UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 16-133-GW(SPx)	Date	May 11, 2017
Title	*Center For Biological Diversity, et al. v. Federal Highway Administration, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: **IN CHAMBERS - FINAL RULINGS ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [32]; FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT [35]; RIVERSIDE COUNTY TRANSPORTATION COMMISSION'S CROSS-MOTION FOR SUMMARY JUDGMENT [36]**

The Court's Final Ruling is attached hereto. Proposed Judgments will be filed forthwith.

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Initials of Preparer JG

Ctr. for Biological Diversity, et al. v. Fed. Highway Admin., et al., Case No. 5:16-cv-00133-GW (SPx); Final Rulings on: (1) Plaintiffs' Motion for Summary Judgment, (2) Federal Defendants' Cross-motion for Summary Judgment, and (3) Intervenor Defendant's Cross-motion for Summary Judgment

Center for Biological Diversity ("the Center"), Sierra Club, Friends of the Northern San Jacinto Valley, and San Bernardino Valley Audubon Society (collectively, "Plaintiffs") filed this action on January 22, 2016, naming the Federal Highway Administration ("FHWA"), Gregory G. Nadeau (Administrator of FHWA), and Vincent Mammano (Division Administrator, FHWA) (collectively "the Federal Defendants") as defendants. The Complaint contains claims for violations of the National Environmental Policy Act ("NEPA") − 42 U.S.C. § 4321, et seq., Section 4(f) of the Department of Transportation Act ("Section 4(f)") − 49 U.S.C. § 303 and 23 U.S.C. § 138, and the Administrative Procedure Act ("APA") − 5 U.S.C. § 706. On May 26, 2016, Riverside County Transportation Commission ("RCTC") was allowed to intervene as a defendant (collectively, the Federal Defendants and the RCTC will be referred to as "Defendants"). *See* Docket No. 22.

A corrected Administrative Record ("AR") was lodged with the Court on August 26, 2016. Plaintiffs filed a motion for summary judgment on September 22, 2016. The Federal Defendants and RCTC each filed cross-motions for summary judgment on October 27, 2016. In brief, the Court rules that all but two of the arguments Plaintiffs raise by way of their motion for summary judgment are not properly before the Court because they have not been administratively exhausted. As to the two arguments that are not barred by that analysis – *i.e.* arguments concerning 1) an alleged deficient description of the project route insofar as it affects residents' properties and 2) an allegedly unsatisfactory consideration of the range of alternatives – the Court rules on the merits in favor of FHWA and RCTC.

I. BACKGROUND

A. Preliminary Note

In setting forth the following factual background, the Court acknowledges and appreciates that "[i]n general, a court reviewing agency action under the APA must limit

its review to the administrative record." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014). As such, the decision to have the parties prepare documents consistent with Local Rules 56-1 and 56-2, *see, e.g.*, Docket Numbers 42-1, 45-1, 46-1, as would be customary in a typical summary judgment-setting, may seem out of place. Here, although the Court refers to those documents in setting out its discussion of the facts, it has used them as a *window into* the extensive administrative record in the case rather than as the controlling document that it might otherwise be in this procedural setting. *See, e.g.*, *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1046 n.13 (9th Cir. 2011) (reflecting district court's use of "statement of genuine issues" document, but relying upon the "correct numbers" shown by the administrative record, even though court "would not [ordinarily] permit a party to dispute factual issues conceded in a statement of genuine issues," because "[i]t makes no sense…to affirm a NEPA violation and set aside a travel plan that serves the public interest on account of a misunderstanding about the administrative record"). This is consistent with FHWA's observation that "[t]he 'Statements of Uncontroverted Facts" that the Parties are submitting in support of their respective motions for summary judgment merely provide the Parties' summaries and characterizations of materials in the Administrative Record that support their legal arguments under the APA standard of review." Docket No. 46-1, at 2:25-3:1.

B. Relevant[1] Factual Background (in Light of the Parties' Arguments)[2]

The Mid County Parkway ("MCP") is a $1.732 billion, multi-facility freeway infrastructure project between the Riverside County cities of Perris, in the west, and San

[1] In particular, facts related to whether the choice to construct the MCP is a good decision, substantively, are not relevant to a NEPA/Section 4(f) analysis. *See, e.g.*, *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997) ("[NEPA] sets forth procedural mechanisms to ensure proper consideration of environmental concerns, it does not mandate particular substantive results."). Any such facts the Court nonetheless recites here are only present to give context to the case and the disputes before the Court.

[2] The Court's factual recitation is the product of an attempt to identify those facts – or *portions* of the presented facts – that the parties do not dispute. Even where, in the parties' Local Rule 56-1 and 56-2 statements, one or more of the parties has identified what they consider to be a "dispute" about a certain fact, upon a close review of that fact the Court has frequently been able to identify at least part of the fact (if not *all* of it) that is not, in truth, disputed, at least so far as addressed by the parties in those materials.

Jacinto, in the east. *See* Plaintiffs' Response to Defendants' Statement of Genuine Disputes of Material Facts ("PR"), Docket No. 42-1, ¶ 1; Riverside County Transportation Commission's Response to Plaintiffs' Statement of Genuine Disputes of Material Facts and Conclusions of Law ("RCTCR"), Docket No. 45-1, ¶ 1. It is a joint project proposed by RCTC, FHWA, and the California Department of Transportation ("Caltrans"), which conducted an environmental analysis of the MCP project under the California Environmental Quality Act ("CEQA") and NEPA through the preparation of a combined Environmental Impact Report/Environmental Impact Statement ("EIR/S"). *See* PR ¶ 5.[3] After the completion and issuance of a Final EIR/S, FHWA issued a Record of Decision ("ROD") on the MCP on August 17, 2015. *See id.* ¶ 30; RCTCR ¶ 36.[4]

As it stands currently, the Ramona Expressway is the only existing major, west-east, continuous transportation corridor located between State Route ("SR") 74 to the south and SR-60 to the north that provides a connection between Interstate 215 ("I-215") and SR-79. *See* Federal Defendants' Reply in Support of Cross-Motion for Summary Judgment ("FDR"), Docket No. 46-1, ¶ 7. However, it does not meet current Caltrans or Riverside County standards for major roadways. *See id.* ¶ 10. It also presently includes a number of direct access points, such as driveways and local roadways that impede traffic flow, reducing its overall capacity and increasing the possibility of accidents. *See id.* ¶ 11. Additional transportation improvements are needed to provide for the efficient movement of people and goods in the future as a result of projected travel demand generated by anticipated population[5] and employment[6] growth. *See id.* ¶ 12.

As described in the Final EIR/S, the purpose of the MCP project is to provide a transportation facility that would effectively and efficiently accommodate regional west-east movement of people, goods, and services between and through the cities of Perris and San Jacinto, between I-215 in the west and SR-79 in the east. *See id.* ¶ 2; RCTCR ¶¶

[3] The Final EIR/S, divided up into three volumes, is located in the AR at AR-005999 through AR-010888.

[4] The ROD is located in the AR at AR-000001 through AR-000134.

[5] The Final EIR/S states that, within western Riverside County, population is expected to increase by over 1.3 million people between 2010 and 2035. *See* FDR ¶ 5; *see also* RCTCR ¶ 3.

[6] The Final EIR/S also states that employment is expected to increase approximately 80 percent between 2010 and 2035, with an overall doubling of the number of jobs between 2003 and 2035. *See* FDR ¶ 6.

15, 59, 63; PR ¶ 6. More specifically, the purpose of the MCP is to: (a) provide increased capacity to support the forecasted travel demands for the 2040 design year; (b) provide a limited access facility; (c) meet state highway design standards; (d) accommodate Surface Transportation Assistance Act ("STAA") National Network trucks; and (e) provide a facility that's compatible with a future multimodal transportation system. *See* FDR ¶ 4; PR ¶ 6.

In its form as announced in the Final EIR/S, the MCP project includes a sixteen mile-long west-east, limited access,[7] six-lane freeway that connects I-215 with SR-79, with a wide median that could accommodate a future travel lane or a transit facility if warranted by future travel demand beyond 2040. *See* PR ¶¶ 2-3; RCTCR ¶¶ 1, 67, 71; AR-006161. The MCP also includes a north-south upgrade and addition of lane capacity to I-215, between Van Buren Boulevard adjacent to the March Air Reserve Base in the north and Nuevo Road in Perris in the south. *See* PR ¶ 4.

The MCP evolved from an earlier project-planning effort conducted by RCTC, Caltrans, the County of Riverside, and FHWA known as the Community and Environmental Transportation Acceptability Process ("CETAP"). *See* FDR ¶ 19; RCTCR ¶ 10. CETAP was one component of the Riverside County Integrated Project ("RCIP"),[8] an unprecedented, comprehensive, multi-year regional planning process to simultaneously prepare integrated housing/development/land use, transportation, and environment/habitat conservation guidelines for Riverside County for the first half of the 21st century. *See* FDR ¶ 20; RCTCR ¶ 7. RCIP's purpose was to address the planning, environmental, and transportation issues that would result from the anticipated doubling of population in Riverside County by 2020. *See* RCTCR ¶ 8.

Overall, CETAP included the study of two *inter*county corridors (Riverside County to Orange County and Riverside County to San Bernardino County) and two *intra*county transportation corridors (north-south and west-east) in western Riverside

[7] Access limitation is used to restrict entry onto highways to manage traffic congestion and improve traffic operation conditions. *See* FDR ¶ 14.

[8] In addition to CETAP, RCIP's other two components were: (1) a new General Plan for Riverside County, adopted in 2003, and (2) a Multiple Species Habitat Conservation Plan ("MSHCP") for western Riverside County, adopted in 2003. *See* RCTCR ¶ 9. The MSHCP "is a comprehensive, multijurisdictional habitat conservation plan and Natural Communities Conservation Plan…for the conservation of species and their associated habitats in western Riverside County." AR-010333.

County. *See id.* ¶ 10. As to the west-east intracounty transportation corridor in western Riverside County, CETAP included a study of what became known as the Hemet to Corona/Lake Elsinore Corridor ("HCLE"). *See* FDR ¶ 21; RCTCR ¶ 11. As such, efforts were begun in the fall of 2000 to select preferred alternatives in order to preserve the needed right of way. *See* FDR ¶ 22; *see also* RCTCR ¶ 57. Analysis dating back to CETAP was part of the AR that was considered – though Plaintiffs argue that it should not have been – when the project was ultimately approved. *See* RCTCR ¶ 61.

As set forth in the Final EIR/S, the purpose of HCLE was "…to provide multimodal transportation improvements that will help alleviate future traffic demands and congestion and improve the east-west movement of people and goods across Riverside County." FDR ¶ 23. A Draft Tier 1 Environmental Impact Report and Environmental Impact Statement ("Draft Tier 1 EIR/S") considering 14 "build alternatives" with varying routes was completed for the HCLE and circulated for public review in 2002. *See id.* ¶ 24; PR ¶ 84. Several of the alternatives were variations of routes along the Ramona Expressway. *See* RCTCR ¶ 58. Thus, the highway alternatives for the HCLE Corridor were done as one component of a comprehensive multimodal vision for transportation in western Riverside County. *See id.* ¶¶ 13, 58.[9]

At that time, it was announced that there was "a specific emphasis on the ongoing development of [High Occupancy Vehicle ("HOV")] facilities in Riverside County," and the preferred CETAP alternative included a provision of HOV lanes. *See* AR-052457; *see also* PR ¶ 116. Options considered in the Draft Tier 1 EIR/S also included rail and bus transit, in addition to conventional freeways and freeways with HOV lanes. *See* FDR ¶ 48; RCTCR ¶¶ 12, 58. However, a Final Tier 1 EIR/S was not completed.[10] *See* PR ¶¶

[9] Various rail and other transit initiatives that also sprang from the CETAP and Draft Tier 1 EIR/S process (such as the Perris Valley Line rail corridor – to provide commuter rail service from the city of Perris to the city of Riverside and areas west) have since been undertaken by RCTC in addition to the MCP. *See* RCTCR ¶¶ 16, 58, 71; FDR ¶ 17. The Perris Valley Line and Perris Multimodal Facility (to which the Perris Valley Line would connect) will be located approximately 3 miles from the MCP, in downtown Perris off C Street. *See* FDR ¶ 18.

[10] The Final EIR/S admits that it "does not 'tier off' the Draft Tier 1 [EIR/S] pursuant to 40 CFR 150.28 of the Council on Environmental Quality's Regulations for implementing NEPA or Section 15152 of the CEQA Guidelines…because a Final Tier 1 EIS/EIR was not completed…, and all of the data and analyses contained in the…Draft Tier 1 [EIR/S] needed to be updated for the analysis of the MCP Alternatives." AR-006094; *see also* PR ¶ 107.

86, 107; AR-006094. Ultimately, as it announced in the Final EIR/S, the FHWA concluded that transit could not achieve certain of the purposes of the project, such as moving goods. *See* FDR ¶ 50.

