

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-14192-CIV-MIDDLEBROOKS/HOPKINS**

CONSERVATION ALLIANCE OF ST. LUCIE
COUNTY, a Florida Not-For-Profit Corporation;
and TREASURE COAST ENVIRONMENTAL
DEFENSE FUND a/k/a INDIAN RIVERKEEPER,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, ANTHONY FOXX, in his
official capacity as Secretary of the Department of
Transportation; FEDERAL HIGHWAY
ADMINISTRATION, VICTOR M. MENDEZ,
Administrator of the Federal Highway
Administration; and JAMES CHRISTIAN, Division
Administrator of the Florida Division of the Federal
Highway Administration,

Defendants.

**PLAINTIFFS' MEMORANDUM SUPPORTING MOTION
FOR SUMMARY JUDGMENT**

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TABLE OF ABBREVIATIONS

AP - Aquatic Preserve

APA – Administrative Procedure Act

CAMA – Coastal and Aquatic Managed Areas

DEIS – Draft Environmental Impact Statement

FDOT – Florida Department of Transportation

FEIS - Final Environmental Impact Statement

FHWA - Federal Highway Administration

FWCC – Florida Fish & Wildlife Conservation Commission

FWS – Fish and Wildlife Service

LPA - Locally Preferred Alternative

NEPA - National Environmental Policy Act

NFSLR - North Fork of the Saint Lucie River

NMFS – National Marine Fisheries Service

ROD - Record of Decision

SPSP - Savannas Preserve State Park

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NATURE OF THE CASE

The Secretary of the Department of Transportation, acting through the Federal Highway Administration, approved a road and bridge, “Alternative 1C,” (the “Crosstown Parkway Extension”) in the City of Port Saint Lucie, Florida that will use both the Savannas Preserve State Park and the North Fork of the Saint Lucie River Aquatic Preserve. These public lands encompass and protect an area of profound aquatic biodiversity for the people of Florida. These state parklands are designated by the Secretary as a “Section 4(f) resource” and are entitled to full protection under the Department of Transportation Act and the Federal-Aid Highway Act (collectively, the “Transportation Act”).

Under the Transportation Act, the Secretary of Transportation is mandated to make special effort to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites (“Section 4(f) Resources”).¹ To that end, the Secretary may approve the use of federally financed transportation projects which use Section 4(f) Resources *only* if (1) no feasible and prudent alternative to the use of the land exists, *and* (2) the project includes all possible planning to minimize harm to the property. Alternatives are prudent, the Supreme Court held, unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.” Referring to Section 4(f), the Court summarized, “If the statutes are to have any meaning, the Secretary cannot approve the destruction of parklands unless he finds that alternative routes present unique problems.” *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), 401 U.S. 402, 413 (1971).

¹ The mandate to place paramount importance on the protection of Section 4(f) Resources first appeared in the Department of Transportation Act in 1966, establishing the federal Department of Transportation. Pub. L. No. 89-670, 80 Stat. 931. The Department of Transportation Act was repealed in 1983 but was recodified without substantial change as part of the 49 U.S.C. § 303. Section 18 of the Federal-Aid Highway Act, 23 U.S.C. § 138, is virtually identical to section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. For purposes of this motion, the statutes will be referred to collectively as “Section 4(f).”

Approval of this project was a clear violation of Section 4(f) because there are feasible and prudent alternatives that avoid *all* use of Section 4(f) Resources. Furthermore, selection of Alternative 1C shows no respect for this Congressional direction, to ensure that “special effort” is made to protect the “few green havens that are public parks.” *Overton Park*, 401 U.S. at 413. According to Florida’s Office of Coastal and Aquatic Managed Areas, “[i]t is unlikely that a location with greater environmental or recreational impact [than Alternative 1C] could be chosen.” Memorandum from Larry Nall, Bureau of Coastal and Aquatic Managed Areas to Tom Butler, Bureau of Public Lands Administration (“1999 CAMA Memo”), p. 2 (May 25, 1999) (SUPP-AR000047). Specifically,

“[t]he location is the widest part of the aquatic/buffer preserve complex (4200’) impacting public lands to the *greatest possible extent*. [...] The road impacts the only improved public access point on the entire preserve. . . [and] the only established trail system on the property.” *Id.* at p. 3 (SUPP-AR000048) (emphasis added).

Furthermore, “[Alternative 1C] contains the [Buffer Preserve]’s *most sensitive and diverse habitat* in terms of community types and native flora and fauna.” Memorandum from Robert Hall, Environmental Specialist, FDEP Office of Intergovernmental Programs to Florida State Clearinghouse, p. 5 (Sept. 23, 2003)(“2003 FDEP Memo”) (SUPP-AR000059). There is no rational reason in this case that protected public conservation and recreational lands should be sacrificed for a new road. It is clear from the record that the Crosstown Parkway Extension can be constructed in a feasible and prudent manner that avoids any and all impacts to Section 4(f) Resources.

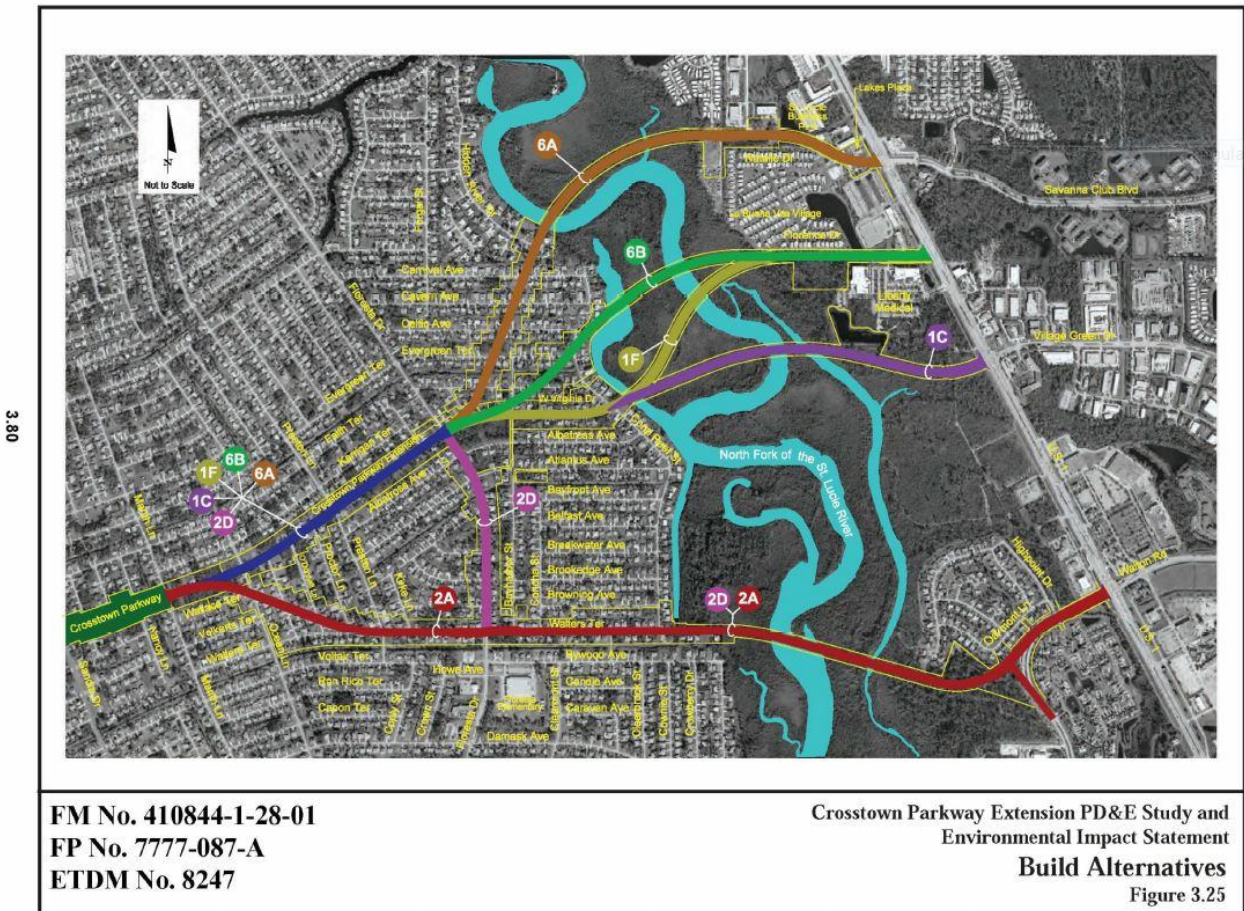
STATEMENT OF THE FACTS

I. DECISION HISTORY

On February 24, 2014, the Federal Highway Administration (“FHWA”) signed a Record of Decision (“ROD”) approving construction of a six-lane highway and bridge (“Crosstown Parkway Extension”) in the City traversing the North Fork of the St. Lucie River (occasionally herein, “NFSLR”), and its tributary, Evans Creek. (AR032572). The route identified by the City

as its Locally Preferred Alternative (“LPA”) and approved by the FHWA in its ROD (referred to herein as “Alternative 1C” and “Corridor 1C”) would traverse the Savannas Preserve State Park (“SPSP” or “Savannas Preserve”) and bisect the Aquatic Preserve (“AP”) at its widest point. 2003 FDEP Memo, p. 5 (SUPP-AR000059). It would also eliminate a popular hiking area.

