

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-3000

PRAIRIE BAND POTTAWATOMIE NATION;
SIERRA CLUB; WETLANDS PRESERVATION ORGANIZATION;
JAYHAWK AUDUBON SOCIETY;
SAVE THE WAKARUSA WETLANDS, INC.;
KANSAS UNIVERSITY ENVIRONS; and ECOJUSTICE
Plaintiffs/Appellants,
vs.

FEDERAL HIGHWAY ADMINISTRATION;
J. MICHAEL BOWER, in his official capacity
as Division Administrator, Federal Highway Administration,
KANSAS DEPARTMENT OF TRANSPORTATION
and DEBRA L. MILLER, in her official capacity
as Secretary of Kansas Department of Transportation,
Defendants/Appellees.

APPELLANTS' REPLY BRIEF

ON APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF KANSAS
Honorable Kathryn H. Vratil
Case No. 08-02534-KHV

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Oral Argument is requested.

September 6, 2011

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REPLY BRIEF STATEMENT OF FACTS

1. The Noise Study Failed to Determine Noise Increase Impacts.

(a) The Noise Study states that “predicted noise levels were not compared to the existing noise levels.”¹

(b) Of the eleven Existing Monitored Noise Levels measured for the Noise Study,²

seven were not used in Attachments B-E.

(These seven receptors and their underlined noise levels are shown on the right.)

Thus, only four measured noise levels

were used in Attachments B-E.

Although receptor R12 was not measured,

a number is shown for it in Attachments B-E.

Receptor	Existing Monitored Noise Levels ³	“Existing” Noise Levels Used in Attachments B-E ⁴
R3	53.3	53.3
R4	<u>64.2</u>	54.4
R5	53.8	53.8
R6	53.8	53.8
R7/14	<u>58.0</u>	62.7
R8	61.4	61.4
R9	<u>58.0</u>	55.5
R11	<u>57.8</u>	54.1
R12	None	33.6
R13	<u>60.0</u>	59.8
R10	<u>58.7</u>	58.8
r1	<u>52.3</u>	50.0

(c) The predicted noise levels at R3 and R4 have a 9.8 to 19.6 decibel disparity between the study’s Noise Maps and Attachments B-E. Their R3 noise levels are very different at the southeast corner Louisiana and 31st St.⁵

¹ Aplt.App.(III) 799.

² The Table of Contents, p. i, identifies page 9 as “Attachment A” and as showing the “Existing Monitored Noise Levels.” Aplt.App.(III) 796, 806.

³ Aplt.App.(III) 806.

⁴ Aplt.App.(III) 807-810.

⁵ See No-Action map for R3 location, Aplt.App.(III) 802.

<u>Alternative:</u>	<u>Vehicles on or near R3⁶</u>	<u>Attachments B-E⁷</u>	<u>R3 Noise Levels on: vs. Noise Maps⁸</u>	<u>Difference in decibels</u>
No-Action	40,300	43.4	vs. 56.0	-12.6
32B	75,100	40.4	vs. 60.0	-19.6
42A	35,600	65.8	vs. 56.0	+9.8

Receptor R4, on Haskell Ave. 1.25 miles south of 31st, has similar disparities.⁹

<u>Alternative:</u>	<u>Vehicles on or near R4¹⁰</u>	<u>Attachments B-E⁷</u>	<u>R4 Noise Levels on: vs. Noise Maps¹¹</u>	<u>Difference in decibels</u>
No-Action	15,200	71.4	vs. 60.0	+11.4
32B	16,700	47.7	vs. 60.0	-12.3
42A	20,900	72.8	vs. 60.0	+12.8

⁶ No-Action is 40,300 (31st: Louisiana to Haskell (25,900) plus Louisiana: 31st to River (14,400)). 32B is 75,100 (32B SLT: Louisiana to Haskell (55,600) plus Louisiana: 31st to River (19,500)). 42A is 35,600 (31st: Louisiana to Haskell (19,600) plus Louisiana: 31st to River (16,000)). Aplt.App.(III) 813, (IV) 1426.

⁷ Aplt.App.(III) 807, 809 and 810.

⁸ On the No-Action map, R3 is on the 56db contour line. Aplt.App. (III) 802. On the 32B map, R3 is in the 60db contour line directly under the 32B traffic corridor. Aplt.App. (III) 804. On the 42A map, R3 has disappeared from its location. Aplt.App. (III) 805. However, the noise at the R3 location for 42A would be no more than the 56.0 db for No-Action.

⁹ See 42A map for R4 location, Aplt.App.(III) 805.

¹⁰ No-Action is 15,200 (Haskell: 31st to River). 32B is 16,700 (South of 32B SLT Interchange to River). 42A is 20,900 (31st to 42A SLT). Aplt.App.(IV) 1426.

¹¹ On the 42A map, R4 is in the 60 db contour line. Aplt.App.(III) 805. R4 is not shown on the No-Action or 32B maps, but ½ mile north of R4 on Haskell, the same traffic as at R4 for No-Action and 32B is in the 60 db contour line.

Aplt.App.(III) 802 and 804.

2. The Noise Study's Geographic Scope was Deficient and Arbitrary.

(a) The Noise Study and its contour maps considered 3 miles of 42A's freeway and only 1.25 miles of 32B's freeway. Aplt.App.(III) 804, 805. The 32B map omitted the Haskell and Louisiana St. noise at the south end of the Haskell Farm. Aplt.App. 804. The different treatment of 32B and 42A was not explained.

(b) Plaintiffs raised the deficient geographic scope of the Noise Study with Federal Highway and the district court:

The "32B maps arbitrarily omit noise contours for Haskell Ave. and Louisiana St. north of the Wakarusa River near the Haskell Farm.

