THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITIZENS FOR MOBILITY; STUART WEISS; DONALD F. PADELFORD; RICHARD NELSON; RICHARD FIKE; THOMAS COAD; AND EMORY BUNDY,

Plaintiffs,

v.

NORMAN MINETA, Secretary of Transportation; JENNA DORN, Administrator of the Federal Transit Administration; RICK KROCHALIS, Regional Director, Federal Transit Administration, Region X; U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL TRANSIT ADMINISTRATION; AND CENTRAL PUGET SOUND REGIONAL TRANSIT AGENCY,

Defendants.

NO. C00-1812Z

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

CONTENTS

Plaintiffs respectfully submit this Reply Memorandum in Support of Renewed Motion for Partial Summary Judgment and in Opposition to Defendants' Motions for Summary Judgment herein.

INTRODUCTION

Plaintiffs make four main points in this Reply Memorandum:

1. Initial Segment's environmental impacts are significantly different than those of Central Link;

2. An EA, even an EA "on steroids," is not an adequate substitute for an EIS or SEIS;

3. Defendants' failure to conduct required alternatives analysis is unjustified; and

4. Defendants still do not have it right on the safety issues.

In Sections I through IV of this Reply Memorandum, plaintiffs address these four points. Before doing so, however, plaintiffs address the proper standard of review in this case.[1]

STANDARD OF REVIEW

In *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989), the Supreme Court stated that under the arbitrary and capricious review standard, a reviewing court must consider whether the challenged decision was based on relevant factors and whether there was a clear error of judgment. *Id.* at 378 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402,

[1] Defendants argue that plaintiffs have referred to matters outside the AR. While plaintiffs generally are content with the record in the AR, it should be noted that most of the documents referenced in plaintiffs' declarations either are in the AR or are closely related source documents from defendants' files. *See* Second Declaration of John D. Alkire, November 26, 2002 ("Second Alkire Dec."), ¶¶ 1-6 (filed herein). Furthermore, the Court may consider material outside the AR if respondents have relied on documents that are not in the AR, supplementation is necessary to explain technical terms or complex subject matter, or an agency's failure to explain action frustrates judicial review. *Friends of Payette v. Horseshoe Bend Hydroelectric Co*., 988 F.2d 989, 997 (9th Cir. 1993); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *corrected*, 867 F.2d 1244 (9th Cir. 1989). *See also Bean Stuyvesant, LLC v. United States*, 48 Fed. Cl. 303 (2000). Given the above, and the lack of specificity in defendants' complaints, the Court should reject their requests to strike materials from the record.

416 (1971)). The inquiry should be "searching and careful" but the ultimate review standard "is a narrow one." *Volpe*, 401 U.S. at 416. Defendants call this Court's attention to the "narrow" portion of this standard but not to the "searching and careful" portion. *Id.*

The Court in *Marsh* identified the need for deference to agency expertise in appropriate circumstances, but then emphasized:

> On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a *reasoned decision* based on its evaluation of the significance—or lack of significance—of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a *reasoned evaluation* "of the relevant factors."

490 U.S. at 378 (emphasis added). [2]

The Ninth Circuit has followed *Marsh* by focusing on *reasonableness* and the need for a *hard look* at the record. As the Ninth Circuit stated in *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998):

> Particularly with respect to the adequacy of an EIS, we apply a *'rule of reason'* that requires an agency to take a *'hard look'* to determine if the EIS contains a "*reasonably thorough discussion* of the significant aspects of the probable environmental consequences." However, this "reasonableness" review does not materially differ from an "arbitrary and capricious" review. *Marsh*, 490 U.S. at 377, n.23 . . . (noting that "difference between the 'arbitrary and capricious' standard and the 'reasonableness' standard is not of great pragmatic consequence").