Figure 1: Map of Build Alternatives
 (FEIS Figure 3.25; AR022360)



AR022360

Pursuant to the National Environmental Policy Act (“NEPA”), in June 2013, the City prepared a Final Environmental Impact Statement (“FEIS”). The FEIS included an analysis of the impacts of various potential corridors and spanning technologies to meet the purpose and need identified by the City: to address existing traffic congestion within the City and prevent severe future congestion.² Defendants’ Answer, Docket (“Dkt.”) 19, ¶ 42; *see also* FEIS, Table 6.2, p. 6.16 (AR022702); FEIS Table 6.3, p. 6.22 (AR022708). The FEIS also included a “Section 4(f) Evaluation” which purported to address impacts to Section 4(f) Resources. FEIS Section 6.0 (AR022687 et seq.). The FHWA relied upon the City’s FEIS for its Section 4(f) Evaluation and adopted the City’s LPA as its own Preferred Alternative. The City further relied upon the Section 4(f) Evaluation in the FEIS which named and rejected various alternatives to Alternative 1C, including alternatives that avoid *all* use of Section 4(f) Resources. Among the rejected avoidance alternatives was Alternative 6A constructed using a spanning technology referred to as spliced beam (“Alternative 6A Spliced”).

Among alternative corridors considered in the FEIS, Corridor 1C contains the “most sensitive and diverse habitat in terms of community types and native flora and fauna.” (“2003 FDEP Memo”) (SUPP-AR000059). The FEIS concedes that Alternative 1C will use both the Savannas Preserve and the Aquatic Preserve and that both are Section 4(f) Resources, thus triggering the Secretary’s obligation to prepare and circulate Section 4(f) Evaluation. FHWA’s Section 4(f) Evaluation concedes that there are feasible alternatives that avoid use of all Section 4(f) Resources. FEIS 6.16 (AR022702)(avoids use of SPSP), 6.22 (AR022706)(avoids use of AP), 6.26 (AR022712).

II. ECOLOGICAL CONTEXT

Alternative 1C would extend a six-lane highway through the heart of a complex of publically-owned conservation lands treasured by the People of Florida for their wild character

² Plaintiffs do not concede that the need for this project is supported by the administrative record, but for purposes of this brief assumes this need exists.

but struggling to assimilate the pollution and crowding of Florida's expanding population and nearby agricultural uses.

The [Aquatic Preserve] and the [Savannas Preserve] represent one of the few remaining expanses of natural habitat within a highly urbanized region. These lands provide important habitat for a variety of fish and wildlife species including American alligators, West Indian manatees, river otters, wood storks, little blue herons, brown pelicans, neotropical migrant birds, snook, and the opossum pipefish. The [Aquatic Preserve] also offers a variety of recreational opportunities to the public including fishing, boating, hiking, bird watching, and wildlife observation. Letter from Joyce Stanley, U.S. Fish and Wildlife Service to Beatriz Caicedo-Maddison, Florida Department of Transportation (Oct. 3, 2011), (AR009189, AR009190-AR009191); Doughty Decl., Ex. 2: FDEP Ecosummary.

Both Alternatives 1C and 6A Spliced would require construction of a new six-lane bridge over a the North Fork of the Saint Lucie River ("North Fork"), but Alternative 1C would do so by drilling pilings in the Aquatic Preserve and paving part of the Savannas Preserve, eliminating a popular hiking trail and public parkland access point at the same time. Florida's Bureau of Coastal and Aquatic Managed Areas (a division of Florida's Department of Environmental Protection) said of Corridor 1C: "[i]t is unlikely that a location with greater environmental or recreational impact could be chosen." Memorandum from Larry Nall, Environmental Administrator, Bureau of Coastal and Aquatic Managed Areas to Tom Butler, Bureau of Public Lands Administration (May 25, 1999) ("1999 CAMA Memo"), p. 2 (SUPP-AR000047). Alternative 6A Spliced would avoid all of these impacts.

A. Florida's Treasure Coast

The public lands this project proposes to use are of profound regional ecological importance. The North Fork is a tributary of the St. Lucie River Estuary and the Indian River Lagoon, which is an Estuary of National Significance. Together, "the St. Lucie River Estuary, its watershed, the Indian River Lagoon, and adjacent continental shelf can boast 800 fish species, nearly 2/3 of Florida's 1300 fish species." Letter from Grant Gilmore, Jr., Ph.D., Senior Scientist with Estuarine, Coastal, and Ocean Science, Inc. to Victor M. Mendez, Administrator, FHWA (Oct. 8, 2013) ("Gilmore Letter"), p. 2 (AR051561); *see also* Comments of Fish and Wildlife Service to FDOT (Aug. 18, 2006)(SUPP-AR000006).

Because this area is relatively small, biodiversity is concentrated and “any anthropogenic changes, however small, will have a magnified impact.” Gilmore Letter, p. 2 (AR051561).

Due to local urban and suburban growth, accompanied by seawalls, dredge and fill operations, wetland drainage or impounding, herbicide and fertilizer applications we are losing the very vegetative structure that insures the survival of this extraordinary fish diversity. This aquatic area can ill afford additional loss and alteration of aquatic habitat, submerged vegetation, mangroves, and wetlands that will occur with the construction of a bridge through one of the healthiest, largest and least disturbed areas of the ... Aquatic Preserve, Evans Creek, and the wetlands of the Halpatiokee Trails section of SPSP.

Id. at p. 1 (AR051560)(Emphasis in original).

Public preservation of wetlands ecosystems in this Treasure Coast region is tremendously important.

Wetlands abutting and adjacent to the NFSLR include tidally influenced estuarine mangrove habitat, and palustrine emergent marsh, scrub-shrub and forested wetlands, and are of extremely high quality. The wetlands within the project area are part of an important complex of intact floodplain wetlands. The estuarine and palustrine wetlands are contiguous and are part of a complete system along the entire reach of the NFSLR. Letter from Garrett Lips, U.S. Army Corps of Engineers, to B. Caicedo-Maddison, FDOT (Oct. 3, 2011); *see* Comments of the National Marine Fisheries Service from Final Programming Screen (Oct. 6, 2008) (AR003250)(“The wetlands associated with the NFSLR are extremely high quality.”).

Many continue to exist only because of public protection. For example, a majority of the remaining mangroves lie within the borders of public lands. *Id.* Halpatiokee Trails of the Savannas Preserve hosts the last remaining palustrine (freshwater) wetland area bordering U.S. Highway 1, as well as other wetlands types.

B. North Fork of the Saint Lucie River Aquatic Preserve

The Aquatic Preserve was established in 1972 and provides protection for 2,972 acres of submerged lands. Letter from Joyce Stanley, Fish and Wildlife Service (“FWS”) to Beatriz Caicedo-Maddison, Florida Department of Transportation (“FDOT”) (Oct. 3, 2011), (AR044099). The Aquatic Preserve is considered a “major tributary of the St. Lucie River Estuary, the Indian River Lagoon Aquatic Preserve, and the Atlantic Ocean.” 2003 FDEP Memo, p. 6 (SUPP-AR000060). It is managed by the Florida Department of Environmental Protection

(“FDEP”) to “maintain and enhance the existing wilderness condition for the enjoyment of future generations and for the propagation of fish and wildlife and public recreation.” FEIS, 6.6 (AR022692).