The initially-proposed MCP was twice the current project's length and included a thirty-two mile facility between Interstate 15 ("I-15") in the west and SR-79. *See* PR ¶ 16. FHWA and RCTC initiated environmental review – including engineering and environmental studies – for the MCP in that form. *See* PR ¶ 87; FDR ¶ 25; RCTCR ¶ 17. A multi-agency coordination process – including representatives from RCTC, FHWA, Caltrans, United States Fish and Wildlife Service, United States Environmental Protection Agency, United States Army Corp of Engineers, and California Department of Fish and Wildlife ("the Coordination Group") – helped to develop alternatives. *See* RCTCR ¶ 18. It resulted in an initial set of eight alternatives. *See id.* ¶ 19. In 2004, FHWA issued a Notice of Intent to prepare an EIS to the public and included seven Build Alternatives and one No Project Alternative. *See* PR ¶¶ 17, 87.

In September 2007, RCTC selected the Locally Preferred Alternative, Alternative 9. *See id.* ¶¶ 18, 88. The following year, when a Draft EIR/S was circulated in October 2008 it proposed seven project alternatives: two No Project Alternatives (Alternatives 1A and 1B) and five Build Alternatives (Alternatives 4, 5, 6, 7, and 9). *See* PR ¶ 89; RCTCR ¶¶ 20, 60; FDR ¶ 61. With respect to the eastern half of the thirty-two mile MCP between I-215 and SR-79, all of the Build Alternatives in the Draft EIR/S were "six- to eight-lane, controlled access" freeways. *See* PR ¶ 90. There was a 90-day public review period of the Draft EIR/S. *See* FDR ¶ 26; RCTCR ¶ 20. On October 17, 2008, the FHWA, Caltrans and RCTC also made available for public comment a Draft Section 4(f) Evaluation. *See* FDR ¶ 75.

Six public meetings/hearings were held from October 28, 2008 through December 2, 2008. *See id.* ¶ 27; RCTCR ¶¶ 21, 35, 50. RCTC accepted public comments for the record at all of these meetings, along with comments via the MCP project website and email. *See* FDR ¶ 27. Over 3,100 comments were received from 50 public agencies and organizations, 10 large property owners, 240 individuals,[11] and a form letter from over

[11] The Draft EIR/S included a table and maps of anticipated property acquisitions, with annotations stating whether the parcels would require full or partial acquisition, or an easement. *See* RCTCR ¶ 53.

1,100 individuals nationwide. *See id.* ¶ 28.

In response to comments about the cost and availability of funds for the full thirty two-mile project and asserting that improvements to existing facilities would be a better use of funding and would reduce impacts, in 2009 the MCP was shortened from thirty-two miles to sixteen miles, changing the western boundary of the project from I-15 to I-215. *See* PR ¶ 20; *see also id.* ¶ 19, AR-006019; FDR ¶ 53; RCTCR ¶ 22. While RCTC recognized that transportation improvements were still needed between I-15 and I-215, proposed widening improvements to the existing Cajalco Road would relieve a portion of that need. *See* FDR ¶ 31; AR-003800; *see also* PR ¶ 121. The Final EIR/S reflects that, on July 8, 2009, the RCTC Board formally took action to refocus the MCP project between I-215 and SR-79. *See* FDR ¶ 32.

As a result of the revised project, FHWA and RCTC issued for public comment a Recirculated Draft EIR and Supplemental Draft EIS ("Recirculated EIR/S") in January 2013, along with a reissued Draft Section 4(f) evaluation[12].[13] *See* PR ¶¶ 23, 91; FDR ¶¶ 33, 61, 76; RCTCR ¶ 23; AR-003781, 006100. The purpose and objectives of the new sixteen-mile route remained the same as the initial thirty two-mile project, except for modification of the distance and a change of five years for the design year, and included the preferred Alternative 9. *See* PR ¶ 24. All of the alternatives included in the Recirculated EIR/S, except for No Project alternative 1A, included a six lane roadway. *See id.* ¶ 92; *see also id.* ¶ 122. All of them also followed the same or similar alignment as the eastern half of the original thirty two-mile freeway, except that Alternative 9 was designed to avoid a park and a fire station. *See id.* ¶¶ 27, 95, 111; AR-006030, 006140.[14] However, the changes to I-215 mentioned *supra* were not part of the project when it was

[12] Plaintiffs responded to FHWA's Section 4(f) analysis in the Recirculated EIR/S by, in part, communicating that "[t]he EIR…fails to analyze all feasible alternatives or mitigation measures to avoid or reduce the impacts of developing parklands and wildlife areas" because "it fails to properly conduct an alternatives or mitigation analysis that demonstrates there are no feasible and prudent alternatives or additional planning mechanisms to reduce impacts." AR-009886; *see also* PR ¶ 137.

[13] One year later, in January 2014, FHWA and RCTC issued a revised version of the Recirculated EIR/S's Chapter 4 to provide additional analysis of the project's potential greenhouse gas, climate change, and air quality impacts. *See* RCTCR ¶ 27.

[14] Like the Draft EIR/S, *see* Footnote 11, *supra*, the Recirculated EIR/S contained maps and tables of anticipated property acquisitions, with annotations stating whether the parcels would require full or partial acquisition, or an easement. *See* RCTCR ¶ 54.

in line to be a thirty two-mile project between I-15 and SR-79. *See* AR-000163-66, 006028, 006101.

In responding to comments on the Recirculated EIR/S, FHWA in part admitted "that the alternatives discussed in Section 2.6, Alternatives Considered and Withdrawn from Further Consideration, starting on page 2-117 in the Final EIR/EIS are alternatives that were considered for the original 32 mile-long MCP facility." PR ¶ 102; AR-009928. FHWA continued on to state that "[t]he foundation for the range of alternatives considered for the modified MCP project in the Recirculated Draft EIR/Supplemental Draft EIS is found in the initial CETAP planning that was conducted as part of the RCIP from 1999-2000." PR ¶ 106; AR-009928.

The alternatives analyzed in the Recirculated EIR/S were designed to meet Caltrans's standard process for preliminary design, including geometric base maps, typical sections, profiles, right of way needs, surveys and mapping, traffic forecast and modeling value analysis, hydraulic studies, utilities needs/impact assessments, railroad issues, materials and geotechnical information studies. *See* RCTCR ¶ 25. The Coordination Group provided their final agreement on the alternatives announced therein. *See id.* ¶ 24.

On April 8, 2015, RCTC adopted Alternative 9 with the San Jacinto River Bridge Design Variation as the approved project. *See* PR ¶ 30. Notice of Availability for the Final EIR/EIS and Final Section 4(f) Evaluation was published in the Federal Register on April 24, 2015. *See* FDR ¶¶ 35, 77; RCTCR ¶ 28.

In the Recirculated and Final EIR/S, the routes east of I-215 were designed to directly connect to the western half of the original thirty two-mile MCP and not proposed as independent alternatives for an eastern route. *See* PR ¶ 96. In the Final EIR/S, FHWA explained that it continued to consider alternatives developed for the original thirty two-mile proposal because a primary purpose of the project was to improve west-east mobility in western Riverside County, a purpose that remained unchanged. *See* FDR ¶¶ 57-58. It also explained in the Final EIR/S why alternatives had been withdrawn from further study. *See id.* ¶ 56. The Final EIR/S noted alternatives that were eliminated from consideration because of issues affecting the western half of the original thirty-two mile MCP, including engineering issues associated with the Cajalco Dam and Metropolitan

Water District Facilities or "the modification to the project limits" to the sixteen-mile MCP after the circulation of the Draft EIR/S. *See* PR ¶ 98.

The Final EIR/S also explained that "transit options such as expanded bus and commuter rail services" were considered early after the project's inception. *See* RCTCR ¶ 69. Participants in the process had earlier raised issues such as "[t]ransit," "[n]eed for project/Widening existing Ramona, Cajalco, and El Sobrante to four lanes," "Improve existing roads plus reduced reliance on automobiles," and "[a]n alternative that focuses on transit rather than new roads, including expanded rail (for freight transport), Metrolink and buses." AR-000145-46, 000506; *see also* PR ¶ 113. Similarly, they called for "[a]lternatives such as dedicated bus lanes and car pool lanes along the freeway alignments, alignments north of Lake Matthews to avoid environmentally sensitive areas, improving traffic and circulation along existing roadways such as Cajalco Road, and improving public transportation between the communities of Perris, Hemet, and Corona." AR-013640-41; *see also* PR ¶ 113. They similarly raised the idea of dedicated HOV lanes. *See* AR-013678; *see also* PR ¶¶ 113-14.

The Final EIR/S explained, in a response to a comment, why transit was not a viable alternative, for a variety of reasons, including that it would not be a viable means of transporting/moving goods. *See* PR ¶ 124; AR-009927. The Final EIR/S also explained the view that no HOV lanes or park-and-ride facilities were proposed as part of the alternatives because "no traffic congestion is expected on the MCP facility through the Horizon year 2040," and that transit would not meet the project objectives to provide increased capacity to support the forecasted travel demand for the 2040 design year and to provide a limited access facility. *See* RCTCR ¶¶ 66, 70. Elsewhere, the Final EIR/S also observed that "[s]treets other than interstates…can be designed to accommodate STAA trucks if they meet certain design standards."[15] AR-009915; *see also* PR ¶ 125.

FHWA ultimately considered in detail three Build Alternatives (Alternative 4 Modified, Alternative 5 Modified and Alternative 9 Modified), and two No Project/No Action alternatives (Alternatives 1A and 1B). *See* FDR ¶¶ 34, 62; PR ¶¶ 25, 93. All of the alternatives studied for the MCP in the Final EIR/S have the MCP traveling east from

[15] "An STAA truck is a truck with a 48-foot (ft) long semi-trailer, an unlimited overall length, and an unlimited kingpin-to-rear-axle distance." AR-009915.

Perris along the existing Ramona Expressway. *See* PR ¶ 10; AR-006026. Each of the three Build Alternatives included the same design variations on the bridge over the San Jacinto River and a parallel route through agricultural lands slightly west of the city of San Jacinto. *See* PR ¶ 26.

All of the alternatives, other than the No Project/No Action alternatives, were new six-lane freeways, varying by less than two miles from north to south through the City of Perris. *See id.* ¶¶ 129, 132. In the Final EIR/S, even No Action Alternative 1B is a six lane roadway upgrade contemplated by the Riverside County General Plan ("General Plan"). *See id.* ¶ 130. The Final EIR/S explained that Alternatives 1A and 1B were "not developed to meet the defined project purpose," but were instead "developed specifically to allow for comparison of future with-project conditions" to either the existing ground conditions or future without-project ground conditions in the study area.[16] *Id.* ¶¶ 94, 131; AR-006200-6201; RCTCR ¶ 72.

Alternative 9 Modified in the Final EIR/S included a design variation to avoid a park and fire station and to integrate a San Jacinto River Bridge design that had not been included in the Draft EIR/S. *See* PR ¶ 111. This was the alternative selected as the preferred project alternative in the Final EIR/S. *See* RCTCR ¶¶ 29-30. The City of Perris also selected Alternative 9 as its locally preferred alternative. *See id.* ¶ 33.

The ROD ultimately stated that FHWA had selected Alternative 9 Modified because it best met the purpose and need of the project while minimizing environmental impacts and addressing community concerns. *See* FDR ¶¶ 36, 67. The Final EIR/S also announced that the adopted alternative will result in travel time for the MCP of 14 minutes between I-215 and SR-79. *See* AR-006054. In contrast, under the two "no build" alternatives presented in the Final EIR/S, that travel time in 2040 would be either 44 or 93 minutes. *See* AR-006054; RCTCR ¶ 68.[17]

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[16] For instance, Alternative 1B considered implementation of improvements to the Ramona Expressway. *See* RCTCR ¶ 72. But the Final EIR/S concluded that widening of the Ramona Expressway would not meet the basic project purpose to effectively and efficiently accommodate the regional west-east movement of people, goods, and services between and through the cities of Perris and San Jacinto. *See id.* ¶ 73.

[17] In the context of discussing a CEQA analysis, the Final EIR/S states that "the MCP project would result in some improvements in traffic conditions in 2020 and 2040 or no substantial change compared to the No Build condition" and that it "would result in traffic conditions slightly worse than the No Build condition at only a few intersections in 2020 and 2040." AR-007357.