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[2] The FTA ignores the quoted requirement in *Marsh* that a reviewing court search carefully for a "reasoned decision" and "reasoned evaluation"; it cites the case instead for the proposition that questions of substantial change and significant impact are examples of factual disputes, calling for deference to the discretion and presumed expertise of the agency. FTA brief at 11. Fairly read, *Marsh* stands for both propositions: While generally deferring to the agency on factual matters, the reviewing court must nevertheless insist upon proof of reasoned decision-making.

Id. at 1149 (citations omitted; emphasis added). Accord, *FOM* Decision at 8-9.[3]

I. INITIAL SEGMENT'S ENVIRONMENTAL IMPACTS ARE SIGNIFICANTLY DIFFERENT THAN THOSE OF CENTRAL LINK

As to whether the changes associated with the new Initial Segment project are "substantial," and whether the actual environmental impacts from those changes are "significant," the Ninth Circuit has stated clearly that any doubts on these issues are to be resolved in favor of full environmental disclosure:

> We have held that an EIS *must* be prepared if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." To trigger this requirement a "plaintiff need not show that significant effects *will in fact occur*" raising "substantial questions whether a project may have a significant effect" is sufficient.

Id., at 1149-50 (citations omitted).

Similarly, in *West v. Secretary of the DOT*, 206 F.3d 920, 927 (9th Cir. 2000), the court stated than if an agency first prepared an EA, and then determined, "based on factors specified in 40 C.F.R. § 1508.27(b), that 'substantial questions are raised as to whether [the] project *may*

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[3] Given these well established and controlling standards in NEPA cases, defendants' citation to review standards in non-NEPA cases is not particularly helpful. *See, e.g., FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (regulations pertaining to common ownership of radio and TV stations), *limited, U.S. West, Inc. v. FCC*, 182 F.3d 1244, 1999 U.S. App. LEXIS 20785, 1999 Colo. J. C. A. R. 5217 (10th Cir. 1999); *Food Mktg. Inst. v. ICC*, 587 F.2d 1285 (D.C. Cir. 1978) (regulation of common carriers); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (rulemaking regarding gasoline additives under the Clean Air Act). The cases cited by FTA for the proposition that plaintiffs have a "heavy burden" involve whether to list a species on the Endangered Species list, *Enos v. Marsh*, 616 F. Supp. 32 (D. Haw. 1984), *aff'd*, 769 F.2d 1363 (9th Cir. 1985), and Interstate Commerce Commission rulemaking, *Short Haul Survival Comm. v. United States*, 572 F.2d 240 (9th Cir. 1978).

Sound Transit's citation of authorities on standard of review is further afield. At page 11 of its brief, it suggests that plaintiffs have a "heavy burden," and cites this Court's Decision in *Monorail* at page 8 and *Volpe*, 401 U.S. at 419. One looks in vain at page 8 of this Court's *FOM* Decision to find the phrase "heavy burden." Likewise, the citation to *Overton Park* is well wide of the mark. The Court's discussion at page 419, cited by Sound Transit, contains no reference to standard of review. What the Supreme Court in *Overton Park* actually said regarding standard of review was: "[The agency's] decision is entitled to a presumption of regularity. . . . But that presumption is not to shield [agency] action from a thorough, probing, in-depth review." 401 U.S. at 415. Sound Transit also cites *Short Haul* in support of its proffered "heavy burden" standard, but again that is an ICC case, not a NEPA case.

cause significant degradation of some human environmental factor,' it must prepare an EIS." (Citation omitted; emphasis added).[4]

The Ninth Circuit has held repeatedly that absent record evidence of convincing reasons why potential effects on the environment are insignificant, an agency's decision to avoid an EIS is unreasonable. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). *See also Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1146-48 (D. Or. 1997) (if agency's decision supporting a finding of nonsignificance ("FONSI") is not based on evaluation of relevant factors, it is arbitrary and capricious).

