A layman's view of our lawsuit, Part II: Improper Segmentation

Count 4 of our Complaint states the following:

> 95. Federal agencies must examine the whole of a proposed action in any EIS, and may not "segment" the action into parts so as to avoid or minimize the environmental effects of the whole action. 42 U.S.C. § 4332(2)(C).
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> "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 CFR § 1502.4(a) (emphasis added).
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> 96. The FEIS improperly segments Defendants' [FTA and City] analysis of the environmental consequences of developing a rail system in the entire study corridor. The FEIS evaluates (and the ROD [Record of Decision] approves) immediate development of a rail system covering approximately 20 miles of the 23-mile "Honolulu High-Capacity Transit Corridor." But at least three additional rail lines are currently planned within that corridor. And at least two of those additional lines — those connecting the Ala Moana Center to the University of Hawaii, Manoa and to Waikiki — have already been the subject of formal proposals and detailed economic, environmental, and engineering studies. In fact, the 2006 Alternatives Report and the 2006 Alternatives Screening Memo consider both of those lines to be part of the Project. In short, construction of the University of Hawaii, Manoa and Waikiki rail lines is just as concrete and just as foreseeable as is the Project. Accordingly, both of those lines should have been considered part of the Project for purposes of the FEIS. They were not. As a result, (1) the FEIS understates the environmental impacts of the rail system and (2) the ROD effectively forecloses meaningful consideration of alternative methods of linking Ewa, the University of Hawaii - Manoa, and Waikiki to other parts of Oahu.

In short, the City's Final EIS must study the entire "Honolulu High-Capacity Transit Corridor" as originally, and logically, defined by the City Council as the "Locally Preferred Alternative," or LPA. As stated in Bill 79 (2006)[1] and Ordinance 07-001:

> The locally preferred alternative for the Honolulu High-Capacity Transit Corridor Project shall be a fixed guideway system between Kapolei and the University of Hawaii at Manoa … with the Waikiki branch … The city administration is authorized to proceed with preparation of an environmental impact statement for the locally preferred alternative.

The City may build only a portion of the LPA at a time, but to meet the requirements of environmental law they must study and evaluate the entire Corridor in the EIS. As the U.S. DOT states:

> A problem of "segmentation" may also occur where a transportation need extends throughout an entire corridor but environmental issues and transportation need are inappropriately discussed for only a segment of the corridor.[2]

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[1] http://www.honolulutraffic.com/Bill79Final.pdf

[2] http://environment.fhwa.dot.gov/projdev/tdmtermini.asp

The second and last Scoping Report, p. 5-3, states clearly that:

> Both UH Mānoa and Waikīkī service are included in all fixed guideway alternatives that will be evaluated in the EIS.

However, in the Final EIS, the detailed environmental analysis and documentation applies only to the core 20-mile alignment between East Kapolei and Ala Moana Center. The additions from East Kapolei to West Kapolei and from Ala Moana Center to UH Mānoa and to Waikīkī are described as "future planned extensions."

The Locally Preferred Alternative should be examined in the EIS in its entirety as was intended by both Notices of Intent and authorized by the City Council. The Final EIS should not have segmented the three "planned extensions" from the Locally Preferred Alternative.

As the U.S. Corps of Engineers commented for the second Scoping Report, A-10,

> The Corps believes the environmental consequences resulting from construction of the "Minimal Operable Segment" and all planned extensions must be considered in the project-level EIS, particularly if the Project [meaning the LPA] benefits, wholly or partially, are derived from one or more of these future extensions and station locations.[3]

We believe that segmentation of what was formerly the Locally Preferred Alternative into a newly designated "Project" (formerly the Minimum Operable Segment and later the First Project) and "planned extensions" was surreptitiously undertaken to avoid the following FTA policy.

> … the Federal 'undertaking' in a Fully Funded Grant Agreement (FFGA) will no longer be segmented into Project and Local Activities. All activities related to a Federal undertaking will be identified as the Federal Project. The Federal funds will be distributed among all the activities in the project at a level funding ratio equal to the percentage of Federal financial participation in the entire project. Thus, all the elements and activities of the project, as described in the FFGA will be funded, in part, with Federal funds; and, the requirements attached to the use of Federal funds will apply to each such task, unless otherwise exempted as provided in the applicable laws, regulations and policies.[4]

Not segmenting the original Locally Preferred Alternative would mean that the City would get far less federal funds for the Minimum Operable Segment and make the MOS even more financially untenable than it is already.