The Final EIR/S also explains that all Build Alternatives would impact minority and low-income populations, primarily from displacements and relocations and from impacts to community character and cohesion. *See* FDR ¶ 64. According to the Final EIR/S, as planned (using Alternative 9 Modified), the MCP will "permanently alter the character of the existing community," requiring the acquisition of 102 residential properties and the relocation of residents therein, and would "bisect a residential community located between Placentia Avenue and Rider Street and a cluster of businesses in the northeast quadrant of the proposed MCP/Redlands interchange." PR ¶ 7; AR-006403; *see also* PR ¶ 64. Of the MCP Build Alternatives, the Final EIR/S further indicated that the selected alternative "would result in the highest impacts to residential relocations in areas with minority and low-income populations."[18] PR ¶¶ 8, 29; AR-006052. At the same time, it concluded that "there is ample supply of existing housing stock in the immediate area that will facilitate the ability to relocate residents within their existing communities," meaning that the selected alternative "is not considered to have disproportionately higher adverse impacts to environmental justice populations." PR ¶ 60; FDR ¶ 70; AR-006052; *see also* RCTCR ¶ 32. The Final EIR/S also explained the position that, to help minimize impacts, the MCP would be below-grade through this community, and that connectivity of the area would nonetheless be maintained with the construction of an overcrossing to provide access between areas and to local parks and community facilities. *See* FDR ¶¶ 65-66.

The Final EIR/S also includes analysis of impacts to land use. *See* RCTCR ¶ 49. The San Jacinto Valley contains areas designated as agricultural lands and conservation areas under the General Plan and the Western Riverside County Multiple Species Habitat Conservation Plan ("MSHCP").[19] *See* PR ¶ 13. The alternatives for the MCP presented in the Final EIR/S run through land that is designated as "MSHCP Criteria Area." AR-006340, AR-007018. Where the proposed alternatives follow the same route, that route is through lightly-populated, sensitive habitat areas. *See* RCTCR ¶ 64. The Final EIR/S

[18] The AR contains evidence of the difficulties facing minority or low-income communities facing a housing loss, both generally and specifically in connection with this project, and reflects awareness that the area covered by Alternative 9 Modified was "dominated by minority, and Hispanic residents with high percentage of economically disadvantaged students." PR ¶¶ 70-74; AR-015973, 016691, 107851.

[19] *See* Footnote 8, *supra*.

concluded that Alternative 9 had "substantially fewer business and employee displacements," and had "the least impacts to designated farmland overall and Prime Farmland, and is the only alternative with no impacts to schools." *Id.* ¶ 31.

In comparing alternatives, the Final EIR/S states that "Alternative 5 Modified would bisect several large intermodal distribution centers along Rider Street, as well as impact commercial and industrial businesses adjacent to I-215, and a few industrial businesses along Perris Boulevard." PR ¶ 53; AR-006051. However, most of the Alternative 5 Modified land north of Rider Street – where the route would be built – is unoccupied, non-residential, agricultural land. *See* PR ¶ 63; AR-006262, 006620. Elsewhere, the Final EIR/S clarifies that "[t]he large intermodal warehouses displaced by this alternative" are "approved but not yet constructed and operational." PR ¶ 54; AR-006052, 006431. It indicated that displacement of those not-yet-constructed warehouses and distribution centers might mean that they would not be able to be relocated within the Perris area due to the need for large parcels of land needed for relocation. *See* PR ¶ 55; FDR ¶ 72; AR-006052, 006431. Alternative 5 Modified was "considered to have disproportionately high and adverse impacts to environmental justice populations" "[b]ecause of this potential loss of major employers." *See* PR ¶ 58; AR-006432. And the FHWA concluded in the Final EIR/S that the adverse impacts of Alternative 5 Modified "would be appreciably more severe or greater in magnitude." FDR ¶ 71.

In Section 2.1, titled Project Description, the Final EIR/S describes the various components of the project. *See* RCTCR ¶ 40. Under the subheading "Typical Sections," it describes the MCP as a six-lane controlled access freeway, for which "[g]enerally, the needed right of way varies from 220 ft to 660 ft in width." PR ¶ 34; RCTCR ¶ 40; FDR ¶¶ 40-41.[20] The Final EIR/S also explains that the "alternatives may require right of way that vary in width as a result of topography requiring cut (excavation) and fill, features of the natural and built environment, and design requirements." FDR ¶ 42; RCTCR ¶ 41. Following the "Typical Sections" subsection, the Final EIR/S contains subsections describing the project's proposed interchanges, bridges, runoff management measures

[20] In describing the width of the MCP project in correspondence with the U.S. Fish and Wildlife Service and the Western Riverside County Regional Conservation Authority, however, RCTC and FHWA indicated that the width of the project could be as much as 1700 feet at interchange locations. *See* PR ¶¶ 40, 46; *see also* AR-010514, 010877-78.

such as retention basis, and more. *See* RCTCR ¶ 42. Appendices to the Final EIR/S contained materials (prepared after the Recirculated EIR/S) describing the typical widths for right of way for basins, large cut and fill, system interchange connectors, interchanges, and on- and off-ramp locations. *See id.* ¶ 43.

The Final EIR/S also includes numerous maps showing the potential routes for the MCP. *See* FDR ¶ 44; RCTCR ¶ 44. Where the body of the Final EIR/S references maps of the project, it generally provides conceptual drawings or regional maps. *See* PR ¶ 35. In its appendices and attachments, however, the Final EIR/S provides the level of detail needed to analyze the actual width of the project through Perris, by comparing the map scale in the figure to the MCP. *See id.* ¶¶ 42, 44-45.

The Final EIR/S also refers to Appendix O as showing the right of way. *See* RCTCR ¶ 46. Appendix O[21] includes lengthy tables listing the physical address, mailing address, and assessor's parcel number of each parcel that would need to be acquired, along with a reference key describing how each of those parcels will be impacted (i.e., full acquisition, partial acquisition, or easement) and under which alternative the acquisition would occur. *See id.* ¶ 47; FDR ¶ 45. Appendix O also contains thirty additional, detailed maps of the proposed project, showing its sixteen-mile-long routes and dimensions. *See* RCTCR ¶ 48; FDR ¶ 46. Attachment O-2 of Appendix O provides parcel acquisition information and diagrams, which also provides a scale in feet. *See* PR ¶ 43; *see also* RCTCR ¶ 55. RCTC also responded to comments asking for further information on how the project would impact individual properties. *See* RCTCR ¶¶ 51-52.

Appendix B of the Final EIR/S contains the nearly 200-page Final Section 4(f) Evaluation. *See* RCTCR ¶ 74. Therein, FHWA determined that there was not a feasible and prudent alternative to avoiding use of any Section 4(f) properties. *See* FDR ¶ 78.

After extensive investigation and analysis, FHWA determined that the three Build Alternatives would result in Section 4(f) effects at five properties/sites. *See id.* ¶ 80; RCTCR ¶ 75; PR ¶ 138. Because they would all follow the alignment of the existing Ramona Expressway in its vicinity, each of the three Build Alternatives would use 2.6

[21] Whenever appendices were attached to the Draft EIR/S, Recirculated EIR/S, and final EIR/S, they were made available to the public. *See* FDR ¶ 47.

acres of a 78.5 acre Multi-Use Prehistoric Site,[22] or approximately 3.3 percent of the total area, because the existing, approximately 142-foot wide right of way would be widened to an approximately 220-foot wide right of way for the MCP. *See* FDR ¶ 81; RCTCR ¶¶ 76-78; PR ¶ 142. Each of the three Build Alternatives would also, FHWA determined, use land occupied by four other sites assumed, for purposes of the evaluation, to be eligible for inclusion in the National Register of Historic Places. *See* FDR ¶ 82.

To determine which of the Build Alternatives would cause the least overall harm to the Multi-Use Prehistoric Site and the four other historic sites, FHWA compared the seven factors set forth in 23 C.F.R. § 774.3(c)(1) concerning the alternatives under consideration. *See id.* ¶ 100. FHWA determined that there was no difference in the net harm that the three Build Alternatives would cause to the Section 4(f) properties under factors 1, 2, 3, and 4. *See id.* ¶ 101. FHWA also determined that all three Build Alternatives also met the project purpose and need as analyzed in factor 5. *See id.* ¶ 102. It also determined that Alternative 9 Modified performed better on factors 6 and 7 than the other two Build Alternatives, including that it would be environmentally superior to the other Build Alternatives, and would cost substantially less. *See id.* ¶¶ 103-04.[23]

Because of the Build Alternatives' impact on the Multi-Use Prehistoric Site, five Avoidance Alternatives were developed and evaluated. *See* RCTCR ¶ 78; *see also* FDR ¶¶ 79, 84. As part of the Section 4(f) analysis, in addition to its evaluation of the two No Build Alternatives, 1A and 1B from the NEPA analysis, FHWA evaluated the Avoidance Alternatives as to whether they (1) met the defined project purposes, (2) met the criteria for assessing whether an alternative is feasible and prudent, and (3) would impact other Section 4(f) properties while avoiding impacts to the Multi-Use Prehistoric Site. *See* PR ¶ 143; FDR ¶ 84; RCTCR ¶ 78. FHWA conducted two feasible and prudent analyses: Chapter 4 addressed the Multi-Use Prehistoric Site, and Chapter 5 analyzed the four remaining cultural resource sites together. *See* PR ¶ 140.

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[22] The Multi-Use Prehistoric Site is approximately 78.5 acres and includes rock shelters, ceremonial areas with rock art panels, milling features with bedrock mortars and slicks, midden deposits, areas of former habitation, and other artifacts. *See* PR ¶ 141.

[23] The Final EIR/S also concluded that the selected alternative was "the most cost-effective Build Alternative," indicating the position that it cost $110 million less than Alternative 5 and $490 million less than Alternative 4. RCTCR ¶ 34.

All Avoidance Alternatives were determined to be feasible in terms of sound engineering, but two – Alternatives 1A and 1B, the No Project/No Action alternatives analyzed by the Final EIR/S – would not meet the project purposes and thus, were considered imprudent. *See id.* ¶ 144; FDR ¶ 85; RCTCR ¶ 79. FHWA also determined that Avoidance Alternatives 2 and 4 would not meet the defined project purpose. *See* FDR ¶ 86. It stated that Avoidance Alternative 2 would shift the MCP to the north where it would not provide increased capacity in an east-west corridor between SR-79 and I-215 to support the forecasted travel demand for 2040. *See id.* ¶ 87. Similarly, it stated that Avoidance Alternative 4 – which would, it stated further, create a more circuitous travel route by moving the MCP to the south where it would no longer provide a direct connection between Perris and San Jacinto and would not directly serve the residential and employment land uses that would be served by the MCP project – would not provide increased capacity for the forecasted 2040 east-west travel demand. *See id.* ¶¶ 88-90.

FHWA next analyzed the impacts of Avoidance Alternatives 1, 3A, and 3B and evaluated whether they would be "prudent" under the regulatory standards as defined by 23 C.F.R. § 774.17. *See id.* ¶ 91; RCTCR ¶ 80; PR ¶ 145. Avoidance Alternative 1 would shift an approximately 2.5 mile long segment of the Build Alternatives north a minimum of approximately 100 feet to avoid impacting the northern-most boundary of the Multi-Use Prehistoric Site. *See* FDR ¶ 92. Avoidance Alternative 3A and 3B would avoid the Multi-Use Prehistoric Site by shifting the alignment of the MCP to the south. *See id.* ¶ 94.

Avoidance Alternative 3A would shift approximately 4.1 miles of the MCP a half-mile south into the Lakeview Mountains. *See id.* ¶ 95. Avoidance Alternative 3B would shift alignment of the MCP at least .6 miles south of the Ramona Expressway. *See id.* ¶ 97; PR ¶ 146; RCTCR ¶ 81. Similar to Avoidance Alternative 3A, it would shift alignment into the Lakeview Mountains, but unlike Avoidance Alternative 3A, it would avoid impacting the dairy operation to the south of the Ramona Expressway. *See* FDR ¶ 98. The Section 4(f) analysis offered the conclusions that the Avoidance Alternative 3B route: would not use a 1.5 mile segment of the Ramona Expressway; would require "slightly more right of way"; would impact more non-transportation land uses; would use approximately 35 more acres of a regional Habitat Conservation Plan "criteria areas";

would impact one prehistoric site; would require construction on steep terrain for a distance of about 1.2 miles causing an increase in the project construction costs by roughly $39 million; would require two additional crossings of the Colorado River Aqueduct; would result in changes in the cut and fill; would result in additional visual impacts; and would not serve the planned residential and employment growth in the San Jacinto Valley area without an additional extension of the future Park Center Drive. *See* PR ¶ 147; FDR ¶ 99; RCTCR ¶ 82.

Thus, FHWA determined that the alternative was not a prudent alternative for avoiding use of the Multi-Use Prehistoric Site because it "would not use an approximately 1.5-mile-long segment of the existing Ramona Expressway, would substantially increase the project costs to an extraordinary magnitude, and would result in greater right of way and land use impacts more severe than the MCP Build Alternative, and contributions to cumulative impacts." PR ¶ 148.[24] FHWA also found that it was not prudent because – "[b]ased on the alignment through the Lake View Mountains, and the resulting greater amount of right of way and land use impacts" – it would result in relatively greater impacts under a number of factors. *See id.* ¶ 150. FHWA also concluded that Avoidance Alternative 3B was not prudent because it would contribute "substantially more" to cumulative impacts "particularly related to biological resources,"[25] and would cause a cost increase of an "extraordinary magnitude." AR-007559; *see also* PR ¶ 182.