* * *

The [32B] map does not show noise levels for 32B along its route west of Louisiana St. or east of Haskell Ave.... (32B travels close to the City of Lawrence, very near the Prairie Park and Nature Center and an east Lawrence residential area.)"¹²

3. The Corps did not apply Section 4(f) in its EIS or ROD. It stated that "Section 4(f) is a U.S. Department of Transportation [statute] and does not apply to this project."¹³

¹² Aplt.App.(I) 105. Aplt.App.(IV) 1169, 1180-1181.

¹³ Aplt.App.(II) 738, No. 9, responding to Aplt.App.(II) 723.

ARGUMENT (I): EXHAUSTION

I. None of Plaintiffs' issues on appeal are barred by issue exhaustion.

For the first time KDOT on appeal raises exhaustion of administrative remedies under *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). No exhaustion argument was raised by Defendants in the district court proceedings. Defendants have not cited anywhere in the record where it was raised. Therefore, they have waived any defense of exhaustion. A litigant who does not argue an issue in the district court may not seek appellate relief. *U. S. v. Jarvis*, 499 F.3d 1196, 1201 (10th Cir.2007).

A NEPA plaintiff “challenging an agency action must first exhaust administrative remedies.” *Biodiveristy Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709, 714 (10th Cir.2010). However, “the usual practice under Federal Rules is to regard exhaustion as an affirmative defense.” *Forest Guardians v. U. S. Forest Serv.*, 579 F.3d 1114, 1121 (10th Cir.2009). Plaintiffs did raise their issues before the agencies and the district court. In any event, Defendants did not raise this defense below and it is therefore, waived.

ARGUMENT (II): NEPA.

II. Federal Highway illegally adopted an EIS that lacked the required NEPA analysis of noise, the 42C alignment, costs and safety.

Its Sec. 4(f) evaluation and decision was “a recommendation or report” for “major federal action” for which an adequate EIS is required. *Ross v. Federal Highway Administration*, 162 F.3d 1046, 1052 (10th Cir.1998) (SLT is “major federal action” within the meaning of 42 U.S.C. §4332(2)(C)). Because the Corps’ EIS did not meet “the standards for an adequate statement” under 40 C.F.R. §1506.3(a), Federal Highway had no authority to adopt it. *Aplt.App.(IV)* 1437. Without an adequate EIS, its Sec. 4(f) evaluation and decision violated NEPA. 42 U.S.C. §4332(2)(C).

A. The EIS Failed to Adequately Determine Noise Impacts.

1. The EIS violated NEPA by failing to determine noise increase impacts.

An EIS noise study must analyze “a comparison of the predicted noise levels with...the existing noise levels.”¹⁴ The SLT Noise Study admits this was not done.

“[T]he predicted noise levels were not compared to the existing noise levels.”

Reply Fact No. 1(a). By this statement, URS, the study’s author and presumed noise expert, admitted that the standards for determining noise increase impacts

¹⁴ 23 C.F.R. §772.5(g) and 23 C.F.R. §772.9(b)(2)-(4) (2010), p. A-68, 69; *Aplt.App.(II)* 436, Noise Impacts §9(b).

were not met. These standards may well require a minimum number of receptors and placement at certain locations. In any case, the Noise Study admits the analysis was not done.

Defendants argue that URS was “obviously wrong” about the deficiency it admits for its own study. They contend that the required noise increase analysis was done, citing Attachments B-E. Aplt.App.(III) 807-810. Nevertheless, the study’s author and expert concluded that noise increase impacts were not determined. This admission should conclusively prove it to be defective.

An examination of the Noise Study confirms that noise increase impacts were not properly measured. Attachments B-E only used four of the eleven existing noise levels. Reply Fact No. 1(b). In addition, the first two receptors on Attachments B-E have gross errors that understated predicted noise for 32B and overstated it for 42A. Reply Fact No. 1(c) shows the following: At R3, the 32B noise map has 60 decibels, but Attachment D has 40.4 decibels there, a 19.6 decibel understatement for 32B. The 42A map has 56 decibels at R3, but Attachment E has 65.8 decibels there, a 9.8 decibel overstatement for 42A. At R4, the 32B map indicates 60 decibels, but Attachment D has 47.7 decibels, a 12.3 decibel understatement for 32B. No-Action’s traffic at R4 is less than 32B’s, but Attachment B shows 71.4 decibels there for No-Action, 23.7 decibels more than 32B. The 42A map has 60 decibels at R4, but Attachment E has 72.8 decibels

there, a 12.8 decibel overstatement for 42A.

The Noise Study failed to use most of the existing noise levels and it has significant 10-20 decibel errors for predicted noise levels.¹⁵ This confirms URS's admission that its study did not properly determine noise increase impacts. This is a substantial deficiency requiring reversal. Federal Highway ignored its regulations, violating 5 U.S.C. §706(2)(D) by acting "without observance of procedure required by law." It prepared and based its decision on a traffic noise analysis that arbitrarily failed to determine noise increase impacts as required by NEPA, 23 C.F.R. §772.5(g), §772.9(b) (2010) and FHWA procedures.

2. The EIS Noise Study was also arbitrary and deficient in geographic scope. It considered noise for only 4.25 miles (35%) of the 12 mile 32B/42A impact area.¹⁶ The 32B contour maps also omitted the noise at the south ends of Haskell and Louisiana St. adjacent to the Haskell Farm. Reply Fact No. 2(a).