The Aquatic Preserve was among the first places in Florida to receive the designation of “preserve state park,” when in 1972 it was “specifically selected for its superb environmental quality.” Letter from Joyce Stanley (Fish and Wildlife Service, “FWS”) to Beatriz Caicedo-Maddison (Florida Department of Transportation, “FDOT”) (Oct. 3, 2011) (AR009189, AR009190-AR009191). As an Aquatic Preserve and an Outstanding Florida Water—designations reserved for the most treasured of the state’s aquatic Resources. Aquatic Preserves are intended by Florida’s legislature to “be set aside forever . . . for the benefit of future generations” because of their “exceptional biological, aesthetic, and scientific value.” Fla. Stat. § 258.36 (2014). Likewise, the North Fork’s “Outstanding Florida Water” designation is recognition that it is worthy of special protection because of its natural attributes. Fla. Admin. Code r. 62-302.700.9.h.28, 62-302.200.26. FDEP has designated the North Fork as a Paddling Trail Priority. Sociocultural Effects Report, 4-18 (AR002446).

C. Savannas Preserve State Park

The Savannas Preserve consists of 5,000 acres of public land located along a 10-mile stretch of the NFSLR. Comments of the U.S. Fish and Wildlife Service from Final Programming Screen (Oct. 6, 2008) (“2008 FWS Comments”) (AR003255). “These public lands were purchased to protect the valuable natural ecosystem of the NFSLR for the benefit of all the citizens of the state.” Letter from Joyce Stanley, U.S. Department of Interior, to B. Caicedo-Maddison, FDOT (Oct. 3, 2011). Part of this state park is what is called the “Buffer Preserve,” the purpose of which is to “protect the valuable natural ecosystem of the NFSLR for the benefit of all the citizens of the state.”³ The Buffer Preserve also represents one of the last areas of

³ The original nine parcels of BP lands were purchased in 1994 through the Conservation and Recreation Lands (CARL) program of Preservation 2000, both of which received their funding through the Land Acquisition Trust Fund. 1999 CAMA Memo, p. 1 (SUPP-AR000046).

natural habitat remaining in a highly urbanized area.” 2008 FWS Comments (AR003255). The portion at risk from Alternative 1C is a 1,071-acre parcel of Buffer Preserve located west of U.S. Highway 1 along the North Fork. Letter from Joyce Stanley, Fish and Wildlife Service (“FWS”) to Beatriz Caicedo-Maddison, Florida Department of Transportation (“FDOT”) (Oct. 3, 2011), (AR044099). Within the context of expansive urban development in Port St. Lucie and its contribution to river and estuary habitat and water quality degradation, “in many places, the narrow BP is the only buffer” that remains between the Aquatic Preserve and developed areas. *Id.*

Within the City’s limits, the Savannas Preserve “provides approximately 8 miles of natural riverfront for the North Fork,” and is “the only continuous natural corridor “ left in the City and one of the few in St. Lucie County, which is rapidly losing green space because of development. 2003 FDEP Memo (SUPP-AR000059); 1999 CAMA Memo, p. 2 (SUPP-AR000047). The Buffer Preserve is exceptionally biodiverse, hosting twelve different Florida Natural Ares Index communities or habitat types: depression marsh, mesic flatwoods, scrub, scrubby flatwoods, blackwater stream, baygall, floodplain marsh, hydric hammock, and tidal swamp, as well as the open riverine system. As of 2003, surveys indicated the existence of “179 plant species – including 12 listed species – and 370 animals - of which 19 are listed species.” 2003 FDEP Memo, p. 5 (SUPP-AR000059).

D. Halpatiokee Canoe and Nature Trail

Alternative 1C would eliminate the only access to the Aquatic Preserve from the Savannas Preserve: the Halpatiokee Canoe and Hiking Trail, located near the eastern terminus of Alternative 1C. 2003 FDEP Memo, p. 5 (SUPP-AR000059). The Martin County Native Plant Society calls Halpatiokee an “ecological gem.” Letter from Joan Bausch, Martin county Chapter of the Florida Native Plant Society, to Victor M. Mendez, FHWA (Oct. 24, 2013) (AR051551). The Halpatiokee Canoe and Hiking Trail was created and maintained by the Florida Trails

Association. It is one of few hiking-only trails in St Lucie County. *Id.* The trails are the only access point from US-1 to this historically accurate representation of land- and water-scapes. (AR051540). Visitors can explore the firebreak and hiking trail system, which travels through seven community types. Establishing a major thoroughfare through the Halpatiokee will prevent the managed burns upon which these ecosystems depend. 1999 CAMA Memo, p. 4 (SUPP-AR000048).

STANDARD OF JUDICIAL REVIEW

Summary judgment is proper if the record before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Plaintiff alleges Defendants acted in violation of Section 4(f). Reviewing courts are to conduct a “thorough, probing, in-depth review” of an agency’s compliance with Section 4(f). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The enquiry into the facts is to be searching and careful. *Citizens to Preserve Overton Park*, 401 U.S. at 416. Section 4(f) does not independently provide for judicial review. However, Congress provided for such review under the Administrative Procedure Act (“APA”). 5 U.S.C. § 702(A). The APA provides that this Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.*; *See also, Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-377 (1989); *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990). This standard requires the Court to determine whether “the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 416; *Marsh*, 90 U.S. at 378; *North Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533 (11th Cir.1990).

“Courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.” *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) (quoting *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1999)). An agency “cannot ignore the requirements” of its own policies and procedures. *Id.* Additionally, “agency actions must be reversed as arbitrary and capricious when the agency fails to examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* at 5 (quoting *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Eleventh Circuit uses a three-part test to review the Secretary’s compliance with Section 4(f). First, the Secretary must have acted within the scope of his authority; second, exercise of that authority must not have resulted in a decision that is arbitrary, capricious, or an abuse of discretion, and third, the Secretary must have followed the appropriate procedures (not at issue in this case). *Citizens for Smart Growth v. Secretary of Dept. of Transportation*, 669 F.3d 1203, 1216 (11th Cir. 2012) (citing *Druid Hills Civic Asso. v. Federal Highway Admin.*, 772 F.2d 700, 714 (11th Cir. 1985)). The scope of the Secretary’s authority to use Section 4(f) Resources for transportation purposes is limited to situations where no feasible and prudent alternatives to the use of the 4(f) Resources in fact existed and the Secretary could have reasonably believed that no such alternatives exist. *Id.* In exercise of their authority, the Secretary’s ultimate decision must not have been arbitrary, capricious, or an abuse of discretion. *Id.* Here, “the court must consider whether the decision was based on...the relevant factors and whether there has been a clear error of judgment.” *Overton Park*, 401 U.S. at 416. If the record does not demonstrate an adequate basis for the administrative decision, the 4(f) determination must be overturned. *Druid Hills*, 772 F.2d at 714. The plaintiff has the burden of proving the Secretary’s noncompliance with section 4(f) beyond a preponderance of the evidence. *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 694 (3rd Cir. 1999).

LEGAL FRAMEWORK

Section 4(f) of the Transportation Act is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971). Section 4(f) provides, in relevant part, that:

The Secretary may 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 . . . 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 the harm . . . resulting from the use. 49 U.S.C. § 303(c).

Moreover, FHWA regulations implementing Section 4(f) (“Section 4(f) Prudency Regulations”) require the Secretary to prepare and circulate a statement examining the highway’s proposed use of parklands and/or historic sites. ⁴ 23 C.F.R. § 771.135(h). The Section 4(f) Prudency

⁴ The FHWA regulations, enumerate the range of impacts that the Secretary is to consider when determining whether an alternative is prudent. The regulations state that an alternative is prudent unless:

- (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
- (ii) It results in unacceptable safety or operational problems;
- (iii) After reasonable mitigation, it still causes:
 - (A) Severe social, economic, or environmental impacts;
 - (B) Severe disruption to established communities;
 - (C) Severe disproportionate impacts to minority or low income populations; or
 - (D) Severe impacts to environmental resources protected under other Federal statutes;
- (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
- (v) It causes other unique problems or unusual factors; or

Regulations specifically require the Section 4(f) statement to analyze alternatives to the use of parklands to determine whether the alternatives are feasible and prudent. *Id.* If there is a feasible and prudent alternative, the statute requires that the Secretary select that alternative. Plaintiffs contend that the Secretary failed to establish that there was no feasible and prudent alternative to the use of Section 4(f) Resources, thus the Court need not address the second prong whether the selected alternative minimizes harm to Section 4(f) Resource.

Pursuant to the statutory directive, the Secretary’s task is to determine, for each potential avoidance option, whether avoiding the Section 4(f) Resource is both “feasible” and “prudent.” *Id.* The feasibility test is straightforward: “an alternative is feasible if it can be built according to sound engineering judgment.” 23 C.F.R § 774.17 (2013); *Overton Park*, 401 U.S. 402, 411 (1971). In the case at bar, the Secretary has conceded that there are feasible alternatives that avoid the use of Section 4(f) Resources, thus the remainder of this brief will focus on the issue of whether the avoidance alternative is prudent. FEIS Table 6.3, p. 6.22 (AR022708), FEIS 6.26 (AR022712).