II. DISCUSSION

A. Procedural Standard

Courts commonly decide cases subject to the APA at the summary judgment stage

[24] As part of its avoidance analysis, FHWA references Table 4.4, which provides an analysis of the feasible Avoidance Alternatives to determine whether they are prudent as defined by regulation. *See* PR ¶ 149. In addition, Table 4.5 calculates the impacts to existing and planned land uses. It states that Avoidance Alternative 3B would impact 1.1 more acres of residential land uses and 2 more acres of public facilities. *See id.* ¶ 162. It also states that Avoidance Alternative 3B will impact a total of 240.1 acres of existing land uses compared to the MCP adopted alternative of 152 total acres. *See id.* ¶ 154. 101.8 acres of the existing land uses impacted by Avoidance Alternative 3B are "Vacant Land." *See id.* ¶ 155. When "Vacant Land" is removed from the "Existing Land Use" totals, Avoidance Alternative 3B results in less impacts to existing land uses than the preferred alternative. *See id.* ¶ 157.

[25] MSHCP requires conservation of only those portions of cells that meet the criteria for conservation, so the impacts the Final EIR/S summarized were "a worst-case estimate of impacts to the entire Western Riverside County MSHCP Criteria Area without taking into account conservation goals specified in the Western Riverside County MSHCP for each criteria cell." *See* AR-007062; *see also* PR ¶ 167.

because, generally-speaking, they "are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Id.; *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114-15 (9th Cir. 2007). However, even in the context of an administrative record review, the Ninth Circuit has indicated that "[s]ummary judgment is appropriate when the pleadings and record demonstrate that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 991.[26] When parties file cross-motions for summary judgment, a court must consider the evidence submitted in support of both motions before ruling on either motion.[27] *See Fair Housing Council of*

[26] In the same context, the Ninth Circuit has also stated the traditional standard that "[w]hen reviewing an order granting summary judgment, '[w]e must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Building Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1032 (9th Cir. 2015); *see also, e.g.*, *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004). Considering the Supreme Court's discussion in *Florida Power & Light*, this Court is not aware of the Ninth Circuit explaining how the principles of viewing the evidence in the light most favorable to the nonmoving party and determining whether there are any issues of material fact would be employed in the summary judgment-setting of an APA administrative record review case (or at least as to the merits of the claims raised in such cases). *See, e.g.*, *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the administrative record."); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) ("[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record, to which the plaintiff and the Defendants have stipulated to [*sic*]. Because this case does not present any genuine issues of material fact, summary judgment is appropriate.") (omitting internal citations). *But see Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) ("[W]e need to determine whether appellant raised a genuine issue of material fact as to whether the Service acted arbitrarily and capriciously in issuing the Permit under the [Endangered Species Act].").

[27] Plaintiffs, FHWA and RCTC have each filed separate motions. Here, the Court has considered and described the facts presented in the parties' respective Local Rule 56-1 and 56-2 statements. At the

Riverside Cnty., Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001).

B. Analysis

1. The Statutes

"NEPA 'is our basic national charter for protection of the environment.'" *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting 40 C.F.R. § 1500.1(a)); *see also* 42 U.S.C. § 4321 ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."). "The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) ("*Powell*"); *see also WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015) ("NEPA serves two fundamental objectives. First, it 'ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' And, second, it requires 'that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). "To that end, 'NEPA imposes procedural requirements, but not substantive outcomes, on agency action.'" *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 111 (9th Cir. 2015) (quoting *Powell*, 395 F.3d at 1026); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."). Thus, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by

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hearing, no party voiced any objection to the Court having considered *all* of the facts presented in those documents for purposes of analyzing *all three* motions.

NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

"NEPA and the Council on Environmental Quality's…regulations implementing NEPA, 40 C.F.R. §§ 1500-1508, prescribe the procedures that must be followed in conducting environmental review." *Montana Snowmobile Ass'n*, 790 F.3d at 924; *see also* 40 C.F.R. § 1500.1(c) ("These regulations provide the direction to achieve [NEPA's] purpose."). "The procedures prescribed both in NEPA and the implementing regulations are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (quoting 42 U.S.C. § 4332(1)). "'[G]rudging, *pro forma* compliance will not do.'" *Id.* (quoting *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) ("*Block*")).

As an "'action-forcing device to ensure that [NEPA's] policies and goals' are considered during agency decision making," *id.* at 1167 (quoting 40 C.F.R. §1502.1), "NEPA requires the preparation of an [Environmental Impact Statement] for 'major Federal actions significantly affecting the quality of the human environment.'" *Cascadia Wildlands*, 801 F.3d at 1111 (quoting 42 U.S.C. § 4332(2)(C)). First, a Draft Environmental Impact Statement is prepared if an Environmental Impact Statement ("EIS") is considered necessary, and is presented to the public for notice and comment. *See* 40 C.F.R. §§ 1502.9(a), 1503.1(a). After an evaluation and response to comments, a Final EIS is prepared. *See* 40 C.F.R. § 1502.9(b). All of this eventually culminates in an ROD explaining the rationale. *See* 40 C.F.R. § 1505.2.

"NEPA regulations require an EIS to '[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.'" *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781, 797 (9th Cir. 2014) (quoting 40 C.F.R. § 1502.14(a)). In the end, "an EIS is adequate if it 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Montana Snowmobile Ass'n*, 790 F.3d at 924 (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004)); *see also Ctr. for Biological Diversity*, 349 F.3d at 1166 (referencing a "rule of reason [standard]"). A

court "must decide whether the [agency] took a 'hard look' at the environmental consequences of the proposed actions and reasonably evaluated the relevant facts." *Cal. ex rel. Imperial Cnty.*, 767 F.3d at 792.

NEPA claims are reviewed under the APA, which means that "an agency decision will be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Cascadia Wildlands*, 801 F.3d at 1110; 5 U.S.C. § 706(2)(A); *see also Montana Snowmobile Ass'n*, 790 F.3d at 924 ("A final agency action 'for which there is no other adequate remedy in a court' is subject to judicial review under the APA.'") (quoting 5 U.S.C. § 704). Such review "is narrow, and [a court does] not substitute [its] judgment for that of the agency." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)); *see also Building Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1032 (9th Cir. 2015). The Ninth Circuit has also described this "standard of review [a]s 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007).

An agency decision is only arbitrary and capricious where it "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Castaneda*, 574 F.3d at 656 (omitting internal quotation marks); *see also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 994. An agency's action "need only be a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

Section 4(f) determinations are also subject to the arbitrary and capricious standard of review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,

415-16 (1971); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984). That statute allows the Secretary of Transportation to:

> approve a transportation program or project…requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if –
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1227 (9th Cir. 2014); *see also Citizens to Preserve Overton Park*, 401 U.S. at 404-05, 411; *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008).

"Section 4(f) itself does not require any formal findings," *HonoluluTraffic.com*, 742 F.3d at 1233, though "[section] 4(f) and its regulations require that the § 4(f) evaluation be completed before an agency issues its ROD." *N. Idaho Cmty.*, 545 F.3d at 1158.; *see also* 23 C.F.R. § 774.9(b) ("Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD."); *Overton Park*, 401 U.S. at 417 (noting that the Department of Transportation Act does not require formal findings). But "if the record fails to show a sufficient basis for the Secretary's decision, the 4(f) determination must be overturned." *Stop H-3 Ass'n*, 740 F.2d at 1450.

A Section 4(f) determination "is entitled to a presumption of regularity," but "a thorough, probing, in-depth review" is still called for. *Citizens to Preserve Overton Park*, 401 U.S. at 415. To make the necessary finding, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* But "the ultimate standard of review is a narrow one. The

court is not empowered to substitute its judgment for that of the agency." *Id.*

2. Plaintiffs' Arguments

Reviewing Plaintiffs' motion, several contentions are apparent.[28] *First*, they argue that the description of the MCP project was flawed, preventing meaningful public review under NEPA. *See* Docket No. 32-1, at 8:25-26. Principally, this issue concerns an allegedly inadequate description of "the true width and dimensions of the Project and route through the affected community in violation of NEPA." *Id.* at 10:4-6. *Second*, Plaintiffs argue that FHWA did not objectively evaluate the effects of NEPA alternatives, focusing that issue on the following assertion: "Instead of accurately depicting the effects and alternatives the EIR/S relies upon a hypothetical future baseline of development: businesses and employees that *could* be affected by Alternative 5 *should* those businesses ever be built, and compares those effects to the *existing* homes and residents who *would* be displaced by Alternative 9." *Id.* at 13:1, 13-17. *Third*, Plaintiffs assert that the FHWA failed to provide and analyze a reasonable range of alternatives. *Fourth* and finally, Plaintiffs contend that the MCP violates Section 4(f) due to FHWA's alleged failure to "provide evidence in the record that feasible and prudent alternatives, including Avoidance Alternative 3 Option B..., cannot be implemented to avoid Section 4(f) resources and it cannot demonstrate that there are 'severe' or 'uniquely difficult' problems of 'extraordinary magnitudes' as required under Section 4(f) to permanently use historic resources that the statute protects." *Id.* at 26:13-20.[29]

3. Exhaustion

RCTC has argued[30] that Plaintiffs failed to administratively exhaust the first,

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[28] As FHWA points out, *see* Docket No. 35-1, at 4 n.2, a number of issues that were raised by Plaintiffs' Complaint have not been addressed in Plaintiffs' opening motion papers, meaning that – because this case will, as in the normal course of such cases, be decided at the summary judgment stage – Plaintiffs have waived those issues not then raised.

[29] Although Plaintiffs do indeed make reference to "feasible and prudent alternatives, *including* Avoidance Alternative 3 Option B," Docket No. 32-1, at 26:15-20 (emphasis added), that avoidance alternative is the *only* one that is the subject of Plaintiffs' Section 4(f) arguments in these motions. *See id.* at 26:13-34:16.

[30] FHWA does not itself make any exhaustion argument, and the Court is unaware of any joinder in RCTC's arguments filed by FHWA. However, where it seems RCTC is clearly correct in certain of its assertions in this regard, the Court sees no reason to find the claims insufficiently exhausted for purposes of RCTC's participation in the litigation, while at the same time ignoring the issue insofar as the litigation between Plaintiffs and FHWA is concerned. *See Coal. for Pres. of Hispanic Broad. v. F.C.C.*, 931 F.2d 73, 76 (D.C. Cir. 1991) (en banc) ("While the government did not specifically raise the exhaustion issue, the

second and fourth of these arguments (and has judicially waived the fourth as well).[31] If true, this would preclude the Court's consideration of the arguments implicated by that failure.

"The [APA] requires that plaintiffs exhaust available administrative remedies before bringing their grievances to federal court…to avoid premature claims and to ensure that the agency possessed of the most expertise in an area be given first shot at resolving a claimant's difficulties." *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002); *see also Heckler v. Ringer*, 466 U.S. 602, 619 n.12 (1984) ("[T]he purpose of the exhaustion requirement is to prevent 'premature interference with agency processes' and to give the agency a chance 'to compile a record which is adequate for judicial review.'") (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)).

> Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978); *see also Sims v. Apfel*, 530 U.S. 103, 109 (2000) ("As we further explained in [*United States v.*] *L.A. Tucker Truck Lines*[, 344 U.S. 33 (1952)], courts require administrative issue exhaustion 'as a general rule' because it is usually

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doctrine concerns economy not only of agency but also of judicial resources, and accordingly this court may in its discretion raise the issue on its own.") (omitting internal citation); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 330 (D.C. Cir. 1987) (Williams, J., concurring and dissenting); *cf. Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1034-37 & n.20 (9th Cir. 2010) (en banc) (noting, in the course of *rejecting* an exhaustion requirement, co-defendant's failure to join in that argument). *But see cf. US Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985, 995 (D.C. Cir. 1999) ("The Board's failure to join undermines the union's claim, since the only litigant with an institutional interest in such an exhaustion requirement has not argued for it.").

[31] First, RCTC asserts that Plaintiffs did not exhaust the argument that the width of the project was inconsistently described in the Final EIR/S. Second, RCTC argues that Plaintiffs failed to exhaust the argument that the Final EIR/S misrepresents the environmental impact of the MCP and its alternatives, resulting in a misleading description of the preferred alternative − specifically, this concerns Plaintiffs' contention that, in one location, the Final EIR/S revealed that certain intermodal distribution centers were approved, but not yet constructed and operational, whereas in another location the document admitted this fact. Third, RCTC believes that Plaintiffs failed to exhaust their Section 4(f) argument asserting that FHWA's determination that Avoidance Alternative 3B is not prudent is not supported in the record. As to this last issue, RCTC argues that the issue not only was not administratively exhausted, but also was not raised in Plaintiffs' Complaint, and waived for that reason as well.