Defendants claim that all these deficiencies were harmless error, arguing that noise impacts are only relevant to noise abatement. They contend no one is "prejudiced by noise in other areas traversed by 32B..., that land west of the Farm Property is largely undeveloped and thus noise abatement need not be considered."

¹⁵ "[E]ach ten decibel increase is equivalent to a doubling of the noise volume." *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002).

¹⁶ $35\% = 4.25 / (32B (5.61) + 42A (6.48))$. Reply Fact No. 2(a), Fact No. 8(c).

FHWA Brief 29-30, fn. 13. Using one of many double standards in this case, Defendants conversely argue that “noise impacts to the undeveloped areas traversed by 42A would be significant due to introduction of a highway in an area with little development.” FHWA Brief 27.

Nothing excused the Noise Study from analyzing the entire geographic lengths of 32B and 42A. If noise impacts on undeveloped land are as significant as Federal Highway contends (at least for 42A), *all* lands adjacent to 32B and 42A must be considered in the Noise Study. It was arbitrary for the study’s maps to include 3 miles of 42A through undeveloped areas while ignoring undeveloped lengths of 32B and considering only one mile of its length. It was substantial, reversible error to include only 35% of the 32B/42A impact area and to omit the adjacent street noise on the south sides of the Haskell Farm for 32B. It was additional harmful error that the study failed to consider 32B’s noise impacts on the nearby noise-sensitive Prairie Park and Nature Center and city homes east of the Haskell Farm. Aplt.App.(IV) 1253.

Noise increase impacts are not just a dispensable aspect of noise abatement. They are determined under NEPA in order for the public and the agency to fully understand the environmental consequences of a project. Federal Highway’s NEPA and Sec. 4(f) procedures thus require “a comparison of the predicted noise levels with both the FHWA noise abatement criteria and the existing noise

levels.”¹⁷ This same definition of noise impacts is found in 23 C.F.R. §772.5(g) (2010), p. A-68. This regulation was promulgated under 23 U.S.C. §109(h),¹⁸ which states that:

“[T]he Secretary...shall...promulgate guidelines designed to assure that possible adverse economic, social and environmental effects relating to any proposed project...have been fully considered in developing such project,...taking into consideration...(1)...noise.”

Thus, in accord with NEPA, this statutory purpose for 23 C.F.R. §772.5(g) (2010) is the full consideration of a project’s environmental consequences. Although 23 C.F.R. §772 is also concerned with noise abatement, this does not alter the fact that it was promulgated “[t]o provide procedures for noise studies” and “to assure that the possible adverse environmental effects...have been fully considered.” 23 C.F.R. §772.1 and 23 U.S.C. §109(h). The Noise Study’s lack of noise analysis required by NEPA is not rendered harmless merely because noise abatement has been considered.

The Noise Study’s deficiencies were particularly harmful in this case. The study was the only potentially-empirical evidence for Federal Highway’s claim that 42A would have secondary impacts from street traffic near the Haskell Farm. Without the determination of noise increase impacts, this claim was based on the

¹⁷ Aplt.App.(II) 436, Noise Impacts §9(b).

¹⁸ See 70 FR 16707-01, 16710, “Authority: 23 U.S.C. 109(h) and (i)...”

arbitrarily-drawn contour maps. Relying on the defective maps, Federal Highway declared that the “total audible disturbance” for 32B will be less “than noise...from adjacent roads associated with 42A.” *Aplt.App.(IV) 1276-1277, 1427.*

Defendants do not dispute that the NEPA standard for harmless error is not whether the error would change the agency’s mind. “That the Secretary may ultimately make the same decision . . . is immaterial; the . . . alleged injury results from Secretarial failure substantively to consider the environmental ramifications of its actions in accordance with NEPA.” *Catron County Bd. of Comm’rs v. U. S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir.1996), and see *Davis*, 302 F.3d at 1115 (environmental harm presumed from NEPA non-compliance). In this case, Federal Highway violated the APA. It “entirely failed to consider an important aspect of the problem” by failing to determine noise increase impacts, as required by its regulations. “[I]t failed to base its decision on relevant factors” by using an EIS Noise Study having an arbitrary and deficient scope. *Utah Env’tl. Cong. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir.2007).

B. Federal Highway failed to consider or include 42C as a Sec. 4(f) alternative and omitted it without explanation.

1. Federal Highway erred by failing to consider 42C as a possible alternative under Sec. 4(f) standards. Its Sec. 4(f) evaluation and decision did not

mention 42C. Although the Corps declined 42C as an EIS alternative, the Corps did not apply Sec. 4(f) standards. (Reply Fact No. 3)

“[S]imply because under NEPA an alternative (that meets the purpose and need) is determined to be unreasonable, does not by definition, mean it is imprudent under the higher substantive test of Section 4(f). Therefore, it is possible for an alternative that was examined but dismissed during the preliminary NEPA screening process to still be a feasible and prudent avoidance alternative under Section 4(f). In other words, there is more room to reject alternatives as unreasonable under NEPA than there is to find those same alternatives are imprudent under Section 4(f).”¹⁹

This is the exact situation for 42C. Federal Highway was required to consider 42C under the “higher substantive test of Section 4(f)”, which requires its selection unless it has unique problems of extraordinary magnitude. Federal Highway erred by completely failing to consider the relevant issue of whether 42C should be an EIS alternative under Sec. 4(f) standards.

2. Federal Highway also erred by failing to include 42C as a formal EIS alternative for its Sec. 4(f) evaluation and decision. The 42C alignment is \$7.5 to \$22.9 million cheaper than 42A.²⁰ The Corps itself determined that 42C “is reasonable and it reflects appropriate roadway design.” Fact No. 4(e). As a reasonable alternative having significant cost savings from a modified route, 42C

¹⁹ FHWA Section 4(f) Policy Paper, Aplt.App.(IV) 1118.