The prudency test requires that appropriate weight be given to the national policy of preserving parkland in the public interest when considering the typical impacts of road construction (e.g., added cost, safety and operational problems, economic, social and non-4(f) environmental impacts). The Supreme Court has held that Congressional direction places “paramount importance” on the preservation of parklands. Non-Section 4(f) impacts must involve “*truly unusual factors*,” present cost or community disruption of “*extraordinary magnitudes*,” and, “[i]f the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present *unique problems*.” *Overton*

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude. 23 C.F.R § 774.17 (2014).

Park, 401 U.S. at 412-413. The FHWA codified this standard in its Section 4(f) Prudency Regulations, wherein a “feasible and prudent avoidance alternative” is defined as one that “avoids using Section 4(f) Resources and does not cause other *severe* problems of a magnitude that *substantially outweighs* the importance of protecting the Section 4(f) property.” 23 C.F.R. § 774.17 (emphasis added). A conclusion that an avoidance alternative is more costly and requires greater commercial and residential relocation than does an alignment which takes the protected property does not establish that the avoidance alternative is imprudent. *See e.g. Wade v. Lewis*, 561 F. Supp. 913, 952 (N.D. Ill. 1983). The presence of such factors alone also does not establish that a project presents “unique problems.” The danger that public lands would be undervalued when considering highway placement is exactly what Section 4(f) is intended to address. The Court stated:

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. [...]

[S]ince people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes. *Overton Park*, 401 U.S. at 412-413.

The purpose of the Congressional directive, therefore, is to weight the analysis of alternatives so that the benefits of public lands shared by all are not inappropriately discounted--“that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” 49 USC § 303(a).

Following *Overton Park*, the common issue of relocation of homes, businesses, churches, and schools in order to protect Section 4(f) Resources has been examined in the context of the prudency analysis by many courts, and it is clear from the case law that “extraordinary magnitude” is an extremely high bar to meet. In *Louisiana Environmental Society, Inc. v. Coleman*, in the context of a minimization of harm analysis, the Fifth Circuit overruled a district court’s finding that a Section 4(f) statement concluding that several alternatives minimizing the

harm to a popular public lake were public parkland resulting in impacts of community disruption were imprudent. 537 F.2d 79 (5th Cir. 1976). The first alternative required displacing 120 single dwellings, 100 single apartment units (1 apartment project), 900 persons, 7 businesses, 1 church, and 1 lodge. The second alternative required displacing 377 single families, 1,508 persons, 21 businesses, and 2 churches. *Id.* at 87 n.6. Ultimately, the Fifth Circuit concluded the community disruption impacts resulting from minimization alternatives was not “of an extraordinary magnitude.” *Id.* at 87. In support of this conclusion, the Fifth Circuit noted that the minimization alternatives were “very similar to the adopted route--and no truly unusual factors have been shown to justify the finding that they are imprudent.” *Id.* Similarly, the Ninth Circuit in *Stop H-3 Ass’n v. Dole* held that requiring dislocation of 1 church, 4 businesses, and 31 residences was not community disruption of extraordinary magnitude. 740 F.2d 1442, 1451-52 (9th Cir. 1984) *cert. denied*, 105 S. Ct. 2344 (1985).⁵

Ultimately, in performing the 4(f) evaluation, the ultimate public interest is in the preservation of parklands unless and until it is shown that parklands unavoidably must be used for highway purposes. *Id.*; *Coalition for Responsible Regional Dev. v. Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975).

ARGUMENT

I. ALTERNATIVE 6A SPLICED IS A PRUDENT ALTERNATIVE TO ALTERNATIVE 1C THAT AVOIDS ALL USE OF SECTION 4(F) RESOURCES.

The Secretary can only approve a transportation project that uses Section 4(f) Resources if “there is no prudent and feasible alternative to using that land.” 49 U.S.C. § 303. If there is a feasible and prudent alternative, the Secretary must choose that alternative over one that uses the Section 4(f) property. *Louisiana Environmental Society*, 537 F.2d at 87.

⁵ Extraordinary cost, which is not at issue in this case, was also examined by the Ninth circuit. The court further held that an additional \$42 million (1979 dollars) was not cost of extraordinary magnitude.

As a threshold matter, it is undisputed that Alternative 6A Spliced avoids all use of Section 4(f) Resources. FEIS 6.16 (AR022702) (avoids use of SPSP), 6.22 (AR022706) (avoids use of AP), 6.26 (AR022712).

Table 5: Alternative 6A Spliced Avoids All use of Section 4(f) Resources; Alternative 1C requires use of Section 4(f) Resources.⁶

	1C⁷	6A Spliced⁸
Total 4(f) property used	2.23 acres	None
Total AP	0.02 acres	None

Additionally, Alternative 6A spliced also satisfies the stated the purpose and need for the project: to address existing traffic congestion within the City and prevent severe future congestion.⁹ DE 19 at paragraph 42; *see also*, FEIS, Table 6.2, p. 6.16 (AR022702); FEIS Table 6.3, p. 6.22 (AR022708). Finally, the feasibility of Alternative 6A Spliced is not in dispute. The only issue remaining for this court to consider is whether Alternative 6A Spliced is prudent. Indeed it is.

⁶ FEIS 3.82 (AR 022362).

⁷ FEIS 6.41 (AR022727). Note that only actual physical occupation of Section 4(f) Resources is counted here, as in bridge pilings. There will be other impacts to the Section 4(f) Resources from shading, noise, litter, etc. CAMA believes that “the shadow of the bridge will sufficiently change the photoperiod and will result in substantial alterations to the underlying habitat. The recreational experience on the land and the river will be substantially reduced by the presence of a bridge.” Memorandum from Larry Nall, Environmental Administrator, Office of Coastal and Aquatic Managed Areas to Tom Butler, Bureau of Public Land Administration (Mar. 3, 2000) (“2000 CAMA Memo”), p. 2 (SUPP-AR000053).

⁸ FEIS 6.16 (AR022702)(avoids use of SPSP), 6.22 (AR022706)(avoids use of AP), 6.26 (AR022712).

⁹ Plaintiffs do not concede that this purpose and need is supported by the record, but for purposes of this section, assumes this need to exist.

II. THE SECRETARY’S SELECTION OF ALTERNATIVE 1C OVER AVOIDANCE ALTERNATIVE 6A SPLICED IS UNSUPPORTED BY THE RECORD AND THEREFORE IS ARBITRARY AND CAPRICIOUS

A feasible and prudent avoidance alternative avoids using Section 4(f) Resources and does not cause other severe problems of a magnitude that *substantially* outweighs the importance of protecting the Section 4(f) Resources. 23 C.F.R. § 774.17. The Supreme Court has held that a feasible avoidance alternative is prudent unless there are “truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach[ed] extraordinary magnitudes,” or the alternative routes present “unique problems.” *Overton Park* at 413; *accord Druid Hills Civic Assn. v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985). Courts have repeatedly required avoidance of Section 4(f) Resources where doing so would cause impacts of much greater magnitude. *See Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1451-52 (9th Cir. 1984) (holding that alternate route requiring an *additional* \$42 million in 1979 dollars and requiring dislocation of one church, four businesses, and 31 residences was not cost or community disruption of extraordinary magnitude), *cert. denied*, 105 S. Ct. 2344 (1985); *Louisiana Env’tl. Soc’y Inc. v. Coleman*, 537 F.2d 79, 87 n.6 (5th Cir. 1976) (holding that alternative route requiring displacement of 377 families, 1,508 persons, 21 businesses, and two churches was not of extraordinary magnitude); *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1116-17 (N.D. Tex. 1985) (finding alternate route requiring dislocation of elementary school was prudent).

As discussed herein, there are no unique problems or costs or community disruption of “extraordinary magnitude” associated with Alternative 6A Spliced, which would cause only impacts of common type and scale for similar road construction projects (e.g. residential and business relocations, traffic noise, changed traffic patterns). *See* DEIS 3.82, AR022362. The Record supports a finding that Alternative 6A Spliced is prudent, independent of any comparison to Alternative 1C. Moreover, a comparison of Alternative 1C to Alternative 6A Spliced in the Record further undermines a conclusion that Alternative 6A Spliced is not prudent. This is because the impacts *other than to public lands* of Alternative 6A Spliced are substantially the

same as those of Alternative 1C. Put another way, by selecting Alternative 1C the FHWA conceded that the impacts of that alternative are prudent. Therefore, it was arbitrary for the FHWA to conclude that the very similar impacts of Alternative 6A Spliced were imprudent. Since Alternative 6A Spliced avoids use of all Section 4(f) Resources while Alternative 1C uses Section 4(f) Resources, the Secretary was compelled to select Alternative 6A Spliced. His failure to do so is a violation of the Administrative Procedures Act and the Transportation Act.