'appropriate under [an agency's] practice' for 'contestants in an adversary proceeding' before it to develop fully all issues there.") (quoting *L.A. Tucker*, 344 U.S. at 36-37). Thus, in general, where a plaintiff cannot point out in the record where it raised an issue before the agency, and a court is unable to locate any reference to the claim, a claim is not properly exhausted and not subject to judicial review because the agency has not been given notice of the claim sufficient to allow it to resolve the claim. *See Idaho Sporting Congress*, 305 F.3d at 965.

At the same time, the exhaustion requirement is to be "interpreted broadly." *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2009) ("'As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time.' However, we have repeatedly held that the exhaustion requirement should be interpreted broadly.") (quoting *Marathon Oil Co. v. United States*, 807 F.2d 759, 767-68 (9th Cir. 1986)). "Plaintiffs need not state their claims in precise legal terms, and need only raise an issue 'with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met.'" *Id.* (quoting *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968 (9th Cir. 2006)); *see also Idaho Sporting Cong.*, 305 F.3d at 966 (refusing to require "magic words" to "leave the courtroom door open to a challenge").

In the absence of sufficient administrative exhaustion, there is a "so obvious" exception, as explained in *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124 (9th Cir. 2011): "The agency…bears the primary responsibility to ensure that it complies with NEPA and an EA's flaws 'might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" *Id.* at 1132 (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004)). However, the Ninth Circuit "has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners." *Id.* For instance, in *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006), the court found the "so obvious" standard met where "[t]he record in th[e] case [was] replete with evidence that the Army recognized the specific shortfall" raised by the plaintiffs. *Id.* at 1092.

With respect to the issue of insufficient administrative exhaustion, Plaintiffs respond to RCTC by citing to those pages from the AR they believe sufficiently demonstrate exhaustion, and by generally relying on the rules that the exhaustion requirement is interpreted broadly and leniently and that they are not required to raise issues with "precise legal formulations" or "incant[ations] of magic words." In addition, Plaintiffs call on the "so obvious" exception to administrative exhaustion (and note another exception for exceptional circumstances[32]).

On the additional issue confronting Plaintiffs' Section 4(f) – that it was not sufficiently described in Plaintiffs' Complaint, *see* Footnote 31, *supra* – Plaintiffs respond that it was adequately raised in this Court because, under applicable pleading standards, a complaint is sufficient if it gives the defendant "fair notice of what the…claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specifically, they believe their allegations in paragraph 87 of the Complaint suffice because that paragraph makes the claim that Defendants failed to comply with Section 4(f) "by failing to select a prudent and feasible alternative that would avoid Section 4(f) resources" despite the availability of such a prudent and feasible alternative.

a. Plaintiffs' Citations to the AR

i. Project Description/Width

For what they believe constituted sufficient enunciation of the Project width description issue, Plaintiffs refer the Court to AR-013453,[33] AR-009819,[34] AR-009566,[35]

[32] Although Plaintiffs also correctly note that there is an "exceptional circumstances" exception to administrative exhaustion, *see generally Marathon Oil Co. v. United States*, 807 F.2d 759, 768 (9th Cir. 1986), they do not actually appear to assert that it applies here.

[33] AR-013453 states that implementation of the MCP "would require almost 200 transportation circulation system modifications, including realigning interchanges, widening certain roads, closing other roads and creating cul-de-sacs," but complains that "the DEIR/S' text never bothers to clearly identify and describe the massive changes in the circulation system," and instead provides a list of the projects "buried in the document's technical report." It also asserts that "the DEIR/S lacks any detail about specific roadway modification design geometrics (i.e., number of lanes and lane configuration)" and concludes that "[u]nless the details of all of these roadway modifications are clearly identified and described, it is impossible to evaluate impacts from the whole of the Project." *Id.* In addition, it identifies, as an example "of how the DEIR/S fails to describe the full scope of the Project," "that it fails to analyze or give adequate information regarding the fact that the Project will include widening existing bridges to accommodate future growth" and gives "no description…regarding the width of each bridge." *Id.*

009583,[36] 068939,[37] 069431-32,[38] 069393,[39] 068999,[40] 069316,[41] 069338,[42] 069218,[43]

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[34] "NEPA similarly requires an accurate and consistent project description in order to fulfill its purpose of facilitating informed decision-making. Unfortunately, the EIR contains an incomplete project description and analysis that fails to provide the public and decision makers with the necessary information in order to analyze impacts and mitigation measures. The Project description omits integral components of…the project's physical characteristics." AR-009819 (omitting internal citation). Beyond that quotation, AR-009819 simply repeats certain of the statements also contained at AR-013453. *See* Footnote 33, *supra*.

[35] Plaintiffs cite to this page of the AR for the statement "[t]he RDEIR/SDEIS does not clearly report the area of the San Jacinto River channel and its floodplain that would receive fill for construction of either the original MCP 'base case' bridge design or its proposed variation. The lack of clarity may lead to conflicting statements…." AR-009566.

[36] "The DEIR also mentions the construction of several culverts and pipes, but it does not disclose their sizes and what potential species, if any, would be able to use them as wildlife crossings." AR-009583.

[37] AR-068939 reflects an email from a resident – after he had been sent "a PDF strip map of the Mid County Parkway preferred Alternative No. 9" and was told by an RCTC representative that the representative would "have [his] property located with the preferred alternative" – reflecting his concern about "whether or not [his] house is in the path of construction" and whether his house was "going to be taken." AR-068939.

[38] AR-069431-32 reflects an email conversation between Dolores Magana and an RCTC representative in which Ms. Magana asks the RCTC representative (and the Mayor of Perris) whether her home was "in the direct path" of the MCP and a series of questions about the details of construction and what it would do to her property value, and reflected her anxiety on the topic. AR-069431-32. The email chain also reflects the RCTC representative having sent Ms. Magana "a map that shows your property with respect to the planned Mid County Parkway Project and a strip map of the preferred alternative for the project" and informing her that "[t]he impact to your property will be minimal most likely consisting of a temporary construction easement to conform the proposed left-turn knuckle of Magellan Lane and Galileo Lane in front of your property driveway." *Id.* at AR-069431. In response to the RCTC representative's delivery of the aforementioned maps, Ms. Magana asked whether the representative had "more graphics," "[o]r some kind of picture of completion with my home in it [because] pictures of completion would help my imagination." *Id.* Ms. Magana asked the RCTC representative to "please understand, this is our home and we learned about all this on Friday April 3rd. Lived here for 3 yrs and was never informed. A bigger larger graph showing a larger scope would help. Also, is my home going to be under a bridge?" *Id.*

[39] AR-069393 is an email to an RCTC representative from George Hague in which Hague asks if the RCTC representative could "give me a map I can read or the names of the streets in which the Mid County Parkway will make its way through the City of Perris." AR-069393. Below Hague's signature, the email displays an aerial-view map which does not reflect the detail Hague sought. *See id.*

[40] AR-068999 is an email from a Senior Land Surveyor from the Department of Water Resources ("DWR") asking to be contacted "to discuss the details of the legal description" after noting that he had attached the DWR's "requirements for legal descriptions used for transfer of title to or from the State of California." AR-068999.

[41] AR-069316 appears to be an email directed to an RCTC representative from the Assistant Director of the Transportation Department of Riverside County asking that the RCTC representative send "a package with project information" to a resident without Internet access who had "received a letter regarding the proposed mid-county parkway project." AR-069316.

[42] AR-069338 is an email from Sonia Sanchez to an RCTC representative thanking the representative for sending a PDF file with respect to her property (consisting of the MCP project alignment between I-215

069250,[44] 069296,[45] and 069346[46]. As reflected in the footnotes below – and as with all of the AR citations Plaintiffs believe reflect exhaustion of any of the issues subject to an exhaustion challenge – the Court has reviewed the contents of these pages of the AR. These comments, Plaintiffs believe, sufficiently show that the public was unable to tell, from the descriptions in the environmental documents, the dimensions of the route through their community and repeatedly made requests for an accurate project description and/or for maps. Plaintiffs also believe this issue meets the "so obvious" exception because, without an accurate description of the project, NEPA's public disclosure principle could not be met.

ii. Comparing Future Employment with Existing Homes

On the issue of exhaustion of the concern about inconsistent descriptions of the intermodal distribution centers, Plaintiffs direct the Court to AR-015995,[47] 015972-75,[48]

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and SR-79 and the MCP alignment "with respect to your property") and informing her that the MCP project "will not have [a] direct impact [on] your property," and asking the representative to call her concerning an unspecified question. *See* AR-069338.

[43] AR-069218 is an email from Frecia Johnson thanking a representative of the RCTC for sending both a PDF "show[ing] the MCP Preferred Alternative with respect" to three particular assessor's parcel numbers and "a PDF copy of the Preferred Alternative Alignment." AR-069218.

[44] AR-069250 is an email from Robert Jacobson which, among other things, thanked an RCTC representative, asked him whether he would "be able to let me know how much, if any, land my subject parcel would be impacted" and asked the RCTC representative to forward "more precise drawings" if they were available. AR-069250.

[45] AR-069296 is an email from Kelly Buffa contacting an RCTC representative "about the impacts to our property from the proposed Mid-County Parkway…construction," reflecting the author's understanding "that you have more detailed construction drawings than what was available when we processed our land use plan" for the property in question, and indicating a desire to meet with the RCTC representative "to discuss…the impacts of MCP construction on our property." AR-069296.

[46] AR-069346 is an email from Joaquin Garcia thanking an RCTC representative for information the representative sent to him, which included "a strip map for the Mid County Parkway preferred Alternative 9 Modified between I-215 and highway 79." AR-069346.

[47] AR-015995 contains the following heading: "THE FEIR/FEIS RELIES UPON AN INFLATED BASELINE TO MASK THE PROJECT'S SIGNIFICANT IMPACTS." AR-015995. It then describes what a project's "baseline" is under CEQA and offers the observation that "[a]ccurately determining the baseline environmental conditions is crucial to accurately evaluating a project's impact." *Id.* For purposes of offering specifics to support the quoted heading, the page contains the following paragraph (with internal citations to the Final EIR/S omitted): "The supplemental Notice of Preparation for the Project was published in 2007. Nonetheless, the FEIR/FEIS relies upon a 2010 baseline for a baseline several years into the future. The FEIR/FEIS cannot use a later baseline to improperly inflate the project setting in order to minimize the reported environmental impacts. Furthermore, the FEIR/FEIS relies upon inflated growth projections to justify the need for this Project." *Id.* No specifics are offered to aid an understanding of what, in particular, supported the final sentence of that excerpt.

009818,[49] 009824-25,[50] 010792,[51] 013625-26,[52] 013496-97,[53] and 014536[54]. They also

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[48] AR-015972 repeats the content from AR-009818 reflected in Footnote 49, *infra*. The remainder of these pages discusses a number of concerns about the impacts of the MCP on low-income communities and minorities, thereby presenting environmental justice concerns, criticizes the Final EIR/S's analysis of likely impacts on low-income and minority communities as "limited and narrow," and closes with the general exhortation that "[p]rior to any approval of this Project, the FEIR/FEIS should be revised to include a more in-depth analysis of these impacts and ensure that low-income and minority communities are not being forced to bear a disparate amount of the negative impacts of this Project." AR-015972-75. It includes no other discussion of improper comparisons, however (though it also acknowledges the Final EIR/S's ultimate conclusion that "the preferred alternative would…'result in the **highest impacts to residential relocations in areas with minority and low-income populations**.'" AR-015974 (emphasis in original)).

[49] "The DEIR/DEIS further fabricates an inflated future growth and baseline in order to justify the Project and mask its numerous impacts." AR-009818.