²⁰ KDOT admits at least \$7.5 million is saved with 42C. Fact No. 4(c). Defendants argue the \$19 million savings estimated for 42C in 2003 was wrongly based on two-lanes. FHWA Brief 33-34. However, the FEIS used costs for a “2-Lane Freeway” for 32B and 42A. Aplt.App.(III) 772, 780.

is “significantly distinguishable” from 42A to require individual alternative analysis. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 709 (10th Cir.2009).

On appeal, Federal Highway misplaces its criticism of 42C on the Tribe’s initial rough draft of it.²¹ After that draft, KDOT prepared a 42C map having two curves at the maximum allowable curvature, allegedly at the request of the Tribe’s attorney.²² KDOT prepared the Corps’ June 16, 2003 letter, which considered KDOT’s map.²³ The Corps rejected KDOT’s 42C map because of “increased curvature of the road.”²⁴ On August 19, 2003, the Tribe delivered a professionally engineered design map of 42C to the Corps.²⁵ It does not have the maximum curvature found in KDOT’s map. The Corps never did consider the Tribe’s 42C design map, responding to it only by referencing its prior comments.

Aplt.App.(III) 980.

²¹ FHWA Brief, p. 34, cites the Corps’ July 16, 2003 letter (Aplt.App.(III) 1013) which discussed the Tribe’s June 2003 rough draft (Aplt.App.(III) 998).

²² Aplt.App.(III) 1056, 1059. Tribe’s counsel later told the Corps, “It is absolutely ridiculous to have stated that the [Tribe] desires the curviest 42C route possible.” Aplt.App.(III) 1023.

²³ KDOT(Sloop) and its consultant HNTB (Pasley) prepared the Corps June 16th letter. Aplt.App.(III) 1035-1038. KDOT had hired HNTB “to complete the EIS process...culminating in a...[32B] permit.” Applee.Supp.App. 91.

²⁴ Aplt.App.(III) 1014.

²⁵ Aplt.App.(I) 132 (42C design map), Aplt.App.(III) 1071.

The Corps did not apply Sec.4(f) to *any* version of 42C. Reply Fact No. 3. Federal Highway cannot blindly rely on the old EIS to assume that 42C does not meet Sec. 4(f) standards. Federal Highway thus erred by completely failing to consider or analyze the 42C design map or any other version of 42C under Sec. 4(f). Federal Highway failed to take a “hard look” and “[r]igorously explore and objectively evaluate” 42C, as required by NEPA and 40 C.F.R. §1502.14(a). Federal Highway’s Sec. 4(f) decision must be reversed under 5 U.S.C. §706(2)(A) and NEPA both because it arbitrarily failed to consider the relevant issue of whether 42C should be a Sec. 4(f) alternative and it failed to include 42C in its EIS as a formal Sec. 4(f) alternative.

3. Federal Highway also violated NEPA regulation 40 C.F.R. §1502.14(a) because its EIS omitted 42C without explanation. Fact No. 4(b), (f) and (g).

C. Federal Highway failed to accurately determine the cost of 32B in violation of NEPA and the APA.

Federal Highway admits that its Sec. 4(f) decision omitted the Mitigation Plan costs for 32B. FHWA Brief 47. It now argues for the first time on appeal that another major error makes its first major error harmless. FHWA Brief 47-48.

The issue of this new major computational error and its effect on 32B's cost was never argued in district court and has therefore been waived.²⁶

Regardless of whether the Corps' FEIS had the same 32B cost errors as the Sec. 4(f) decision, Federal Highway admits major errors in computing 32B's cost. Reversal and remand for the agency's recomputation of 32B's actual cost is the proper course rather than this Court analyzing new computations of 32B's cost for the first time on appeal, as requested by Defendants. Further, if bridge costs are going to be recomputed on appeal, another error should be corrected. Although EIS costs were based on a "2-Lane Freeway", bridge costs were erroneously based on four lanes. Aplt.App.(III) 772, 780. Bridge widths should be reduced to two lanes to be consistent.²⁷

D. Federal Highway arbitrarily failed to apply the accident rate standard for determining the safety of the alternatives, violating NEPA and the APA.

The EIS and Sec. 4(f) evaluation specified that "to meet the purpose and need...the alternative must yield a predicted collision rate at or below" 1.34 accidents per million vehicle miles driven.²⁸ An alternative's accident rate, not

²⁶ Defendants only argued in district court that "the Final Section 4(f) Evaluation did include mitigation costs" for 32B. Aplt.App.(I) 177, fn. 11; Aplt.App.(I) 284, ¶17(a), 313.

²⁷ The western leg of the SLT was completed in 1996 and is still a two-lane highway. Aplt.App.(II) 505.

²⁸ Aplt.App.(II) 509, Aplt.App.(IV) 1219.

total numbers of accidents, is the information required by Federal Highway's NEPA and Sec. 4(f) procedures.²⁹ This was not just a matter of "phrasing." Alternative safety was not "rigorously and objectively evaluate[d]" under the specified accident rate standard, in violation of 40 C.F.R. §1502.14(a).

ARGUMENT (III): SECTION 4(F).

III. Federal Highway Arbitrarily Decided that the 42nd St. Alignment Was Imprudent Under Sec. 4(f).

Federal Highway incorrectly argues that imprudence in this case can be "based on an accumulation of minor factors." FHWA Brief 45. The standard is instead proof of "unique problems," alone or collectively, that are "truly unusual" or "reach extraordinary magnitudes." *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1550 (10th Cir.1993), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). Instead of being based upon unique problems for 42A, Federal Highway's decision was largely based upon ordinary factors "common to substantially all highway construction," contrary to *Overton Park*. 401 U.S. at 412.

