss whether the Refined LPA and/or the IOS is consistent with the PUC-DP. Instead, the Federal FEIS mentions limited policies in a draft development plan for the PUC that have not been adopted. Discussion of whether the Refined LPA and/or the IOS is consistent or inconsistent with the development priorities established in the PUC-DP is completely absent in the Federal FEIS. Accordingly, the Federal FEIS is invalid.

~~140.166.~~ FTA's failure to discuss the consistency of the Refined LPA and/or the IOS with the PUC-DP in general, and the PUC-DP's development priorities in particular, constitutes a violation of NEPA, and is arbitrary and capricious, an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

~~141.167.~~ An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to discuss in an EIS any inconsistencies of the Refined LPA and/or the IOS with the

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PUC-DP, and if an inconsistency exists, to describe the extent to which FTA would reconcile the Refined LPA and/or the IOS with the PUC-DP.

XVI.XVII. TWELFTH CLAIM FOR RELIEF

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(NEPA – Failure to Comply With State Environmental Laws)

142.168. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

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143.169. The CEQ Regulations require federal agencies such as FTA to cooperate with state and local agencies in fulfilling EIS requirements of state laws not in conflict with those in NEPA. See 40 C.F.R. § 1506.2(c).

144.170. The FTA Regulations require that FTA, in conducting environmental review of an action pursuant to NEPA, give consideration to State environmental protection goals. See 23 C.F.R. § 771.105(b).

145.171. Hawai‘i’s environmental protection goals are embodied in, and promoted by, HEPA.

146.172. The Federal FEIS violates HEPA in numerous ways, as described in the foregoing paragraphs of this Complaint. Each violation in turn constitutes a violation of NEPA, the CEQ Regulations, and the FTA Regulations. Such violations are arbitrary and capricious, constitute an abuse of discretion, and/or without observance of procedure required by law within the meaning of

the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

147.173. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to cooperate with state and local agencies in fulfilling the EIS requirements of HEPA.

XVIII. THIRTEENTH CLAIM FOR RELIEF

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(NEPA – Insufficiency of Federal FEIS)

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174. Plaintiff repeats and realleges the foregoing paragraphs of this Complaint.

175. The Federal FEIS does not sufficiently discuss and analyze the environmental impacts that will result from the Refined LPA and/or the IOS.

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176. The Federal FEIS relies upon faulty data to conclude that no significant environmental impacts will result in the construction and operation of the Refined LPA and/or the IOS.

177. The Federal FEIS makes false and/or misleading comparisons between existing conditions and conditions that will exist after the Refined LPA and/or the IOS is implemented.

178. Accordingly, the Federal FEIS is insufficient to meet the requirements of NEPA.

179. FTA's acceptance of the Federal FEIS as to the IOS is arbitrary and capricious, constitute an abuse of discretion, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful by this Court.

180. An actual controversy has arisen and now exists between Plaintiff and FTA/ADMINISTRATOR concerning their duties under NEPA to submit an EIS for the Refined LPA and/or the IOS that complies with the requirements of NEPA.

XVII.XIX. PRAYER FOR RELIEF

FOR THE FOREGOING REASONS, Plaintiff respectfully requests that this Court enter judgment and provide the following relief.

A. A declaratory judgment that the Federal FEIS is unlawful and therefore invalid.

B. A declaratory judgment that the ROD for the IOS is unlawful and should be set aside.

C. A declaratory judgment that Defendants must immediately prepare a DEIS or SDEIS for the Project that includes discussion of the IOS.

D. A mandatory injunction compelling Defendants forthwith to commence the process of preparing a DEIS or SDEIS for the Project that includes discussion of the IOS.

E. A preliminary and permanent injunction preventing Defendants from encumbering any funds appropriated by Ordinance 02-33 for the IOS until the NEPA and HEPA EIS processes have been completed.

F. A declaration that FTA/ADMINISTRATOR have violated NEPA and its implementing regulations by failing to: prepare a joint EIS for the Project, coordinate review of the Project under a single process, prepare a DEIS or SDEIS for the IOS, consider cumulative impacts, refrain from improper segmentation, consider approved local plans or laws, and comply with state environmental laws.

G. A declaration that DTS/DIRECTOR have violated HEPA and its implementing regulations by failing to: prepare a joint EIS for the Project, coordinate concurrent public review and processing of the EIS for the Project, and prepare a DEIS or SDEIS for the IOS.

H. A declaration that FTA/ADMINISTRATOR acted arbitrarily and capriciously, in abuse of discretion, and without observance of procedure required by law in violation of the APA, by failing to comply with NEPA and HEPA.

I. An injunction preventing FTA/ADMINISTRATOR and DTS/DIRECTOR from funding, approving, authorizing, or otherwise permitting the Project until they fully comply with NEPA and HEPA.

J. Plaintiff's costs of litigation including, but not limited to, reasonable attorneys fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504.

K. Retention of continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein.

L. Such other and further relief as this Court deems just and appropriate to effectuate a complete resolution of the legal dispute between Plaintiff and Defendants.

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

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