[50] Giving specifics to the general statement at AR-009818, *see* Footnote 49, *supra*, AR-009824-25 discuss "an improper and unrealistic projection of future growth and project need." AR-009824. This statement, however, is immediately followed by a discussion of the Draft EIR/S's projections "of growth of over 60% [in population] by 2035 and 80% growth in employment," and a comparison of "current LOS to project LOS in 2040." *Id.* It follows up on these concerns by stating that "the basis and legitimacy of these projections are questionable, as discussed in other sections of these comments including the traffic section." *Id.*

[51] To the extent AR-010792 has anything to say on this subject, it reflects a comment that "Alternatives 1A and 1B[] do not consider the environment in its pre-project condition, but instead consider speculative conditions forecast into 2040." AR-010792. It concludes that "[b]y failing to compare a reasonable range of alternatives, including Alternatives 1A and 1B, to the existing environmental conditions the EIR relies upon an improper future baseline to avoid a meaningful analysis of the Project's impacts and alternatives." *Id.*

[52] These pages reflect assertions that the Final EIR/S "relies on an improper baseline" and that a "[f]ailure to use a proper baseline results in the oversimplification and unjustified dismissal of significant impacts." AR-013625. They then discuss what the rule is, under certain guidelines, "for what constitutes an environmental baseline" and offers further thoughts on why a proper baseline is important to a proper environmental analysis. *Id.* Specificity as to why this objective was not met here, according to the Center, is provided by the statement that "[t]he EIR/EIS for the MCP is fundamentally flawed because it relies upon a comparison of the '2035 No build conditions'" for certain analyses, and the conclusion that "[t]he EIR/EIS is not permitted to choose a date 27 years into the future in order to fish for a transportation calculation that improperly masks the significant increase in emissions that would result from the construction of a new six to eight lane freeway." *Id.* at AR-013626. It also offers the conclusory assertion that "[t]he EIR/EIS's improper baseline dooms the environmental review throughout the document." *Id.* While these pages also state that "[i]t is also unclear to what degree the EIR/EIS's inflated baseline relies upon the MCP itself" and "[t]he EIR/EIS cannot create a self fulfilling [*sic*] prophecy that employs a baseline that actually incorporates the project itself to mask project impacts," these are, respectively, the topic and closing sentences of a paragraph dedicated to the issue of *traffic forecasts*. *Id.*

[53] "Although the DEIR/S is not explicit, the RCTC appears to base its determination of no significant impacts partly on the fact that farmland conversion is already anticipated in the general plans…. Even if this is true, the DEIR/S' analysis violates CEQA, which require that the significance of impacts be measured against a baseline of existing conditions, not future conditions…. The DEIR/S must explicitly acknowledge the baseline for its 'no significant impacts' determination and cannot use future expectations as the baseline." AR-013496-97.

believe that RCTC is "misstat[ing] the thrust" of Plaintiffs' argument by claiming it is one concerning intermodal distribution centers and ambiguous text. The argument, they assert, is that "the EIR/S 'fabricates inflated future growth projections and baseline in order to justify the Project and mask its numerous impacts,' especially as it relates to the MCP's disparate impacts on low-income communities and minorities that will suffer the brunt of the pollution and impacts from the preferred alternative," Docket No. 42, at 37:1-6, an argument Plaintiffs support by reference to AR-015973[55].

iii. Section 4(f) Exhaustion

With respect to administrative exhaustion of the Section 4(f) argument, Plaintiffs only state that, for years during the administrative process, they emphasized that the environmental documents must properly evaluate avoidance alternatives, citing AR-009886,[56] 013572,[57] 013573,[58] 014335,[59] 084428,[60] 014486,[61] and 015996-97[62]. They

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[54] AR-014536 is effectively duplicative of the material at AR-010792. *See* Footnote 51, *supra*.

[55] *See* Footnote 48, *supra*.

[56] "The EIR also fails to analyze all feasible alternatives or mitigation measures to avoid or reduce the impacts of developing parklands and wildlife areas…. [I]t fails to properly conduct an alternatives or mitigation analysis that demonstrates there are no feasible and prudent alternatives or additional planning mechanisms to reduce impacts." AR-009886.

[57] "[W]e requested that the subject environmental documents demonstrate compliance with the requirements of Section 4(f) of the U.S. Department of Transportation Act of 1966 which specifies that publicly owned parks, recreation areas, wildlife or waterfowl refuges may not be used for projects which use federal funds, unless there are no feasible and prudent alternatives to the use of such land. In addition, the Section 4(f) requirements stipulate that the project includes all possible planning to minimize harm to federal, state, or regional wildlife conservation lands resulting from the proposed transportation use." AR-013572.

[58] AR-013573 says nothing about Avoidance Alternative 3B. It simply complained that the Section 4(f) avoidance alternatives "are obscured in an appendix of the voluminous environmental document"; suggests that the RCTC thereby "effectively side-stepped the NEPA/CEQA mandates to examine reasonable alternatives capable of avoiding significant impacts to the Lake Mathews/Estelle Mountain wildlife conservation lands"; asserts that the argument of greater project costs was not properly contrasted with the irreparable harm that will happen to "the last vestiges of biodiversity in western Riverside County"; asserts that the Section 4(f) mandate "also requires that the subject transportation project include all possible planning to minimize harm to federal, state, and regional wildlife conservation lands"; and posits that the Draft EIR/S provides "poor consideration" of the indirect impacts the MCP will have on endangered species habitat, specifically designated conservation lands for the Stephens' Kangaroo Rat. *See* AR-013573.

[59] AR-014335 repeats the concern that the environmental documents demonstrate compliance with Section 4(f) and its requirements, including "that the project includes all possible planning to minimize harm to federal, state or regional wildlife conservation lands resulting from the proposed transportation use." AR-014335.

also argue that FHWA's obligation to comply with mandates for adoption of feasible and prudent alternatives to the use of Section 4(f) resources satisfies the "so obvious" exception.

b. RCTC's Reply re Exhaustion

In Reply, RCTC takes the position that Plaintiffs' interpretation of the exhaustion requirement exceeds even the widest reading of the rule, relying on *Vermont Yankee* and *City of Carmel-By-The-Sea v. United States Department of Transportation*, 123 F.3d 1142 (9th Cir. 1997) and the contention that "[n]one of the administrative comments cited by [Plaintiffs] name the specific alleged mistake or include the why that is argued in this litigation." Docket No. 45, at 19:12-14. The RCTC persuasively argues that what Plaintiffs are attempting to have the Court accept here is the notion that "it is sufficient to merely restate an agency's legal duties and broadly allege that the agency has not complied," *id.* at 19:15-16, further observing that it is difficult to see how, "under [Plaintiffs'] interpretation," it would not be sufficient to "exhaust essentially every issue" by simply sending in "a comment letter reading like a NEPA treatise sprinkled with general allegations." *Id.* at 19 n.4.

c. The Court's Assessment

The Court has considered the parties' arguments regarding administrative exhaustion, and Plaintiffs' citations to the administrative record (*see* Footnotes 33-62, *supra*) in an effort to demonstrate such exhaustion, with the administrative exhaustion standards and rules recognized by the Supreme Court and Ninth Circuit in mind.

i. As to the Project's Width Description and Route

First, on the issue of arguments concerning: (1) an insufficient description of the project's width and (2) the exact route through the community, the Court believes that the former issue was not adequately exhausted, while the latter was. There is no question that the AR reflects questions, concerns and uncertainties from residents about the impact of the MCP route on their specific properties. *See* AR-068939, AR-069218, AR-069250, AR-069296, AR-069316, AR-069338, AR-069346, AR-069393, AR-069431-32.

[60] AR-084428 is an outline of the general legal requirements imposed by Section 4(f). *See* AR-084428.

[61] AR-014486 reflects the same comment found at AR-009886. *See* Footnote 56, *supra*.

[62] AR-015996-97 reflects the same comment found at AR-009886. *See* Footnote 56, *supra*.

However, the only concerns about *width* in the pages of the AR that Plaintiffs have identified involve either specific issues such as bridges, culverts and pipes, *see* AR-009583, AR-013453, standards that have little apparent relation to NEPA (such as the DWR's "requirements for legal descriptions used for transfer of title to or from the State of California," *see* AR-068999), or are so generally-stated as to be effectively useless to FHWA in attempting to address any perceived concerns, *see* AR-009819. *See Vermont Yankee*, 435 U.S. at 553-54; *Idaho Sporting Congress*, 305 F.3d at 965.

The Court also rejects any suggestion that any flaws regarding descriptions of the width of the MCP were "so obvious" to FHWA as to provide a means to avoid the exhaustion requirement. In both the Recirculated EIR/S and the Final EIR/S, it was noted in the "Typical Sections" description of the MCP Build Alternatives for the proposed six-lane freeway that: "*Generally*, the needed right of way varies from 220 ft. to 660 ft. in width." AR-003918, AR-006161 (emphasis added). It was also noted that the MCP Build Alternatives would also have interchanges and bridges; and the proposed locations of those items were delineated. *See e.g.* AR-003922-29, AR-006161-71. In the Final EIR/S, it was also explained in more detail that:

> The right of way width for the facility ranges typically from 200 feet to 350 feet. At locations of basins, in large cut or fill, and system interchange connector's right of way width ranges typically from 400 feet to 700 feet. At interchange locations the width varies from 350 feet to approximately 1700 feet width for on and off ramps. The width varies due to the terrain and required roadway features.

AR-010335. Moreover, both the Recirculated EIR/S and the Final EIR/S included maps which depicted the proposed route to be taken by the MCP and which indicated the various points where interchanges and bridges were to be constructed. *See e.g.* AR-003932, AR-006174, AR-007993-94, AR-009201-03. As Plaintiffs concede, the maps provided in the Final EIR/S include a level of detail from which the width of the MCP at various points can be estimated using the "map scale in the figure;" and from those maps it can be discerned that the MCP at designated areas will vastly exceed the general right of way range of between 220 and 660 feet for the typical sections of the freeway.[63] *See*

[63] While Plaintiffs concede this point only as to the Final EIR/S, the Court would note that similar maps, albeit smaller in scale, were also included in the Recirculated EIR/S. *See e.g.* AR-003932, AR-004228, AR-004332, AR-004350, AR-004624, AR-005944-46.

e.g. PR, ¶¶ 41-46.

Given the above, Plaintiffs' failure to adequately articulate their "project width description" challenge (other than in general, unspecified and non-apparent language such that the agencies would be able to understand Plaintiffs' point[64]) constitutes a failure to exhaust. Further, given their concession that the maps provided with the Final EIR/S (and, as found by this Court in the Recirculated EIR/S) do indicate the approximate width of the MCP at various points in its route, the present situation does not fall within the "so obvious" exception to the administrative exhaustion requirement.

ii As to the Purported Use of an Improper Baseline

As concerns Plaintiffs' arguments concerning the use of an improper baseline, it is clear that *none* of Plaintiffs' citations to the AR have anything to do with their concern, repeatedly-emphasized in their motion papers (*see* Docket No. 32-1, at 13:13-16:13 and Docket No. 42, at 7:23-9:27), that the FHWA inflated the impacts of Alternative 5 Modified by analyzing intermodal distribution centers that had not yet been built while at the same time utilizing *existing* residential data for purposes of assessing Alternative 9 Modified. All discussions of an inflated or erroneous "baseline" Plaintiffs have pointed to in the AR concerned completely different perceived "baseline" problems or simply made reference to the importance of accurate baselines and intimated, generally, that one or more improper ones had been used here. *See* AR-009818, 009824, 010792, 013496-97, 013626, 014536, 015972, 015995. Plaintiffs surely cannot sufficiently exhaust any and all issues having to do with any "baseline" problem by simply pointing to comments concerning baseline problems other than the one specific baseline problem they now desire to litigate. *See, e.g.*, *Oregon Natural Desert Association v. Jewell*, 840 F.3d 562, 571-73 (9th Cir. 2016). Nor can Plaintiffs creatively spin their objections as a more *general* problem with "inflated future growth projections and baseline" when they have

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[64] For example, as delineated by San Bernardino Valley Audubon Society, its contention is that:

> the EIR contains an incomplete project description and analysis that fails to provide the public and decision makers with the necessary information in order to analyze impacts and mitigation measures. The Project description omits integral components of both the project's physical characteristics as well as planning level changes that are necessary to implement the MCP.

AR-009819.

specifically relied on *one* such alleged problem in their briefing and, as to that one purported problem, they have plainly failed to exhaust. Consequently, the Court concludes that Plaintiffs have failed to sufficiently administratively exhaust this argument. Plaintiffs also cannot satisfy the "so obvious" exception to administrative exhaustion in connection with this argument, because they have presented nothing in the record to demonstrate the particular baseline defect asserted here was known to FHWA.

iii. As to the Section 4(f) Issue

Similarly, with respect to the Section 4(f) issue, the Court is compelled to agree with RCTC. There is no mention of Avoidance Alternative 3B in any of the materials Plaintiffs cite, let alone an assertion that FHWA has not sufficiently demonstrated that Avoidance Alternative 3B is not prudent. Apart from citations to cases discussing the general standards applying to exhaustion analysis, Plaintiffs have not directed the Court to any case assessing exhaustion of a Section 4(f) argument that might demonstrate the sufficiency of their (or others') exhaustion efforts here. *See* Docket No. 42, at 37:10-38:5.