²⁹ FHWA procedures ask: "(8) * * * Is the existing accident rate excessively high? Why? How will the proposed project improve it?" Aplt.App.(II) 425.

A. Ordinary factors are not extraordinary problems.

Federal Highway's Sec. 4(f) decision was improperly based upon ordinary factors typical of avoidance alternatives. It used 42A's length to find it imprudent even though avoidance alternatives are normally longer to avoid Sec. 4(f) land. The 6.48 mile length of 42A is not extraordinary. It is only .87 mile longer than 32B (at 5.61 miles), and is .41 miles shorter than the current No-Action route (at 6.89 miles). Fact No. 8(c). Thus, 42A is only slightly longer than 32B, and would represent only a 6% increase in length for the entire SLT project.³⁰

The expected slight additional length of 42A automatically increased another factor, upon which Federal Highway improperly relied. The additional length of 42A is the *only* reason why the 42A freeway has 12 more accidents per year than 32B. Opening Brief 42-43.³¹ However, while relying on ordinary aspects of 42A, Federal Highway arbitrarily ignored 32B's relevant problem of increasing the traffic on Iowa St., where accident rates are the highest on the K-10 connecting link. Fact No. 9(c), Aplt.App.(IV) 1217-1218.

³⁰ The SLT project is 14 miles long. *Ross*, 162 F.3d at 1052 (holding that "the entire Trafficway is a 'major federal action'" from which the eastern leg cannot be removed). With the additional .87 miles, 42A would make the SLT 6% longer.

³¹ Accidents rates are stated in terms of accidents per million vehicle miles driven. All things being equal, an x% increase in length (miles driven) automatically increases accidents by x%.

B. Federal Highway failed to consider relevant cost factors by omitting substantial costs for 32B and failing to consider the cheaper 42C alignment.

Federal Highway admits that its Sec. 4(f) decision erred by omitting roughly \$10 million of 32B “Proposed Mitigation Plan” costs. FHWA Brief 47, Fact No. 5. This significant error requires reversal and remand to the agency rather than this Court recalculating 32B’s cost for this omission and other 32B cost adjustments which were not considered by the district court.

Federal Highway failed to consider the cheaper 42C alignment as a possible Sec. 4(f) alternative under Sec. 4(f) standards, which also requires reversal as previously discussed. The 42C alternative would save \$7.5 to \$22.9 million. Federal Highway has never considered the revised version of 42C, as professionally designed and certified by Plaintiffs’ highway engineer. The Sec. 4(f) decision must be reversed and remanded to the agency to consider 42C as a possible alternative under Sec. 4(f).

C. Federal Highway arbitrarily considered 42A imprudent even though it meets the SLT purpose and need as well, if not better, than 32B.

It is undisputed that “[42A] meet[s] the purpose and need for the project...” Aplt.App.(IV) 1271. The avoidance alternative in *Boomer* did not. 4 F.3d at 1550 (“if an alternative does not satisfactorily fulfill the purpose of the project, which in this case included an east-west transportation route through town, then the alternative may be rejected.”) Although 42A satisfies the purpose and need,

Federal Highway arbitrarily found it imprudent by assuming that 32B diverts more city traffic. Its decision utterly failed to compute or state the two numbers used for this assumption. Aplt.App.(IV) 1271. Thus, *there was no methodology* to which this Court could defer. Plaintiffs' summation of KDOT's numbers shows that 42A diverts 9,300 more city vehicles than 32B, but Federal Highway objects to this act of simple addition. Fact No. 9(b). (Although this does double count vehicles, it double counts them consistently for all alternatives.) If Federal Highway had a better method, or even any method at all, it was not used or disclosed in its decision.

On appeal, Federal Highway supports its "method" only by rewriting the EIS purpose and need from "alleviat[ing] congestion on Lawrence city streets"³² to diverting traffic on east-west streets. FHWA Brief 42-43. The street focus of the stated purpose and need is instead the existing unsafe K-10 "connecting link...on Iowa and 23rd streets."³³ Defendants' east-west street theory is drawn solely from an inappropriate extra-record affidavit. Aplt.App.(I) 187, 189-190. If the agency's decision cannot be sustained based upon the administrative record, the appropriate remedy is not the introduction of such extra-record documents, but remand to the agency for further consideration. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

³² Aplt.App.(II), 508.

³³ Aplt.App.(II) 507, 517-518. Iowa St. is a north-south street.

Federal Highway arbitrarily ignored the entire connecting link, on which 42A diverts more traffic than 32B. Opening Brief Attachment p. A-66 (Aplt.App.(I) 348). It also ignored the link's most dangerous segments on Iowa St., where 32B would worsen the already unsafe traffic conditions. Fact No. 9(c). On appeal, Federal Highway cherry picks a few isolated street segments to attempt to show 32B to be better. FHWA Brief 43-44. This is not a method, it is an arbitrary preference for 32B. For city streets in general and the existing K-10 connecting link, 42A outperforms 32B. Fact No. 9(b), p. A-64, 66 (Aplt.App.(I) 130, 348). Federal Highway's conclusion on diversion of city traffic was arbitrary and had no rational basis. It was arbitrarily based upon isolated segments used to prefer 32B, and it failed to consider all city streets, the connecting link streets and 32B's problem on Iowa St.