A. Initial Segment Involves a Substantial Change With Significant Impacts in the Affected Environment That Have Not Been Analyzed in an EIS or SEIS

Defendants suggest that there really is no change from Central Link. Yet the record shows that the *FTA itself* identifies important factors causing significant new environmental impacts associated with Initial Segment. These matters, which involve especially the new plan to employ mixed use of buses and trains in the Downtown Seattle Transit Tunnel (DSTT), were not addressed in the FEIS. This point becomes clear upon comparison of DSTT analysis leading up to the 1999 FEIS with DSTT analysis from year 2001 onward.

In 1998, defendants commissioned a special report, the "Downtown Seattle Transit Tunnel (DSTT) Report," that examined both exclusive rail use and mixed bus-train use in the

[4] Title 40 C.F.R § 1508.27(b) sets forth factors to be considered in applying the term "significantly." Those considerations include: "The degree to which the proposed action affects public health or safety," (b)(2); "The degree to which the effects on the quality of the human environment are likely to be highly controversial," (b)(4); "The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," (b)(5); if the action considered cumulatively is significant, (b)(7); and other considerations.

DSTT. The 1998 report found mixed use to be unacceptable, and as a result defendants rejected the mixed-use approach in the 1999 FEIS. FEIS pp. 3-12, 3-13; AR 3224-25.

Then, in 2001, defendants commissioned another special report, this one called "Evaluation of Joint Operations in the Downtown Seattle Transit Tunnel, August 21, 2001." AR 502638-93. This report, consisting of 50 pages of single-spaced type, small font (AR 502638-93), *rejects* the conclusions reached just two years earlier in the 1999 FEIS and recommends instead that defendants proceed with the previously rejected mixed-use approach. *See* EA, pp. 8-9; AR 502513-14. On the strength of this new 2001 report, defendants elected to proceed with mixed-use in the DSTT for Initial Segment. *Id.*

An instructive case dealing with the question of project changes resulting from substantially revised governmental analysis is *Stop H-3 Ass'n v. Lewis*, 538 F. Supp. 149 (D. Haw. 1982), *aff'd in part and rev'd in part sub nom., Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984). In *Stop H-3*, the government wrote an EIS for a highway project, proposed a realignment, and wrote two additional SEISs. *Id*. at 154-56. Plaintiffs alleged one of the SEISs was inadequate for failing to address the H-3 alternative considered thereafter by agency staff. The court agreed with plaintiffs: "The fact that the Secretary's selection of the H-3 alternative instead of the recommended (T)H-3 alternative was largely based upon the results of the cost-benefit analysis [by government staff] indicates the significance of this information." *Id*. at 170. Because that government staff analysis was not addressed in the SEIS, the SEIS was held to be inadequate. *Id.*

Similarly, in this case, defendants' decision to implement Initial Segment with its mixed-use DSTT plan was based upon the results of the "Evaluation of Joint Operations in the Downtown Seattle Transit Tunnel, August 21, 2001." AR 502513-14. Here, as in *Stop H-3*, the effect of the new governmental analysis confirms the significance of the information.

Because the August 21, 2001 study obviously was not included in the 1999 FEIS, that FEIS is inadequate with respect to the important DSTT mixed use issues.

In November 2001, Sound Transit presented both its Joint Operations Report of August 2001 for the DSTT (AR 502638-93), and its draft EA (AR 502222-301), to the FTA for review and comment. AR 502221. After reviewing this material, the FTA raised a number of concerns regarding the DSTT mixed bus-train proposal. In a December 2001 memorandum to Sound Transit, the FTA stated: *"[M]any issues* below raised by the proposed joint use of the tunnel [DSTT] and the various tunnel bus technology alternatives *remain murky."* AR 502329 (emphasis added). The FTA asked a number of questions regarding reliability and speed of buses on surface streets versus buses in the DSTT under the mixed-use plan and regarding the effects of possible breakdowns and other malfunctioning in the DSTT. AR 502335-36.