FHWA alleges that Alternative 6A Spliced is not “a prudent avoidance alternative”

because:

it would result in severe social impacts on both sides of the NFSLR. In addition, it should be noted that impacts to adjacent habitat of non-Section 4(f) resources would be 69 times greater for the spliced beam bridging option for Alternative 6A than for using a pile bent structure for Alternative 6A. FEIS 6.26 (AR022712).

And, although the FHWA did not closely consider Alternative 6A Spliced itself,¹⁰ in Table 6.7, it identified issues of concern, apparently referencing its Section 4(f) Prudency Regulations, for Corridor 6A (which is shared by Alternative 6A and Alternative 6A Spliced) (Summarized below, Table 2). FEIS 6.41-6.42 (AR015369-70). Most importantly, none of the factors cited are substantially different in magnitude or type from the impacts of selected Alternative 1C.¹¹

¹⁰ The FHWA states in its Section 4(f) Evaluation that it *failed to even consider* and evaluate Alternative 6A Spliced as an avoidance alternative: “all build alternatives, including the Preferred Alternative, use at least one Section 4(f) property; therefore, no feasible and prudent avoidance alternative exists.” FEIS 6.40 (AR022726) (emphasis added). The is not true; Alternative 6A Spliced avoids all use of Section 4(f) Resources, by the FHWA’s own admission.

¹¹ It is worth noting that none of the factors, save “other unique problems or unique factors,” and specifically that 1C is the “[Alternative 1 C is the only alternative that would use lands located in Halpatiokee, which is associated with the Section 4(f) protected recreational functions of both the AP and the SPSP,” were listed for Alternative 1C. FEIS 6.38 (AR022724). This is despite the fact that the impacts of Alternatives 1C and 6A Spliced were similar. This betrays the bias that was applied in the FHWA’s analysis. Note that the one factor prudence factor that was identified for Alternative 6A—impacts to Halpatiokee--was not weighed in the alternatives analysis discussed below.

Table 6: Identified Prudency Concerns for Corridor 6A¹²

Section 4(f) Prudency Regulations Factor Cited (40 C.F.R. 774.17)	Identified Issues
Severe disruption to established communities	“Substantial community cohesion and local mobility impacts west of NFSLR; access road to La Buona Vita substantially changed”
Severe disproportionate impacts to minority or low income populations	“Potential Environmental Justice issues in neighborhood with higher than County average for minority populations”
Other unique problems or unusual factors	“Substantial visual and noise impacts for residents along diagonal route; new access road required at entrance to La Buona Vita; new access road causes additional traffic noise; traffic flow changed within La Buona Vita”
Cumulatively cause unique problems or impacts of extraordinary magnitude	Collective operational, visual, noise, cohesion, mobility, and access impacts to neighborhoods on the west side of NFSLR and east of the NFSLR at La Buona Vita

A. The record shows that the negative impacts of Alternative 1C are greater than for 6A Spliced on every non-Section 4(f) natural resources measure.¹³

The selected Alternative 1C has:

the highest direct wetland acreage impact among the alternatives; relatively high acreage of upland impacts; the highest potential impact to threatened and endangered species due to the habitat diversity; the *highest impact among build alternatives to state-owned lands including direct impacts to Savannas Preserve State Park- Halpatickee Canoe and Nature Trail*; and the second highest construction costs due to the length of bridge structure required to cross the natural areas. FEIS 3.37 (AR022317).

The Corps of Engineers described Alternative 1C as the “worst case condition” among alternatives from a stormwater pond siting and wetlands perspective. Minutes: Crosstown Parkway Extension Team Meeting (Apr. 17, 2008) (AR050099). Alternative 1C would cross three separate tributaries: the St. Lucie River, Evans Creek, and the Coral Reef Waterway--more

¹² Content of table drawn from FEIS 6.41-6.42 (AR022727-28).

¹³ Focusing on the use of land for pile bent pier or spliced beam technology ignores how small a portion of the total use the piers are for any alternative. “The approaches and pond sites make up nearly all of the use (over 99 percent) and the remainder [less than 1%] is due to the placement of piers.” FEIS 6.36 (AR022722).

than any of the other proposed build alternatives. 1999 CAMA Memo, p. 2 (SUPP-AR000047). Audubon Florida objects to bridge Route 1C as it would impact the “large number of species of migratory birds which transit the Eastern Flyway,” in which this area belongs. The bridge route also would impact an important wildlife sanctuary owned by Florida Audubon Society, which would be immediately adjacent to the bridge. [AR048030] The St. Lucie County chapter of Audubon is on record as opposing Route 1C. [AR051540]

6A Spliced would cause direct impacts to 7.7897 acres of wetlands as compared to the 10.10 acres of direct impacts to wetlands caused by Alternative 1C.¹⁴ FEIS, 3.82 (AR022362). Likewise, Alternative 6A Spliced’s direct impacts to upland habitat is less than that of selected Alternative 1C. Alternative 6A Spliced directly uses 0.15 acres of upland habitat and indirectly uses 0.01 acres of upland habitat whereas Alternative 1C directly uses of 3.95 acres of upland habitat and indirectly uses 0.03 acres of upland habitat.¹⁵ FEIS, p. 3.82 (AR022362).

Table 7: Habitat Impacts (worst case highlighted for each parameter)

	1C	6A	6A Spliced
Wetland Impacts (direct)	10.10 ¹⁶	7.69	7.7897
Wetland Impacts (temporary)	0.24	0.07	Not provided
Wetland functional loss¹⁷	11 ¹⁸	7.64	Not provided

¹⁴ FEIS Table 6.5 shows that the increased wetlands acreage consumed in using spliced beam instead of pile bent for 6A is from 0.0015 acres to 0.1012 acres of stream and lake swamp (an increase of 0.0997 acres), for a total direct impact to wetlands of 7.7897 acres, which is still substantially less than the 10.10 acres of direct impacts attributed to 1C.

¹⁵ Use of spliced beam technology would apparently impact no more upland habitat than bent pile. See FEIS 6.27 (AR022713).

¹⁶ ROD, p.10 (AR032582); FEIS 3.82 (AR002713). Impact is reduced to 6.83 acres if the bridge profile is narrowed. As this exercise was not but could be applied to the other alternatives presented in this table, it is not presented above to avoid an apples to oranges comparison.

¹⁷ If the right of way for the preferred alternative is shrunk from 157 feet to 103 feet wide for the bridge, then the total acres impacted shrinks from a total of 18.3 acres to 10.94 acres. Essential

Upland Impacts (direct)	3.95 ¹⁹	0.15	0.15
Sovereign Submerged Lands	1.74 acres ²⁰		Not measured
Essential Fish Habitat ²¹	8.34 functional loss units ²²		Not measured
Total 4(f) property used	2.23 acres ²³	0.01 acres ²⁴	None

Additionally, Alternative 6A Spliced fares better than Alternative 1C with regard to the state management agency’s prioritization of natural resource impacts. The FEIS states that, “the FDEP (the agency with jurisdiction) has expressed a preference for the placement of piers in the AP rather than have additional impacts to the SPSP, and the SFWMD has expressed a preference for piers in the AP over additional impacts to any adjacent wetlands.” FEIS, p. 6.26 (AR022712).

Fish Habitat Assessment, p. 37 (AR024368). This calculation was not performed for 6A or Spliced Beam 6A.

¹⁸ ROD, p. 10 (AR 032582) FEIS 3.82 (AR002713). This is reduced to 8.34 functional loss units if the bridge profile is narrowed. However, for the same reason offered above, the chart does not include this reduction.

¹⁹ ROD, p. 10 (AR 032582); FEIS 3.82 (AR002713); Again, with a narrower bridge profile, 2.96 acres.

²⁰ FEIS 7.5 (AR022753)

²¹ Alternative 1C has the greatest impact among alternatives on Essential Fish Habitat. Essential Fish Habitat Assessment, p. 28 (AR024359). It would directly impact 11.85 acres of EFH total— 1.75 acres of estuarine subtidal open water, 9.91 acres of palustrine emergent and forested wetlands (freshwater) and 0.19 acres of estuarine intertidal scrub-shrub habitat. Id. at 28 (AR024359). It would temporarily impact 0.08 additional acres of palustrine emergent and forested wetlands. Id. at 29 (AR024360). Alternative 6A would have the least impact to EFH- 8.47 acres of direct impact, and 0.06 acres of temporary impact. Id. at 28-29 (AR024359-60). Functional loss for alternatives 1C and 6A, respectively would be a total of 11.0 and 7.64 acres. Id. at 29 (AR024360).