Federal Highway also arbitrarily found 42A imprudent based upon its freeway traffic volume. On this issue, Defendants only respond that with 42A's slightly lower volume, 32B must divert more city traffic. FHWA Brief 44. In doing so, they continue to ignore their estimates for all city streets and the connecting link. They also completely fail to consider the relevant factor of freeway thru-traffic, which may use 42A slightly less by taking the current I-70 route along the north side of Lawrence. Aplt.App.(IV) 1173.

Defendants do not dispute that 42A's lower freeway traffic would make it preferable to 32B. Opening Brief 40. After diverting more city traffic than 32B, 42A's freeway is safer with less traffic and has greater capacity for future traffic. Both freeways would have an "A" level of service on the same number of lanes, and thus the same overall capacity. Fact No. 8(a). However, 32B's future capacity for more vehicles would be less. It was a clear error in judgment for Federal Highway to find 42A imprudent based on freeway volume.

The 7% difference of 3,634 vehicles between the 32B and 42A freeway is not statistically significant.³⁴ KDOT's previous estimate for 42A's freeway was 62,000 vehicles/day, 10,000 more than now. Aplt.App.(I) 280, ¶11(b). KDOT's estimates have varied widely by 20%.³⁵ It was arbitrary for Federal Highway to use such minor differences in estimated traffic to manufacture a problem for 42A.

D. Federal Highway arbitrarily exaggerated the secondary impacts of 42A and omitted significant direct impacts of 32B.

The 32B freeway would bring 55,566 more vehicles directly over the Haskell Farm. Fact No. 7. The 42A Alternative would have no direct impact on the Haskell Farm, as Federal Highway admits. Aplt.App.(IV) 1275. Common sense tells us that 32B's impacts would be greater. Defying common sense, Federal Highway found that 42A's secondary impacts would be greater than 32B's

³⁴ 32B (55,566) - 42A (51,923) = 3,634/day. Fact No. 8(b).

³⁵ KDOT's 2025 estimates for Haskell Ave. were 32,000 in 2001, 38,000 in 2007 and 25,600 in 2010. Aplt.App.(I) 188, ¶5.

direct and indirect impacts. It reached this conclusion by making arbitrary assumptions for 42A and omitting significant amounts of traffic for 32B.

Federal Highway’s principal false assumption was that 42A “would result in a substantial increase in traffic on streets contiguous to the Farm Property/Baker Wetlands.” FHWA Brief 54. Its assumption is proven false by adding the numbers. The 42A alternative would cause only 1,000 more vehicles there.

Traffic Volumes on Contiguous Streets in 2025 (vehicles per day ³⁶)		
	<u>42A Alternative</u>	<u>No-Action</u>
31 st St: Louisiana to Haskell	19,600	25,900
Louisiana St.: 31 st to W. River	16,000	14,400
Haskell Ave.: 31 st to W. River	<u>20,900</u>	<u>15,200</u>
 Total Vehicles/day on Streets	 <u>56,500</u>	 <u>55,500</u>

Federal Highway’s finding that 42A would increase Haskell Farm traffic and thereby cause secondary impacts “runs counter to the evidence before the agency” and must be reversed. 479 F.3d at 1280.

Ignoring 42A’s insignificant 1,000 vehicle/day (or 2%) increase in traffic at the Farm, Federal Highway found 42A to have secondary impacts by arbitrarily considering only Haskell Avenue. It found 42A’s additional 4,200 vehicles there

³⁶ Traffic from Aplt.App.(III) 813, Aplt.App.(IV) 1426. These are the same street segments as in the Noise Study.

(above 32B) to be “a substantial increase.”³⁷ From this “substantial increase,” Federal Highway then conjured secondary impacts for 42A: “Urban development, along with associated increases in traffic, will lead to significant increases in noise, light, urban debris, and visual disturbances in and around the” Haskell Farm. Aplt.App.(IV) 1276. For 42A it arbitrarily assumed urban development in the adjacent floodplains even though development there is “not recommended” by the city or county and has not occurred for the past 20 years in the floodplains along the SLT’s western leg. Fact No. 12.

On the other hand, Federal Highway arbitrarily minimized the impacts of 32B. It ignored the 32B freeway and the 38,000 vehicles at Haskell’s north end, where 32B would cause 17,100 more vehicles than 42A. Fact No. 10(a), 11(b) and (d). When 32B’s freeway is included, 32B would have 107,666 vehicles that impact the Farm, 50,000 more than for both 42A and No-Action:

³⁷ Aplt.App.(IV) 1275. Haskell’s southern end: 20,900 (42A) – 16,700 (32B) = 4,200.

Traffic on Contiguous Streets and 32B Freeway in 2025

	(vehicles/day ³⁸)		
	<u>42A</u>	<u>No-Action</u>	<u>32B</u>
31 st St: Louisiana to Haskell	19,600	25,900	19,500
Louisiana St.: 31 st to W. River	16,000	14,400	15,900
Haskell Ave.: 31 st to W. River ³⁹	20,900	15,200	16,700
32B Freeway: Louisiana to Haskell	<u>- 0 -</u>	<u>- 0 -</u>	<u>55,566</u>
Total Vehicles/day on Streets	56,500	55,500	107,666
With Mitigation: Remove Louisiana St.			-15,900
Remove Haskell Ave.			<u>-16,700</u>
Total Vehicles with 32B after Mitigation			75,066

Even with the above mitigation, 32B would still have 75,066 vehicles that impact the Farm, or 19,566 more than No-Action. The additional 1,000 vehicles there with 42A pales in comparison.