The FTA then identified the following specific areas of concern regarding DSTT safety issues associated with the mixed-use plan (AR 502336):

- "Concerning the signal system and the potential for collisions between rail cars and buses, how and when will you know if the signal system works?"
- "Will there be testing [of the signal system]?"
- "How confident are you in the [signal system]?"
- "Is there any hazard of crossover collisions in the station areas?"
- "Why are bus-to-bus collisions estimated to be the same? Are there any operating conditions that may change accident rates? Buses will travel through in platoons. If there are no conditions of concern, please explain, briefly, and support."
- Do "[fire/life/safety issues] need to be resolved to safely accommodate joint bus/rail operations?"

- Do "[fire/life/safety issues] need to be resolved in order to fully evaluate the safety impact?"
- "What are the fire/life/safety issues that need to be resolved?"
- "How and when will they be resolved?"
- "Is this why buses and trains are not allowed in the tunnel at the same time? Is it related to hybrid buses? Please explain and address."

These important questions were not addressed in the FEIS. These questions arise because the Initial Segment proposal would change materially the conditions in the affected environment from those contemplated and discussed in the FEIS.

Moreover, the EA *does not answer the above questions.* Plaintiffs invite the Court to study the record provided with the following questions in mind: (1) have defendants really answered the critical DSTT safety questions raised by the FTA itself; and (2) should not these important safety issues be put through the scrutiny of a full EIS? The record shows that the issues regarding DSTT safety remain just as "murky" today as when the FTA raised its concerns in December 2001. [5]

B. Applicable Case Law Supports a Finding That Initial Segment Involves Significant Changes From Central Link

An analogous case, that by coincidence also involved the FTA as a defendant, sheds light on the issues in this matter. In *Preservation Coalition of Erie County v. Federal Transit Administration*, 129 F. Supp. 2d 551 (W.D.N.Y. 2000), *corrected, injunction granted, in part, injunction denied, in part*, *Pres. Coalition v. Fed. Transit Admin.*, 2001 U.S. Dist. LEXIS

[5] Exhibit B to the Second Alkire Dec. is a copy of AR 502336, containing the questions quoted in the text above. Exhibit C contains copies of AR 502338-42 and 502253-54, being excerpts of the draft EA submitted by Sound Transit to the FTA. Exhibit D contains copies of AR 502511-17 and 502530-31, being the corresponding pages of the final EA. In Exhibit D, portions added to the final EA, in apparent response to the questions posed, are outlined.

24654 (W.D.N.Y. Jan. 23, 2001) after completion of an EIS for a harbor redevelopment and transportation project, defendants discovered archaeological remains that may have been eligible for registration as historic sites. The FTA argued that the *possibility* of discovering such remains was listed in the EIS, and this was enough. The court disagreed, and ordered that an SEIS be prepared in light of the new discovery. *Id.* at 569-71. *Cf. Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998) (mere "listing" of mitigation measures does not qualify as "reasoned discussion" NEPA requires) (internal quotation marks and citation omitted).

Newly discovered archaeological remains and newly discovered plans for the DSTT admittedly involve different factual settings; plaintiffs nevertheless commend to this Court the careful reasoning of Judge Skretny in the *Preservation Coalition* case, involving as it did the same respondent federal agency.[6]

In *Association Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101, 1113-14 (N.D. Tex. 1985), the court found that an agency's new noise analysis and changes in the quality of the noise impact of a highway project—neither of which had been addressed in the EIS—would need to be addressed fully in an SEIS.[7] *See also Puerto Rico Conservation Found. v. Larson,* 797 F. Supp. 1074 (D.P.R. 1992) (revised highway construction plan, EIS required); *Ashwood Manor Civic Ass'n v. Dole,* 619 F. Supp. 52 (E.D. Pa. 1985) (revisions to expressway project required preparation of an SEIS), *aff'd*, 779 F.2d 41 (3d Cir. 1985).

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[6] Arguably the case for an SEIS is even stronger here: The choice of mixed or exclusive use of the DSTT was reasonably within control of defendants at the relevant time periods, whereas in *Preservation Coalition* the discovery of artifacts presumably was not within defendants' control at the time the EIS was written, i.e., it had to await commencement of excavation.