As RCTC argues, unless the Court is to conclude that exhaustion is satisfied simply by mentioning an agency's legal duties and the broad contention that it has not complied with those duties, Plaintiffs' comments were not sufficient to exhaust this issue.[65] Plaintiffs have not demonstrated that anyone gave FHWA an adequate "first shot" at resolving the Section 4(f) issue Plaintiffs now rely upon in court, *Idaho Sporting Congress*, 305 F.3d at 965, and to credit these comments for doing so would be to reward "cryptic and obscure reference to matters that 'ought to be' considered," *Vermont Yankee*, 435 U.S. at 553-54. Finally, while the need for *compliance with* Section 4(f) might be "so obvious" to the FHWA, Plaintiffs have not demonstrated any "so obvious" "*flaws*" in the analysis that FHWA did undertake to allow for an exception to the administrative

[65]Perhaps especially in light of the Ninth Circuit's recent decision in *Oregon Natural Desert Association*, the Court finds Plaintiffs' references to the administrative record wanting insofar as exhaustion is concerned. In that case, the Ninth Circuit noted that the plaintiff "did not use the term 'genetic connectivity' in its comments on the draft EIS, nor did it make specific arguments about that issue, separately from the more general issues of habitat connectivity and fragmentation." *Or. Nat. Desert Ass'n*, 840 F.3d at 571. Despite comments that were close to the topic at issue, the Ninth Circuit concluded that the plaintiff's general statements and "vague" and "opaque" comments were not sufficient, "particularly in light of [the plaintiff's] otherwise extremely comprehensive comments." *Id.* at 571-73. The exact same conclusion is appropriate here.

exhaustion requirements on this issue in this case, *see Barnes*, 655 F.3d at 1132, much less that FHWA *recognized* those flaws or "errors," *see 'Ilio'ulaokalani Coalition*, 464 F.3d at 1092.

Finally, turning (unnecessarily, given the failure to *administratively* exhaust the Section 4(f) issue) to the question of waiver by judicial inaction related to Plaintiffs' Section 4(f) claim, in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), an *en banc* decision of the Ninth Circuit in a NEPA case decided (except as to one claim) on cross-motions for summary judgment (and that post-dated *Twombly*), certain plaintiffs attempted to argue that a Final EIS failed adequately to consider risks posed by human ingestion of artificial snow in connection with a project tied to a ski resort. *See id.* at 1063, 1066, 1079. The Ninth Circuit observed that the plaintiffs' complaint had not included this particular NEPA claim "or the factual allegations upon which the claim rests." *Id.* In connection with the summary judgment briefing, the plaintiffs moved to amend their complaint to add a distinct claim on this topic, but the district court denied the motion. *See id.*

On appeal, the plaintiffs argued that the claim in question "was adequately presented to the district court because the claim 'was briefed at summary judgment by all parties and presented at oral argument [to the district court].'" *Id.* at 1080. Nevertheless, the Ninth Circuit observed that "our precedents make clear that where, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court." *Id. Wasco Products v. Southwall Techs., Inc.*, 435 F.3d 989 (9th Cir. 2006), is to similar effect. *See id.* at 991-92 (holding that conspiracy-based justification for tolling statute of limitations must be included in pleadings, "even where the tolling argument is raised in opposition to summary judgment," because "'summary judgment is not a procedural second chance to flesh out inadequate pleadings'") (quoting *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990)). That clear statement renders Plaintiffs' attempt to distinguish *Navajo Nation* – based on the fact that the plaintiffs in that case had conceded that the specific allegations were not included in the complaint and were attempting to amend the complaint at summary judgment – inadequate. *Navajo Nation* specifically referenced "the necessary factual allegations to state a claim," and Plaintiffs'

Complaint failed to include any *factual* allegations concerning FHWA's Section 4(f) obligations at all, simply restating the legal obligation to choose a prudent and feasible alternative that would avoid Section 4(f) resources. Raising the claim at this stage, therefore, is insufficient. As such, irrespective of whether Plaintiffs properly exhausted the particular Section 4(f) issue raised here administratively (or the issue should have been "so obvious" to FHWA), their failure to raise the issue of Avoidance Alternative 3B in factual allegations in their Complaint precludes their ability to argue the point at summary judgment. *See Navajo Nation*, 535 F.3d at 1080 n.27 (noting that proper administrative exhaustion does not suffice to preserve an issue that a party waives by not properly raising it in court, such as by failing to sufficiently present the issue to the district court).

In sum, the only aspect of Plaintiffs' first, second and/or fourth arguments that they sufficiently exhausted involves questions about the impact of the MCP on specific residents' properties. To the extent Plaintiffs are able to advance any argument about an inadequate description of the MCP (for purposes of satisfying NEPA's requirements for an informed public-participation process), it is to be limited in that regard. The Court's assessment of that argument and the only argument that neither RCTC nor FHWA argue was insufficiently exhausted – the argument that the FHWA failed to provide a reasonable range of alternatives – now follows.

4. Inadequate Route Description

Plaintiffs' concerns about FHWA's inadequate route description are presented as part of an argument that this alleged error did not permit meaningful public review of the project in violation of NEPA under the Supreme Court's *Public Citizen* decision, the Ninth Circuit's decision in *Klamath-Siskiyou Wildlands Center v. U.S. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004), and regulations such as 40 C.F.R. §§ 1500.1(b) and 1502.8. Section 1500.1(b) provides that:

> NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

Section 1502.8 provides the following:

> Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

See also Or. Envtl. Council v. Kunzman, 817 F.2d 484, 494 (9th Cir. 1987) ("We hold that § 1502.8 imposes a requirement that an EIS must be organized and written so as to be readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the EIS.").

Public Citizen and *Klamath-Siskiyou*, to the extent they are relevant here, only generally discuss the process surrounding, and purposes underlying, NEPA. In *Public Citizen*, the Supreme Court explained the "two purposes" served by NEPA's EIS requirement, one of which was "the informational purpose":

> [T]he 'informational role' of an EIS is to 'giv[e] the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provid[e] a springboard for public comment' in the agency decisionmaking process itself. The purpose here is to ensure that the 'larger audience' can provide input as necessary to the agency making the relevant decisions.

541 U.S. at 768 (omitting internal citations and certain internal quotation marks) (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)). In *Klamath-Siskiyou*, meanwhile, the Ninth Circuit noted that:

> under the CEQ regulations, agencies are told that "public scrutiny [is] essential," 40 C.F.R. §1500.1(b), and are charged to "encourage and facilitate public involvement in decisions," *id.* §1500.2(d), so that "environmental information is available to public officials and citizens before decisions are made," *id.* § 1500.1(b). They are also told that NEPA documents "shall be written in plain language…so that decisionmakers and the public can readily understand them." 40 C.F.R. § 1502.8.

387 F.3d at 996. In that case, counsel for the defendant had argued to the Ninth Circuit "that to the eye of the 'agency specialists,' the scant information included in the" environmental assessments was "sufficient to determine what the cumulative environmental impacts" would be from a project. *Id.* The court concluded that "[e]ven

accepting the BLM's representation that 'specialists' can understand the information in these [environmental assessments], the documents are unacceptable if they are indecipherable to the public." *Id.*

Here, Plaintiffs assert that the maps the FHWA provided to the public in the NEPA process were not detailed enough to disclose the precise route of the MCP, at least through the residential community that it will bisect. As evidence of this, Plaintiffs point to the comments received from property owners and residents and, though they admit that RCTC *did* respond to residents' comments, note that none of the responses provided links to the Recirculated or Final EIR/S. Plaintiffs also acknowledge, however, that Attachment O-2 of Appendix O of the Final EIR/S "provides parcel acquisition information and diagrams, which also provides a scale in feet." Docket No. 32-1, at 11:21-23.

FHWA responds that the Final EIR/S "includes numerous detailed maps showing the potential routes of the MCP," and, in Appendix O, "provides copious detail, including lengthy tables listing each address and assessors' parcel number for each parcel to be acquired for the MCP" in addition to "30 detailed maps of the proposed routes for the MCP." Docket No. 35-1, at 5:16-19, 21-22. It argues that placement of this information in an appendix was perfectly appropriate, citing 40 C.F.R. § 1502.18[66] and *Pacific Rivers Council v. U.S. Forest Service*, 689 F.3d 1012, 1031 (9th Cir. 2012), *vacated as moot*, 133 S.Ct. 2843 (2013). It further states that Appendix O was made available to the public at all stages of the NEPA process.

For its part, RCTC points out that Plaintiffs admit that the project's route can be found in the Final EIR/S because Chapter 2 of the Final EIR/S, Project Alternatives, contained numerous, detailed maps showing the project's potential routes, and additional maps are found throughout the Final EIR/S. In addition, the Final EIR/S explained that a

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[66] "If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).
(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.
(c) Normally be analytic and relevant to the decision to be made.
(d) Be circulated with the environmental impact statement or be readily available on request."

40 C.F.R. § 1502.18.

detailed, defined right-of-way required for the project could be found in Appendix O, which – in addition to providing thirty additional, detailed maps – listed the physical address, mailing address, and assessor's parcel number of each parcel that would need to be acquired, along with a reference key describing how each parcel would be impacted. Beyond that, RCTC cites to case law supporting the proposition that an EIS "need not be exhaustive to the point of discussing all possible details bearing on the proposed action." *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214, 1217 (9th Cir. 1979) (omitting quotation marks) (quoting *Cnty. of Suffolk v. Secretary*, 562 F.2d 1368, 1375 (2d Cir. 1977)); *see also Tinicum Twp. v. U.S. Dep't of Transp.*, 685 F.3d 288, 296 (3d Cir. 2012) ("While additional data might enable a more detailed environmental analysis, NEPA does not require maximum detail. Rather, it requires agencies to make a series of line-drawing decisions based on the significance and usefulness of additional information.").

As to the questions received from the public, RCTC first argues that if mere questions from the public were evidence of an inadequate EIS, no EIS could ever be upheld, and then notes that RCTC actually responded to the concerned residents (leading many of them to *thank* RCTC for the response). RCTC dismisses the fact that its responses did not include links to the Final EIR/S, turning that into a conclusion that the responses in fact went *above and beyond* any statutory obligations by providing *additional* material.

In Reply, Plaintiffs argue that the public was misled, pointing in part to 40 C.F.R. § 1502.18 in support thereof. *See* Docket No. 42, at 3:21-4:3, 4:26-6:3. But Plaintiffs did not make the argument they believe is supported by Section 1502.18 in their opening brief, and may not do so for the first time in their Reply in order to demonstrate why they should prevail on this issue.[67]

[67] While *FHWA* did raise Section 1502.18 in its brief (that served both as an opposition to Plaintiffs' motion and the opening brief on its own cross-motion for summary judgment) in an attempt to demonstrate why Plaintiffs' could not prevail, *Plaintiffs* bear the burden of persuasion in this case. *See W. Watersheds Project v. Salazar*, 766 F.Supp.2d 1095, 1104-05 (D. Mont. 2011), *aff'd*, 494 Fed. Appx. 740 (9th Cir. Aug. 30, 2012); *see also Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014) ("'When courts consider [APA-based challenges to agency action,] an agency's decision is entitled to a presumption of regularity, and the challenger bears the burden of persuasion.'") (quoting *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011)); *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1555 (10th Cir. 1993). *But see New York v. U.S. Nuclear Reg. Comm'n*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) ("Of course, the NRC always retains the burden of persuasion under NEPA to consider fully the environmental impacts and alternatives for its proposed action."). As such, waiting to raise Section

Plaintiffs also respond that RCTC's and FHWA's responses to inquiries from the public came too late because some of them came after RCTC had already approved the MCP and the Final EIR/S. As RCTC points out, this too is a new argument Plaintiffs have raised for the first time in their Reply. *See* Docket No. 45, at 4:26-5:3. They may not prevail on it for at least that reason.

Supported by the view regarding the outer limits of agency obligations announced in cases such as *Westside Property Owners* and *Tinicum Township*, the Court has no difficulty in concluding that FHWA's description of the route of the MCP was sufficient and clear enough to the public, and did not run afoul of Sections 1500.1(b) and/or 1502.8, or violate the principles announced in *Public Citizen* and *Klamath-Siskiyou*. Detailed information about the route was available in the environmental documents and their appendices, and the Court rejects any suggestion that such information was "indecipherable to the public," as was the case in *Klamath-Siskiyou*, or that even further detail was required. *See also League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1136 (9th Cir. 2010) ("[T]he inclusion of additional, unnecessary data in the EIS would run contrary to the purpose of NEPA, as 'NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.'") (quoting 40 C.F.R. § 1500.1(b)); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008) ("'The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.'") (quoting *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289, 298 (8th Cir. 1972)). To the extent the public had difficulty navigating the information contained in the documents, RCTC responded to their concerns. This issue is simply not a basis to find FHWA's work deficient under NEPA or the APA. As such, the Court rules in favor of FHWA and RCTC on this issue.

5. Reasonable Range of Alternatives

The only other argument Plaintiffs sufficiently exhausted – or at least the only issue on which there is no apparent dispute regarding exhaustion – is the contention that

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1502.18 until their Reply in support of their own motion (and in opposition to FHWA's and RCTC's cross-motions) cannot aid them in their attempt to prevail in this case.

FHWA failed to develop a reasonable range of alternatives. The consideration of alternatives, including the proposed action, "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The environmental impact statement "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*; *see also* 42 U.S.C. § 4332(C)(iii) ("The Congress…directs that, to the fullest extent possible:…all agencies of the Federal Government shall…include in every recommendation or report on proposals for…major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on…alternatives to the proposed action.").