Federal Highway committed substantial reversible error by failing to consider the 38,000 vehicles on Haskell Ave. and the 32B Freeway traffic in its “Projected Traffic Increase.” Aplt.App.(IV) 1276, Table 6. After failing to determine noise increase impacts and omitting this significant traffic for 32B, it then used the defective noise contour maps to find that the “audible disturbance” would be less with 32B.⁴⁰ In this manner Federal Highway arbitrary found 42A imprudent using arbitrarily assumed secondary traffic impacts and the defective noise study.

³⁸ Traffic from Aplt.App.(III) 811, Aplt.App.(IV) 1426 or Fact No. 8(b).

³⁹ In Table 6, Federal Highway intentionally omitted the 38,000 vehicles/day on Haskell Avenue between 31st St. and the 32B SLT Interchange. See Fact No. 11(b). These 38,000 vehicles are not included in these computations.

⁴⁰ Aplt.App.(IV) 1276-1277, 1427.

Federal Highway argues that Table 6 only intended to look at streets. FHWA Brief 56. Intended or not, the omission of the 32B freeway traffic and the 38,000 vehicles on Haskell was arbitrary and substantial reversible error. Mitigation does not make the omission harmless. As shown above, 32B has 20 times the increase in Haskell Farm traffic as with 42A even after the removal of Haskell and Louisiana St. from 32B.⁴¹ Noise walls do not make the 32B freeway traffic disappear, as shown by its large noise footprint on the noise contour map. Aplt.App.(IV) 1427.

Federal Highway's decision failed to consider the relevant question of whether 32B would end the Haskell Farm's status as historic property. On this issue, Defendants only respond by attempting to minimize the impacts of 32B. However, 32B's proximity to and impact on the historic structures are obvious. Fact No. 15(b), p. A-62. The Sec. 4(f) decision discussed this issue in a single sentence, concluding without analysis that 32B "does not affect any of these remaining physical characteristics that contribute to the eligibility." Aplt.App.(IV) 1278-1279. The decision did not discuss the Park Service or MPO dire complaints about 32B's great impact on historic integrity. Fact 15 (a) and (c). Federal Highway did not even read the Park Service official criteria for historic eligibility

⁴¹ 19,566 for 32B vs. 1,000 for 42A.

in reaching its conclusion.⁴² Its decision must be reversed for failing to consider and apply the relevant criteria to the facts to determine 32B's impact on the Farm's historic eligibility.

E. Floodway and Floodplain Impacts.

Federal Highway admits that "[42A] would have no direct impacts to the Haskell [Farm]", which means no direct impacts to its floodway or floodplain. Aplt.App.(IV) 1275. Although it claims 42A would indirectly stimulate floodplain development near the Farm, this is based on the same arbitrary finding of 42A secondary impacts as discussed above. Federal Highway does not argue that the alleged 42A "potential" impacts elsewhere in the floodplain are unique, unusual or extraordinary.

Federal Highway arbitrarily ignored 32B's floodplain impacts. Its decision and brief on appeal totally failed to discuss the relevant opinion from FHWA headquarters that "[o]ur regulations (23 C.F.R. §650) state that it is FHWA policy to avoid longitudinal encroachments (like 32nd St B)." Fact No. 13(b). Although 42A may have potential impacts away from the Farm, 32B's direct impacts on the Farm are real and certain. At the Farm's center, 32B would destroy 53 acres of floodplain wetlands in a National Natural Landmark recognized for its

⁴² Plaintiffs' Ex. 15, "How to Apply the National Register Criteria for Evaluation," was issued under NPS regulations. Aplt.App.(IV) 1542-1544. Federal Highway moved to strike it because it did not consider it. Aplt.App.(IV) 1535.

“undisturbed wetland prairie.” Fact No. 7. “These wetlands represent an increasingly rare natural resource” and have been designated by the State as Special Aquatic Life Use Waters. Aplt.App.(II) 724 (E.P.A. letter).

Federal Highway’s decision arbitrarily failed to consider the obvious 32B impacts of floodplain dredging and construction for its 300-400’ wide traffic corridor across one mile of Haskell Farm floodplain. Aplt.App.(IV) 1244, ¶3.b. For the 32B freeway in operation on the Farm, its decision also failed to consider that:

“Wildlife and habitat functions and values would be diminished due to changes in water quality” and due to “[a]nimal habitat isolation, . . . roadkill mortality, roadway litter, wildlife disturbance, and the effects of habitat fragmentation.” Aplt.App.(II) 722.⁴³

For recreational purposes, Federal Highway’s decision failed to determine or consider 32B’s relevant noise impacts on visitors to the Farm’s historic structures or that:

"Constructing a four-lane limited access trafficway between the [Haskell] campus and the wetlands severely damages the connection between [Haskell] and the wetlands – essentially placing an impenetrable barrier between the [Haskell] family of students, faculty and friends and this wonderful natural area."⁴⁴

⁴³ The U.S. Fish and Wildlife Service concluded that even with 32B mitigation, “an alternative route that goes south of the Wakarusa River would result in less impacts to streams and wetlands.” Aplt.App.(II) 721-722.

⁴⁴ Aplt.App.(IV) 1482 (Lawrence City Commission letter).

Although 32B would attempt to build wetlands elsewhere, this does not help the Haskell Farm, nor does the 80% failure rate for wetland mitigation.⁴⁵ With 42A “encapsulation” of the Farm may be theoretically possible, but with 32B a freeway through its center is absolutely certain and would have much greater impacts. None of these relevant factors were considered in Federal Highway’s arbitrary evaluation of the floodplains and floodways. Aplt.App.(IV) 1244.