²² FEIS 7.5 (AR022753)

²³ FEIS 6.41 (AR022727)

²⁴ FEIS 6.42 (AR022728) (although no explanation for where the 0.01 acres was discovered between DEIS and FEIS).

6A Spliced avoids *all* use of both the AP and the SPSP (1C uses portions of each) and would *reduce* impacts to wetlands as compared to 1C. *See* Table 4.

Dismissing 6A Spliced based upon non-4(f) impacts is not supported by the record and therefore arbitrary and capricious.

B. Alternative 6A does not cause severe disruption to established communities as compared to Alternative 1C.

This first reason given for finding that Alternative 6A Spliced was imprudent was: “Substantial community cohesion and local mobility impacts west of NFSLR; access road to La Buona Vita substantially changed.” Although Alternative 1C also has community cohesion and local mobility impacts, this prudency factor was not identified for Alternative 1C. As shown below, this was arbitrary and capricious because the impacts of the two alternatives on these factors was substantially the same.

1. Community cohesion and local mobility impacts west of the NFSLR are similar for Alternatives 1C and 6A Spliced.

FHWA eliminated 6A from consideration in part because of “[s]ubstantial community cohesion and local mobility impacts west of NFSLR.” FEIS 6.42 (AR022727); *see also* FEIS 5.23 (AR022547). With respect to community cohesion and local mobility impacts, 6A and 1C are in fact more alike than different. The effects of every alternative are substantial to the immediately impacted neighborhoods:

The proposed project will result in a physical barrier that will divide an established neighborhood on the west side of the NFSLR. Though there will be signalized crosswalks at the intersections for pedestrians and bicyclists to cross Crosstown Parkway, the distances between crosswalks and the number of lanes that need to be crossed may be a deterrent for some. As noted in the ETDM comments, the degree of effect on community cohesion within the community on the west side of the NFSLR is substantial. Sociocultural Effects Report 5-14 (AR002496).

However, the FEIS presents all build alternatives as net-positive with regard to improvement to community cohesion at the regional level: “All build alternatives, including the Preferred Alternative [1C], would enhance regional cohesion by providing a connection across the physical barrier of the NFSLR.” FEIS 5.5 (AR022529).

[A]ll build alternatives include shared-use pathways along both sides of the alignment abutting adjacent neighborhoods so that all build alternatives, including the Preferred Alternative, would improve access for the community, including the transportation disadvantaged. The extension of Crosstown Parkway to U.S. 1 would divert regional traffic from Port St. Lucie Boulevard and Prima Vista Boulevard, especially during congested peak travel times, and would divert local traffic from Airoso Boulevard and Floresta Boulevard. All build alternatives, including the Preferred Alternative, would improve traffic circulation and reduce traffic congestion on Port St. Lucie Boulevard and Prima Vista Boulevard by diverting regional traffic from these corridors, especially during congested peak travel times. FEIS 5.23 (ARO22546).²⁵

Likewise, impacts that might be perceived as negative are shared by all build alternatives. Constructing either Alternative 6A Spliced or Alternative 1C will “introduce a 6 lane alignment to what currently is an area of 2 land streets of low and medium density residential area.” Sociocultural Effects Report 5-5 (AR002487). “[A]ll build alternatives, including the Preferred Alternative, would change local traffic patterns through the established communities in the study area, creating a number of cul-de-sacs, redirected roads, and restricted access.” FEIS 5.23 (AR022547). In fact, Alternatives 6A and 1C “traverse the same alignment . . . up to Floresta Drive” intersection where “full access (left turns, through movements, and right turns from all directions) to the Crosstown Parkway Extension would be provided.” FEIS 5.13 (AR022537).

²⁵ Impacts to regional traffic of Alternatives 1C and 6A Spliced are essentially equal. For Alternative 1C:

The Design (2037) year system performance measure base on CORSIM for Alternative 1 C indicates 29.03 mph average speed and 0.86 min/mi of delay in the AM peak hour and 24.53 mph and 1.22 min/mi in the PM peak hour. The AM and PM peak-hour system-wide average speed improved by 22.8 percent and 32.7 percent, respectively, as compared to the No Build Alternative. The AM and PM peak-hour system-wide delay decreased by 32.8 percent and 39.0 percent, respectively, as compared to the No Build Alternative. FEIS 3.120 (AR022401). For Alternative 6A Spliced:

The Design (2037) year system performance measure base on CORSIM for Alternative 6A indicates 28.89 mph average speed and 0.85 min/mi of delay in the AM peak hour and 24.76 mph and 1.21 min/mi in the PM peak hour. The AM and PM peak-hour system-wide average speed improved by 22.2 percent and 34.0 percent, respectively, as compared to the No Build Alternative. The AM and PM peak-hour system-wide delay decreased by 33.6 percent and 39.5 percent, respectively, as compared to the No Build Alternative. FEIS 3.148 (AR022428).

“Construction of [Alternative 6A] would require the same geometric improvements at the Floresta Drive intersection as [Alternative 1C], resulting in the same right in and right out conditions for Chaloupe Avenue and Albatross Avenue.” *Id.*

The routes for Alternatives 1C and 6A Spliced diverge west of the bridge only after the Floresta Drive intersection. At that point, 6A traverses diagonally across six residential streets, while Alternative 1C progresses along the present orientation of West Virginia Drive. FEIS 5.13 (AR022537). All divergent impacts in this area are to local neighborhood streets, not to regional connectivity. FEIS 4.9 (AR022469). The differences in this area of divergence are small and do not render Alternative 6A Spliced imprudent. Figure 4.4, FEIS 4.10, (AR 022470).

A limited number of north-south streets provide continuity and connectivity within the local area: Manth Lane, Preston Lane, and Floresta Drive. A canal located south of and parallel to Walters Terrace limits north-south connectivity. In addition, Ocean Lane provides north-south continuity from Evergreen Terrace southward, connecting the southern two thirds of the study area to the areas south of the study area; Coral Reef Street provides north-south continuity between Carnival Avenue and Walters Terrace; and Bayharbor Street provides north-south continuity between Evergreen Terrace and Walters Terrace. Local east-west connectivity is provided by Evergreen Terrace, West Virginia Drive, and Walters Terrace. FEIS 4.9, (AR 022469) (internal citation omitted); *see also* Sociocultural Effects Report, p. 4.25 (AR026014).

Both Alternatives 1C and 6A Spliced would create dead ends in Bayharbor Street. FEIS 5.16, (AR022540). In fact, the impacts of Alternative 1C would be greater than 6A spliced: the dead end of this street created by Alternative 6A Spliced would be north of the portion of this street identified in the FEIS as important for connectivity, while 1C would be *within* that portion important for connectivity. *Id.* Alternative 1C would cut across Coral Reef Street, limiting north-south continuity. FEIS 5.12 (AR022536); *but see* FEIS 7.8 (AR022756) (this impact may be mitigated with pass-over bridge). Alternative 6A Spliced would cut across Evergreen Terrace, limiting neighborhood east-west connectivity, but would have no impact on Coral Reef Street. FEIS 5.16, (AR022540); *see also* FEIS 6.31-6.32 (AR022717-18) (no measures to minimize harm were explored for Alternative 6A Spliced, and so it is unclear whether the type of bridging to minimize the impacts of Alternative 1C is also feasible for Alternative 6A Spliced).

Table 8: Community Cohesion and Mobility Impacts of Alternatives 1C and 6A Spliced

	1C	6A Spliced
Regional Cohesion	Improved	Improved
Shared-use pathways increasing access	Yes	Yes
Improved traffic circulation, including during peak hours	Yes	Yes
change local traffic patterns (cul-de-sacs, redirected roads, and restricted access)	Yes	Yes
Disruption of major local connectivity streets east of Floresta	Yes	Yes
La Buona Vita	None	Access road moved from front to rear of community

Additionally mitigating against a finding of imprudence is the pattern of past road construction in this community. Modifications of traffic flow east of the Floresta Drive intersection, including for the existing Crosstown Parkway, are similar to those proposed here. Sociocultural Effects Report, 4-54 (AR002482) (image of multi-purpose path from the existing Crosstown Parkway Section). If impacts may be measured by value of homes, then the presence of the Crosstown Parkway does not appear to be a negative factor to the surrounding community:

Overall, the results of the analyses do not indicate there is a significant difference between the values of residential properties immediately adjacent to the roadways and the values of residential properties located one and two lots away from the roadway. In the case of the existing Crosstown Parkway section, there appears to have been a small increase in the value of properties immediately adjacent to the West Virginia Drive as they were being acquired to construct the existing section, and no significant change in the adjacent properties that were not acquired is evident. Sociocultural Effects Report, 4-44 (AR002472).