Plaintiffs base their argument here, in part, on their position that, once the MCP was shortened from thirty-two miles to sixteen miles, the environmental documents (including the Final EIR/S) were still based on alternatives for that earlier length of freeway – what they contend were "alternatives proposed or eliminated for a different project." Docket No. 32-1, at 18:5-6. Consequently, the only variation in the viable alternatives is a two mile east-west segment of the MCP through the City of Perris.

At the same time, Plaintiffs concede that, in the Recirculated and Final EIR/S, Alternative 9 (the alternative ultimately selected) was designed to avoid Paragon Park and a fire station, and that the Build Alternatives added upgrades to I-215 when they were presented in the Recirculated and Final EIR/S. But they contend that the shortening of the MCP from thirty-two to sixteen miles and addition of the I-215 upgrades created an "independent project," yet, they assert, "no independent alternatives analysis of those alternatives is provided." Docket No. 32-1, at 22:2-4.

Plaintiffs find further fault with what they perceive to have been a failure to consider "reasonable alternatives such as incorporating HOV lanes, different road alternatives such as those that proved viable for the western half of the MCP, or combining road upgrades with transit." Docket No. 32-1, at 18:10-12. Plaintiffs also find it odd that (in their view) no such alternatives were considered even though FHWA purports to have relied on the Draft Tier 1 EIR/S,[68] which analysis noted a "specific

[68] For purposes of the Build Alternatives that *were* proposed, Plaintiffs assert that FHWA cannot rely on analysis performed as part of the Draft Tier 1 EIR/S because it was never completed and FHWA admitted

emphasis on the ongoing development of HOV facilities in Riverside County." Plaintiffs also assign error to the failure to consider an alternative that employed upgrades to the existing road network, except as part of a no-action alternative that FHWA conceded was developed only for comparison. The FHWA's rejection of transit because it cannot "move goods" does not, they contend, account for an alternative that would include *both* transit and upgrades to existing roadways, an alternative that they argue was lacking from the analysis here.

In the end, Plaintiffs acknowledge that the range of alternatives considered by an agency is governed by a "rule of reason." But they also note the Ninth Circuit's stance that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Id.* at 19:1-2 (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (quoting *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994)). In addition, Plaintiffs point to *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980), *City of Carmel* and, in their Reply, *Alaska Center for the Environment v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997), in support of their arguments on this issue.

FHWA's response on this issue is to point to the lengthy history underlying all of the alternatives considered and to note that, in the Recirculated EIR/S, modified alternatives were introduced which included – in addition to the change in length of the MCP – modifying Alternative 9 to avoid Paragon Park, moving local interchanges, and planning improvements to I-215. It then emphasizes that an agency need only examine "those alternatives necessary to permit a reasoned choice." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997).

Accepting Plaintiffs' view that there were no *new* alternatives after the change in length of the MCP, FHWA argues that it explained why alternatives were withdrawn from further study and also explained its position that it was appropriate to consider alternatives developed for the originally-proposed MCP because a primary purpose of the project was to improve west-east mobility in western Riverside County, a purpose that remained unchanged even after the length of the MCP was shortened. Alternatives were

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in the Final EIR/S that the analysis therein needed to be updated and was over 14 years old. *See generally Or. Nat. Resources Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006) (discussing tiering).

withdrawn because non-freeway alternatives did not meet the purpose and need of the project including, with respect to transit in particular, that it would not be able to meet the purpose of moving goods and, as to rail transit, that it would require installing track, and building stations and other structures, all of which would result in significant environmental effects. FHWA also notes that non-freeway options *were* considered as part of the early phases of the project during the HCLE corridor CETAP studies. FHWA further insists that it was not required to consider an alternative that was unlikely to be implemented or that was inconsistent with its basic objectives. *See Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996); *see also HonoluluTraffic.com*, 742 F.3d at 1231 ("The range of alternatives that an EIS must consider is 'dictated by the nature and scope of the proposed action.'") (quoting *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008)).

Similarly, RCTC argues that HOV lanes, different road alternatives and a combination of road upgrades and transit *were* considered, beginning with the HCLE Corridor studies conducted for CETAP and the Draft Tier 1 EIR/S. It notes the Final EIR/S's explanation for why no HOV lanes or park-and-ride facilities were proposed as part of the Build Alternatives (while the project still was designed so that these options could be added in the future if needed) – because no traffic congestion was expected *on the MCP* through 2040. And, like FHWA, it also points out the other reasons why transit options were not acceptable as alternatives, even though availability of adding them later was factored into the planning.

RCTC cites *HonoluluTraffic.com* for the rule that "an agency does not violate NEPA by refusing to discuss alternatives already rejected in prior state studies," 742 F.3d at 1231, and rejects the notion that the project became a new project, requiring all previous analysis to be disregarded, just because it was shortened in response to public feedback. It also dismisses the notion that the Build Alternatives are too similar by noting that there are few feasible routes for effectively connecting two cities, such as Perris and San Jacinto here.

In responding to Plaintiffs' highlighted authorities, RCTC distinguishes *Bowers* by virtue of the fact that, here, the Final EIR/S did consider options other than the six-lane MCP in the form of an alternative that kept the Ramona Expressway as-is, and an

alternative that implemented improvements to the Ramona Expressway. As for *City of Carmel*, RCTC argues that the options considered there were also considered here.

RCTC closes by taking the position that Plaintiffs failed to demonstrate that there were any "viable but unexamined" alternatives and, even if there were, *Vermont Yankee* demonstrates that a "detailed statement of alternatives" is not deficient simply because it "fail[s] to include every alternative device and thought conceivable." *Vt. Yankee*, 435 U.S. at 551; *see also Bowers*, 632 F.2d at 783 ("The alternatives requirement of NEPA is not to be used for chronic faultfinding."). In the end, RCTC believes the agencies did exactly as they were required by 40 C.F.R. § 1502.14(a),[69] briefly discussing alternatives and the reason for eliminating them.

Plaintiffs respond to the assertion that the Final EIR/S considered upgrades to the Ramona Expressway in Alternative 1B by asserting that it is a cursory analysis of a no action alternative that failed to "[d]evote substantial treatment to each alternative considered in detail…so that reviewers may evaluate their comparative merits." Docket No. 42, at 15:12-27 (quoting *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1058 (9th Cir. 2011) and 40 C.F.R. § 1502.14(b)).[70] Plaintiffs also reject the suggestion that the Draft Tier 1 EIR/S analysis considered non-highway options. Instead, they argue, it only considered transit options and HOV lanes as part of the six-plus lane MCP freeway. Because the Draft Tier 1 EIR/S recognized the viability and importance of integrating public transit and HOV lanes, the failure to consider that

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[69] Section 1502.14(a) requires that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

[70] As the Court sees it, this argument is the closest Plaintiffs come to prevailing on their inadequate-range-of-alternatives argument. Taking into consideration the Ninth Circuit's decision in *Southeast Alaska Conservation Council*, the Final EIR/S's consideration of the No Action Alternative 1B does appear to be relatively cursory. *See* AR-006201. The Defendants have not helped their cause here by failing to address that Ninth Circuit decision in their briefs.

On the other hand, while shorter (in terms of number of paragraphs) than the consideration of the No Action Alternative in *Southeast Alaska Conservation Council*, the Final EIR/S's discussion of No Action Alternative 1B does include a number of reasons why that alternative would not be consistent with various aspects of the Project's goals (*i.e.* the Alternative "would not provide a limited access facility, would not provide roadway geometrics to meet state highway design standards; would not accommodate Surface Transportation Assistance Act National Network trucks, and would not provide a facility that is compatible with a future multimodal transportation system." *Id.* Plaintiffs have not established that those reasons are incorrect or invalid. Further, as pointed out by the Defendants at the hearing, Alternative 1B was used as a comparison to the other alternative proposals and in the context of impact discussions in other portions of the Recirculated EIR/S and Final EIR/S.

recognized-as-viable option meant that the range of alternatives considered was unreasonable under *'Ilio'ulaokalani Coalition*. Plaintiffs additionally conclude that FHWA's rejection of alternatives with public transit and HOV lanes based on a previous analysis of the project route supporting those components "has no rational connection to the record," citing *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005). Finally, Plaintiffs also argue that the failure to consider an alternative that includes public transit, HOV lanes *and* roadway expansion together means that FHWA failed to provide a reasonable range of alternatives.

With the general rules in mind that a "rule of reason" and the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standards apply, that once a court is "satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, [a court's] review is at an end," *City of Carmel*, 123 F.3d at 1151 (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)), that an agency need only consider "those alternatives necessary to permit a reasoned choice," and that it need not consider an alternative that was unlikely to be implemented or that was inconsistent with its basic objectives, and having reviewed – among other cases – the Ninth Circuit's decision in *Bowers*, *City of Carmel*, *Alaska Center for the Environment* and *Southeast Alaska Conservation Council* (the last of which provides only abbreviated analysis under NEPA),[71] the Court concludes that Plaintiffs may not prevail on this issue for a series of reasons.

First, Plaintiffs are incorrect in their assertion that the agencies simply considered the same alternatives, unchanged, as those that were part of the analysis when the MCP was a thirty two-mile-long project. Among other things, Alternative 9 was modified in certain regards, and changes to I-215 were added. Relatedly, Plaintiffs have not sufficiently explained why the shortening of the project would render the project an entirely new one and/or call for a collection of entirely new alternatives to be assessed, especially when the purpose of the shortened MCP project remained the same as the

[71] As – apart from the general principles already discussed in this section – none of these cases set down any rigid rules of law about what particular forms of alternatives *must* be considered as part of *any* NEPA process involving road/freeway projects, the Court does not find these decisions particularly illuminating with respect to the present dispute. All such projects/cases are, to at least a certain degree, *sui generis*, and the rule of reason must be flexibly applied to take into account the different factual circumstances involved in each.

purpose of the longer version. As RCTC adequately summarizes in its Reply, "[n]ot only is" Plaintiffs' position about analysis of the "same alternatives" for the original thirty two-mile MCP as for the sixteen-mile MCP "wrong factually, [Plaintiffs also] provide[] no rationale for why a brand new analysis was required," nor "any legal authority for this proposition." Docket No. 45, at 8:7-10, 15-16.

Second, it seems to this Court that, for Plaintiffs to prevail on this argument, they would need to have the Court conclude that FHWA could not rely on the analysis performed as part of the HCLE Corridor/CETAP project and/or the Draft Tier 1 EIR/S. But Plaintiffs have not sufficiently explained, by virtue of citation to authority, why FHWA was unable to do so.

Third – and obviously related to that second point – FHWA and the other agencies involved clearly *did* consider alternatives incorporating (or consisting of) HOV, transit, and roadway upgrades, and there is thus an obviously rational connection between the conclusions reached and the record. In fact, the Build Alternatives provide for the flexibility to include HOV and transit options in the future should the need arise. FHWA reasonably determined that alternatives consisting of, or focusing upon, these options would not comply with the purpose of the project, or its objectives, and explained its reasoning in this regard (and other reasons for rejecting such alternatives). *See City of Carmel*, 123 F.3d at 1155 ("The stated goal of a project necessarily dictates the range of 'reasonable' alternatives…."); *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) ("[T]he EIS discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated. This is all NEPA requires…."). Among other reasons for rejecting them (and concluding that they were not viable), transit could not assist in the transportation of goods, there was no expectation of traffic congestion on the MCP through 2040 (and therefore no need for HOV lanes), and non-freeway road upgrades would not meet the "effective and efficient" goal considering the travel time comparisons with a freeway project. *See* AR-006172, 009925, 009927, 010817. Even if true, the fact that FHWA did not explicitly consider an alternative that combined HOV, transit *and* roadway upgrades does not, in this Court's view, render the range of alternatives considered unreasonable, especially given the lengthy and detailed consideration of alternatives the agencies engaged in over the entire

course of the process and the reasons given for why each of those design options were inconsistent with the project's objectives and non-viable.

Similar to the situation in *City of Carmel*, Plaintiffs' disagreement with the plans established by FHWA and RCTC "appears to be a substantive one," 123 F.3d at 1159: they prefer no freeway. "Although the merit of their environmental concerns may be strong, these concerns are beyond the scope of [this Court's] review." *Id.* Pursuant to the foregoing analysis, the Court rules in favor of FHWA and RCTC insofar as this issue is concerned.

III. CONCLUSION

For the reasons stated above, the Court concludes that all but two of the arguments Plaintiffs raise by way of their motion for summary judgment are not properly before the Court because they have not been administratively exhausted. With respect to the two arguments that are not barred by that analysis – arguments concerning an alleged deficient description of the project route and an allegedly unsatisfactory consideration of the range of alternatives – the Court rules on the merits in favor of FHWA and RCTC. Under this approach, the Court denies Plaintiffs' motion and grants FHWA's and RCTC's motions, and judgment will be entered for the Defendants.