F. Effect on Planned Development.

Federal Highway argues that development south of the River with 42A would cause more Haskell Farm traffic and related secondary impacts. This false assumption of more traffic with 42A has been shown clearly erroneous by the actual traffic estimates. Although the estimates “assumed major development would occur south of the Wakarusa River,”⁴⁶ the Haskell Farm traffic was basically unaffected by 42A. Reply Brief 21.

Federal Highway improperly relied upon ordinary changes to planned development to find 42A imprudent, contrary to *Overton Park*. All new highways are going to raise new planning issues over development around them. In this

⁴⁵ R.E. Turner, A.E. Redmond and J.B. Zedler, *Count It by Acre or Function: Mitigation Adds Up to Net Loss of Wetlands*, Natl. Wetlands Newsletr. 23(6):5, 15 (2001), all members of the Committee on Mitigating Wetland Losses, “Compensating for Wetland Losses under the Clean Water Act,” National Research Council (National Academy Press, Washington, D.C., 2001).

⁴⁶ Aplt.App.(IV) 1200.

respect, there is no unusual problem here for 42A. It is located where new development is planned, in the Lawrence Urban Growth Area as expanded southward in 2004. Aplt.App.(IV) 1162, 1173. This southward expansion of the city has caused the local planning agency to now oppose 32B, and it has no problem with changing its land use plans to delete 32B. Fact No. 15(d).

G. Federal Highway arbitrarily considered 42A imprudent based upon non-existent impacts to other historic properties and impacts to trees.

Its decision found that 42A would have “no adverse effect” on the historic Mear’s Farm. Aplt.App.(IV) 1277. On appeal, it concedes this fact to be “*de minimus*,” but argues it is relevant. FHWA Brief 61. In this same manner, its entire decision was a clear error in judgment. It found 42A imprudent by accumulating such non-existent, minor or groundless criticisms for 42A while ignoring significant impacts for 32B. It is no wonder the district court had “misgivings” about Federal Highway’s Sec. 4(f) decision. p. A-2 (Aplt.App.(I) 350).

Federal Highway arbitrarily found 42A imprudent concerning Blanton’s Crossing. The Sec. 4(f) findings failed to consider relevant facts (buried elsewhere) that 1) 42A has no direct impact on it and 2) it is not historic. (Compare findings at Aplt.App.(IV) 1277 with Comment 4 Response facts at 1261-

1262.) The “indirect effects” alleged for 42A on appeal have already been exposed as arbitrary. FHWA Brief 61.

Although 42A’s freeway uses a few more trees than 32B, this ordinary condition of a highway through trees has little weight compared to 32B’s destruction of 53 wetland acres of a National Natural Landmark in the historic Haskell Farm’s center.

H. Federal Highway arbitrarily relied upon the alleged “net benefit” of 32B to find 42A imprudent.

Federal Highway’s Sec. 4(f) decision arbitrarily found net benefits for 32B based upon its relocations of 31st St., Haskell Ave. and Louisiana St. Aplt.App.(IV) 1278. The 32B freeway would bring 55,566 loud freeway vehicles across the Farm’s center.⁴⁷ Although these street relocations would help, 32B would still have 75,066 vehicles that impact the Farm, roughly 20,000 more than for No-Action (55,500) and 42A (56,500). Reply Brief 22. Thus, it was clearly erroneous for Federal Highway to find the 32B street relocations would cause a net benefit to the Farm. The decision states that 32B would protect the Farm from indirect impacts with 42A, but these impacts were arbitrarily found for 42A in the first place. Thus, the protection that is needed is from the net detriment of 32B’s

⁴⁷ “Traffic at 65 miles per hour sounds twice as loud as...30 miles per hour.” FHWA, Highway Traffic Noise, p. 2-3, <http://www.fhwa.dot.gov/environment/htnoise.htm>.

freeway traffic, whose noise impacts are still unknown due to the defective Noise Study.

The other net benefit alleged in the Sec. 4(f) decision was the 32B Mitigation Plan. Aplt.App. 1278. It was arbitrary to consider this Plan because its costs are not in the 32B Alternative. Although the 32B Mitigation Plan would provide some benefits to society and nature, this does not mean that 42A has unique problems. It was clearly erroneous to use this to find imprudence.

The benefits alleged for 32B do not protect the Haskell Farm's historic status, which is the purpose of Sec. 4(f). With the 32B freeway, its historic eligibility is in serious doubt. Fact No. 15(a)-(c). Nevertheless, Federal Highway failed to consider this issue. It admits that it failed to apply the relevant historic criteria to the facts. Its one sentence comment on future eligibility with 32B did not decide whether the Farm's historic status would continue, even with the alleged 32B benefits. Aplt.App.(IV) 1278-1279.

CONCLUSION AND RELIEF SOUGHT

Federal Highway's May 2008 Record of Decision ("ROD") must be reversed. It was based upon a substantially defective EIS, from which harmful error is presumed under *Catron County*. Its EIS failed to measure noise impacts, omitted 42C, misstated 32B's cost and failed to apply its standard for safety.

The ROD's Sec. 4(f) finding that 42A was imprudent must also be reversed. Using the defective EIS, its ROD and Evaluation failed to measure noise impacts, omitted any consideration of 42C under Sec. 4(f)'s different standards, misstated 32B's cost and ignored its standard for safety. The ROD found 42A imprudent using a host of arbitrary conclusions and clear errors in judgment. Federal Highway could not have reasonably believed 42A to be imprudent. Its ROD must be reversed for all of these substantial violations of NEPA and the APA.

Respectfully submitted,

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I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF** was furnished through (ECF) electronic service on this the 6th day of September, 2011, and hardcopies provided by U.S. mail, to the following:

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