Thus, the FHWA elimination of 6A from consideration in part because of “[s]ubstantial community cohesion and local mobility impacts west of NFSLR” is not supported by the record and thus arbitrary and capricious.

2. The record does not establish that changes in the access road to La Buona Vita will result in “severe disruption” to that community.

On the east side of the NFSLR, the FHWA concedes that “the cohesion between established communities is less affected because the project [regardless of alternative] does not bisect or fragment communities.” FEIS 5.7 (AR022531). Alternative 6A Spliced would require:

the relocation of the access road into La Buona Vita community from its current location along U.S. 1 to the Crosstown Parkway Extension. The new access road would substantially change traffic flows within the community (a retirement community restricted to people 55 years old and over), increasing noise and visual impacts at the vicinity of the new access road. FEIS 6.47 (AR022733).

The conclusion that relocating the La Buona Vita access road would result in “substantial” changes to traffic flows is entirely unsupported by the record. Similarly, there are no facts that show that relocating an entrance from US-1 to Crosstown Parkway would change internal traffic patterns significantly or negatively, or that the La Buona Vita residents prefer their access to be located on US-1 instead of on the proposed Crosstown Parkway.²⁶

The conclusion that 6A would result in “substantial visual and noise impacts” is also arbitrary and capricious to the extent that this suggests that 6A is substantially more harmful than the chosen alternative. Again, all build alternatives traverse through established residential neighborhoods. (FEIS at 6.3.) All build alternatives, consequently, will result in substantial noise and visual impacts. Impacts should be considered relatively.

C. Neither Alternatives 6A Spliced nor Alternative 1C cause “severe disproportionate impacts to minority or low income populations.”

The claim that any of the build alternatives poses any environmental justice issues is grossly overstated and not supported by the record. The 4(f) analysis identified 6A as having “Severe Disproportionate Impacts to Minority or Low-Income Populations (After Mitigation),” and specifically with regard to displacement of minority populations: “Potential Environmental Justice issues in neighborhood with higher than County average for minority populations.” FEIS 6.42 (AR015370) (emphasis added). However, the Sociocultural Effects Report states “the

²⁶ See above, discussion of Crosstown Parkway increasing the value of adjacent properties.

displacement of minority populations for each alternative ranges from 17% to 14.00%, and does not exceed the overall percentage of minorities in St. Lucie County of 25.82% for any alternative. The degree of effect [on displacement of minority populations] is none.” Sociocultural Effects Report 5-13 (AR002495)(emphasis added). With regard to other impacts, the FEIS states that “[n]one of the build alternatives, including the Preferred Alternative, will disproportionately impact low-income populations or affect the demographic make up of the residential communities.”²⁷ FEIS 5.3 (AR022527) (emphasis added). It was plainly arbitrary and capricious for the FHWA to suggest “potential” environmental justice impacts, contradicted by its own record, would contribute with sufficient weight to substantially outweigh the paramount importance of protecting Section 4(f) Resources.

Furthermore, it is arbitrary and capricious to conclude that Alternative 6A Spliced differs from Alternative 1C with regard to minority impacts. The alleged “potential” environmental justice impacts were based on census tract statistics and Alternatives 6A Spliced and 1C traverse the same census tracts.²⁸ The FEIS asserts that, of the total residences that Alternative 6A Spliced would displace, 36.47 percent are minority households. (FEIS at 3.148.) In contrast, of the total households that would be displaced by Alternative 1C, 32 percent are minority. *Id.* In addition, the table at FEIS 5.4 (AR022528) identifies no environmental justice issues for alternative 1C and only “minimal” environmental justice issues for Alternative 6A (without elaborating on the difference in weight).

²⁷ Absent from the record is any discussion of the environmental justice impacts using Section 4(f) Resources currently enjoyed by City residents for a transportation project.

²⁸ The FEIS purports to analyze the total displaced households, but curiously only examines anticipated relocations, not those that have already occurred for which demographic information could be obtained. See FEIS 5.25 (AR022549). Keeping its analysis as nonspecific as possible, the FHWA declined to use census blocks or census block groups to analyze potential environmental justice impacts, stating that they were “too small to sufficiently represent the communities within the SCE study area” and instead relied on census tracts which average 4,000 persons in size. Sociocultural Effects Report, 4-4 to 4-5 (AR002432-33). The FHWA was then forced to rely on statistical impacts to specific individual minority, elderly, disabled households to state “potential” environmental justice impacts when very specific information about the impacted households was readily available. See Home valuations, commencing at ARO25770; See parcel-by-parcel starting at AR025806.

The analysis arbitrarily concludes that a mere four percent difference in minority households affected between alternatives 1C and 6A represents a meaningful difference. The FEIS also points to the fact that St. Lucie County's total population consists of 36.1 percent minorities. (*Id.*) There is no reasonable basis for relying on the County's minority population percentage as an ad hoc red line not to be crossed. In essence, the Secretary is claiming that a four percent difference between 1C and 6A in the number of minority households relocated, combined with the fact that 6A displaces .37 more minority households than the percentage of minorities in the entire county, somehow creates environmental justice issues.

D. Alternative 6A Spliced does not cause unique problems of any significant magnitude as compared to Alternative 1C.

The Section 4(f) Analysis alleges that Alternative 6A Spliced is imprudent in part because of "Substantial visual and noise impacts for residents along diagonal route; new access road required at entrance to La Buona Vita; new access road causes additional traffic noise; traffic flow changed within La Buona Vita." from FEIS 6.42 (AR022728). These impacts have been addressed above.

E. Alternative 6A Spliced does not cumulatively cause unique problems or impacts of an extraordinary magnitude as compared to Alternative 1C.

The Section 4(f) Analysis alleges that Alternative 6A Spliced is imprudent in part because it causes "unique problems or impacts of extraordinary magnitude," and specifically, that it causes "Collective operational, visual, noise, cohesion, mobility, and access impacts to neighborhoods on the west side of NFSLR and east of the NFSLR at La Buona Vita." Even under the most lenient interpretation of Section 4(f)'s obligations, in order to substantiate the use Section 4(f) Resources the record must demonstrate that the cumulative problems caused by an alternative result in "*truly unique* problems." *Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990). As discussed supra, the impacts caused by Alternative 6A Spliced are substantially the same as the preferred alternative. Furthermore, none of the non-section 4(f) impacts are unique or rise to the level of "extraordinary magnitude" as required by the law.

F. Alternative 1C causes substantially more harm to the environment than Alternative 6A Spliced, even without taking into account its impact on Section 4(f) Resources.

An additional reason provided by FHWA for rejecting Alternative 6A Spliced as “a prudent avoidance alternative” is that “impacts to adjacent habitat of non-Section 4(f) resources would be 69 times greater for the spliced beam bridging option for Alternative 6A than for using a pile bent structure for Alternative 6A.” FEIS 6.26 (AR022712). This is misleading. First, comparison of Alternative 6A (a use alternative) and Alternative 6A Spliced (an avoidance alternative) is not relevant; what is relevant to determining the existence of a feasible and prudent avoidance alternative is the absolute impact of Alternative 6A Spliced. Second, Alternative 1C has far *greater* impacts to non-Section 4(f) natural resources, *by any measure*, than Alternative 6A Spliced. See Table 3. As such, it was blatantly arbitrary and capricious to ground rejection of Alternative 6A Spliced on environmental impacts while selecting Alternative 1C.

III. THE PROCESS BY WHICH THE FHWA ARRIVED AT A PREFERRED ALTERNATIVE WAS DEEPLY BIASED AGAINST THE PROTECTION OF SECTION 4(F) RESOURCES.

The City’s selection of Alternative 1C as the Locally Preferred Alternative, and the FHWA’s concurrence in that choice in its adoption of 1C as the Preferred Alternative was based on a fatally flawed analysis that ignored impacts to Section 4(f) Resources except as an afterthought. Section 4(f) established national policy that “special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” 23 USCS § 138(a). The FHWA’s policy guidance urges that “[c]are must be taken when making determinations of feasibility and prudence not to forget or de-emphasize the importance of protecting the Section 4(f) property.” Doughty Decl., Ex. 1: FHWA, *Section 4(f) Policy Paper* (July 20, 2012), p. 13. “If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process.” *Id.* at 12.