The lack of any credible rationale in the Final EIS for the City's segmentation of the "planned extensions" from the LPA intimates that the segmentation was done to facilitate funding. The cost and environmental impacts of the full LPA will be significantly greater than the isolated Minimum Operable Segment, or "Project."

The UH Manoa and Waikiki extensions will traverse the core urban center of Honolulu creating significant cumulative environmental impacts. These will include prolonged lifestyle disruption due to construction difficulties, excavation of culturally sensitive areas, severe noise impacts through close-quartered residential neighborhoods resulting in great emotional distress,

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[3] U.S. Corps of Engineers comments, Appendix. A-1, p. A-6, at: www.honolulutraffic.com/NEPAScopingReport.pdf

[4] http://www.fta.dot.gov/funding/thirdpartyprocurement/bppm/grants_financing_6105.html

impossible to mitigate visual impacts, and negative impacts on property values within close proximity to the rail line.

As one court ruled,

> When several foreseeable similar projects in a geographic region have a cumulative impact, they should be evaluated in a single EIS.[5]

Like the two sections of the Winston-Salem beltline at issue in *North Carolina Alliance*, the three remaining sections of the Locally Preferred Alternative,

> … constitute cumulative actions, and therefore should [be] considered in the same environmental impact statement.[6]

The *de minimus* discussion in the Final EIS of the cumulative impacts of planned extensions does not justify segmentation of the Locally Preferred Alternative under NEPA. This segmentation has occurred because of funding considerations and the arguments found in the Draft EIS are merely post-hoc rationalizations for this funding-driven violation of the law.

The Final EIS violates NEPA because it fails to consider the fully detailed cumulative actions of both the Minimum Operable Segment and the "planned extensions" in a single Environmental Impact Statement.

The Final EIS, p. 2-49, states that,

> The Ala Moana Center Station and a future planned station at the Convention Center would be transfer points between the UH Mānoa and Waikīkī branch lines.

This raises innumerable question about how this would all work and what would be the impacts. For example, the engineering drawings[7] in the Draft EIS showed that the planned extension to UH would entail adding a branch line near the junction of Queen and Waimanu Streets. This would near double the width of the rail bed. The drawings also showed that these two rail lines cross over one another at Piikoi and Kona Streets with one line continuing at the 35 feet level and the one above at 65 feet giving two stations at Ala Moana Center. This may be an even greater eyesore than was in the original plan.

This double line configuration does not appear in the Final EIS, which only begs the question of how the planned extensions to Waikīkī and UH Mānoa are going to work? How can the promised three-minute headways possibly be maintained with these future extensions.

Further, if Ala Moana Center and the Convention Center are transfer points to Waikiki and UH Manoa, how will that work environmentally? If UH Manoa and Waikiki are also to have service every three minutes, how is that going to work with three separate lines — Ala Moana only line, UH Manoa line and Waikiki line — in operation?

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[5] Resources, Ltd. v. Robertson, 35 F.3d 1300, 1306 (9th Cir. 1993), quoted in North Carolina Alliance for Transportation Reform v. U.S. Dept. of Transportation, 151 F. Supp. 2d 661, 685 (M.D.N.C. 2001).

[6] 151 F.Supp. 2d at 684.

[7] Draft EIS, Appendix A, Sheet RP024.

Will construction of the higher elevation station at Ala Moana Center present insurmountable engineering difficulties? Or, is it that the "planned extensions" would not pass the FTA's cost-effectiveness test? According to the Alternatives Analysis (but not available in the Final EIS) the greatest daily transit ridership generated for the full 28-mile LPA was only 4.3 percent greater than that for the 20-mile version but at a 27.8 percent increase in capital costs.[8] Since the 20-mile version itself barely passes the cost-effectiveness test, it is highly improbable that the "planned extensions" would pass it.

Further, had the City Council and the public been aware of this segmentation at the time of the Alternatives Analysis then the public response may well have been very different. For example, the public may have considered the Managed Lane Alternative to be a better choice if there were to be no direct rail connection to UH Manoa.

In addition, the Minimum Operable Segment will have less impact on residential property than the planned extensions to UH Manoa and Waikīkī, which will have significant adverse impacts on high-rise condominiums, hotels, and family dwellings.

For all these reasons, the City should re-examine the full corridor in its entirety in the Final EIS.

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[8] Alternatives Analysis, Table 6-3, shows a 4.3 percent increase in total transit ridership. Total capital cost for the 28-mile version would be an additional $1.0 billion, or 27.8 percent.