The City and the FHWA turned the intention of the Section 4(f) evaluation on its head in selecting the route and technology for the Crosstown Parkway Extension. To select the LPA, the City and the FHWA agreed to a weighted analysis scoring five criterion (points assessed to each criterion in parenthesis):

- Meeting purpose and need (0-20)
- Social/community impacts (0-10)
- Natural Environment Impacts (0-10)
- Physical impacts (0-5)
- Project cost (0-5)

FEIS 3.150 (AR022430); Crosstown Parkway Extension: Selection of a Preferred Alternative (“LPA Process”) p. 5 (AR008202). Points were assigned by scorers from the City’s contractor, K&S, and by a panel consisting entirely of construction- and transportation-focused state and city employees (the City Engineer, the City’s Project Manager, FDOT’s Senior Project Manager, and the St. Lucy County Transportation Planning Organization’s Executive Director, collectively herein the “Panel”).²⁹ LPA Process at 27 (AR008224). Scorers allegedly “looked at the totality of information on each alternative for each criterion using data and information from the DEIS, agency and public comments, the Public Hearing and best professional judgment.” City of Pt. St. Lucie slide show (August 2012) (AR046064, AR046065). However, this “totality of information” failed to give any weight to Section 4(f) impacts. FEIS, 3.150 (AR022430)(“the potential use of Section 4(f) lands for a given build alternative was not assigned points during the evaluation of alternatives”).

The result was exactly what Section 4(f) was intended to avoid and what the Supreme Court recognized would always be the case in the absence of a proper Section 4(f) Evaluation: that an avoidance alternative was eliminated from consideration because of the weight given to

²⁹ Cathy Kendall, an environmental specialist for the FHWA was present for the scoring by the Panel, but did not participate directly in the actual scoring. LPA Process at 27 (AR008224), Letter from Gustavo Schmidt, FDOT to Martin Knopp, FHWA (July 16, 2012) (SUPP-AR000019).

non-Section 4(f) impacts, and especially social impacts. As the Supreme Court predicted in *Overton Park*, “[i]t is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible . . . Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.” 401 U.S. at 411.

The scoring of alternatives demonstrates minimal differences in Alternatives 6A Spliced and 1C with regard to non-Section 4(f) impacts. Of 60 possible points, *and giving absolutely no weight to Section 4(f) Resources*, the Panel scored 1C as 39 and 6A Spliced as 36—**a difference of only 3 points**. The contractor, K&S scored 1C as 43 and 6A as 37—**a difference of only 6 points**. City of Pt. St. Lucie slide show (August 2012) (AR046067). A difference of 3 or 6 points on a 60 point scale, which does not include Section 4(f) impacts, is insufficient to establish that Alternative 6A will have impacts of such “extraordinary magnitude” as compared to Alternative 1C that it would be imprudent to proceed.

Furthermore, Plaintiffs do not concede that even the three to six point “advantage” of Alternative 1C actually exists. For example, the FEIS concedes that “[a]ll build alternatives meet the purpose and need.” FEIS 3.152 (AR022432). The Panel gave Alternative 1C a score of 20 and Alternative 6A Spliced a score of 15. FEIS 3.156 (AR022436). The record does not support a five point premium for Alternative 1C. Factors allegedly considered (no indication of how heavily each was weighed was provided) were:

- 1) The preferred alternative would divert 52% and 21% of traffic from the Prima Vista Boulevard and Port St. Lucie Boulevard Bridges, respectively. 6A would divert 54% and 16% from those same bridges—differences of 2% and 5%.³⁰ FEIS 3.152 (AR022432).

³⁰ Projected traffic volumes are probably wrong because the population projections are probably wrong. *See* AR004496, AR023711 (incorporated in FEIS) stating 2010 population expected to be 189,300, 2022 at 280,000, and 2025 at 350,200. In fact, St. Lucie’s population was “approximately 165,000 in 2010—only 87% of what was expected, and sufficient to potentially

- 2) The preferred alternative would have no hot spot or operational issues, while 6A would have only one (all other alternatives ranged from 2 to 5 such issues). FEIS 3.153 (AR022433).
- 3) Neither the preferred alternative nor 6A addresses the city’s long term goal of changing the bedroom community development pattern (sprawl). FEIS 3.154 (AR022434). However, alternatives 2A and 2D would address this problem. *Id.* Note that the preferred alternative was not docked any points for failing to address this issue, nor were 2A and 2D given.
- 4) For improved emergency response time as compared to the no build alternative, Alternatives 1C and 6A are nearly identical, with 6A providing slightly better service from Crosstown Parkway and 1C doing slightly better at Port St. Lucie Boulevard. FEIS 3.155 (AR022435).

Table 5: Traffic-related impacts (worst case highlighted)

	1C	6A
Purpose and need	Meets	Meets
Traffic diverted from Prima Vista Blvd	52%	54%
Port St. Lucie Blvd	21%	16%
Hot spots and operational issues	0	1
Reduce sprawl	No	No
Emergency service from Crosstown Pkwy	6.6 minutes faster than no build	7.1 minutes faster than no build
Emergency service from Pt. St. Lucie Blvd	4.9 minutes faster than no build	4.5 minutes faster than no build
Emergency service from	3.4 minutes faster than no	3.4 minutes faster than no

impact the 2-5% differences in bridge traffic used to rate Alternative 1C higher than Alternative 6A. FEIS 4.2 (AR022462).

Traffic analysis was based on 2003 traffic analysis, which presumably incorporated inaccurate population projections discussed above. FEIS, 3.12 (AR014934). Unclear whether updated numbers were used to make this statement: “It is important to note that based on 2008 traffic volumes, the combined capacity was exceeded by over 17 percent.” FEIS 3.12 (AR014934).

Prima Vista Blvd	build	build
Score given ³¹	20/20	15/20

The FHWA’s reliance on the City’s flawed analysis to select a Preferred Alternative was arbitrary and capricious and in violation of Section 4(f). While the City may not have to tilt the balance in favor of protection of Section 4(f) Resources in selecting a LPA, the FHWA certainly must in selecting a Preferred Alternative. Nevertheless, the FHWA “concurred with the identification of Alternative 1C as the Preferred Alternative based on its ability to fulfill the project purpose and need while considering environmental impacts, costs, and technical factors.” ROD 6 (AR032578). Although it acknowledged that Alternative 6A would avoid all use of Section 4(f) Resources, the FHWA recited that it was rejected because of its “severe social impacts.” ROD 11 (AR032582). However, the FHWA relied on the City’s analysis contained in the FEIS to support its decisions (*see Id.*), and that analysis ignored impacts to Section 4(f) Resources until after the selection of a LPA. As a result, the decision of the FHWA to fund Alternative 1C was arbitrary and capricious because it failed to comply with the weighting requirements of Section 4(f).

CONCLUSION

Plaintiffs respectfully submit that the 2014 decision to approve the Crosstown Parkway Extension Alternative 1C was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Transportation Act and its implementing regulations. In flagrant violation of national policy and law the route selected would cut through the heart of an area of such profound ecological importance that Florida’s Bureau of Public Lands Administration proclaimed that “[i]t is unlikely that a location with greater environmental or recreational impact could be chosen.” (SUPP-AR000047). Approval of Alternative 1C is a clear violation of Section 4(f) because there are obvious feasible and prudent alternatives, which avoid *all* use of Section

³¹ FEIS 3.156 (AR022436).

4(f) Resources. It is clear from even a rudimentary reading of the record that the City of Port St. Lucie chose preferred Alternative 1C giving no weight whatsoever to Section 4(f) Resources, developed a nearly 60,000 page record to attempt rationalize its unlawful decision, and then refused any attempt to intervene and defend its decision in this honorable court.

Plaintiffs request that this Court hold that there is no dispute of material fact and Plaintiffs are entitled to judgment as a matter of law on the following:

- a) Declare Defendants' failure to select an available feasible and prudent avoidance alternative to Alternative 1C in violation of the Transportation Act and the APA;
- b) Enjoin the Defendants to comply with the applicable provisions of the Transportation Act;
- c) Vacate the February 24, 2014, ROD approving Alternative 1C and the use of Section 4(f) Resources and the incorporated FEIS;
- d) Enjoin Defendants from proceeding with any irrevocable actions related to the construction of Alternative 1C;
- e) Award Plaintiffs their costs and reasonable attorneys' fee and expert fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and Fed. R. Civ. P. 54(d); and
- f) Award Plaintiffs any other relief that is just and proper.

Respectfully submitted,

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