[7] By contrast, redesign of a freeway interchange that did not change visual site lines or otherwise cause changes to the physical environment did not trigger any supplementation requirement. *Price Rd. Neighborhood Ass'n v. U.S. DOT*, 113 F.3d 1505 (9th Cir. 1997).

In *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995), the EIS at issue discussed only alternatives available under a then-existing timber harvest contract in the affected area. Cancellation of that contract made other reasonable alternatives available, and failure to address them in an SEIS was error.

In *Idaho Sporting Congress*, 137 F.3d at 1152-54, the court held that failure to consider the effects of proposed timber sales on trout populations was improper, and an EIS was required. A similar result was reached in *Leavenworth Audubon Adopt-a-Forest Alpine Lakes Protection Society v. Ferraro*, 881 F. Supp. 1482 (W.D. Wash. 1995). In that case, the agency failed to analyze the effect of an action on the bull trout, even after an agency expert had stated it was "possible" bull trout existed in the proposed project area. *Id.* at 1487. The court determined that the agency finding of lack of significance was arbitrary and capricious, and therefore reversible error. *Id.* at 1487-88.

C. Cases Cited by Defendants are not Applicable

The cases cited by defendants are not applicable here. In *Half Moon Bay Fishermans Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 509 (9th Cir. 1988), for example, the alternative in question, "site B1," was specifically identified as an alternative, and addressed as such, in the supplemental EIS. In this case, by contrast, it is undisputed that "Initial Segment" was neither identified as an alternative nor fully addressed as such in the 1999 FEIS.

In *Northern Plains Resource Council v. Lujan*, 874 F.2d 661 (9th Cir. 1989), the proposal changed from a lease arrangement to a fee transfer arrangement, but this did not alter the actual impacts in the affected environment. Indeed, the court held that the actual environmental consequences of the alternative were "indistinguishable" from the action first

proposed. *Id.* at 666.[8] In this case, we do not have a mere change from lease to sale, or a new legal listing on a document in Washington, D.C. We have a material change of plans, two years after publication of the FEIS, that alters the physical impacts in the real, affected environment.

Arizona Cattle Growers' Ass'n v. Cartwright, 29 F. Supp. 2d 1100 (D. Ariz. 1998), cited by defendants, was a complex case involving amendment of a U.S. Forest Service plan covering forest territory throughout Arizona and New Mexico. At issue were the *planning* Draft EIS and the *planning* Final EIS. Plaintiffs contended there were too many changes between the Draft and Final EISs. *Id.* at 1103, 1110-13.

The court in *Arizona Cattle* emphasized that the planning guidelines at issue in the case were "not currently binding" and that "an additional NEPA process will be required when site-specific implementation occurs during a 'new *project* decision.'" 29 F.Supp. 2d at 1114 (emphasis added). The court noted that agency counsel "represented emphatically that the guidelines would not be enforced prior to a new *project* decision on a specific site," and affirmed: "Defendants are bound by these representations." *Id.* at 1119 (emphasis added).

Despite the foregoing safeguards, in *Arizona Cattle* the court still clearly struggled with the case, and it ruled in favor of the agency only reluctantly:

> While it is clear that the process invoked by the USFS was not ideal and may have resulted in some notice violations of NEPA . . . , these violations did not hamper the overall NEPA process. . . . [T]he court does not conclude that . . . the agency's findings on appeal were arbitrary and capricious.

29 F.Supp. at 1120-21.

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[8] *Accord, Forest Conservation Council v. Espy*, 835 F. Supp. 1202 (D. Idaho 1993), *aff'd*, 42 F.3d 1399 (9th Cir. 1994) (Chinook salmon was placed on a protected species list after an EIS was written pertaining to improvement of a forest development road; because the mere change in legal status of the Chinook did not change any of the environmental analysis in the EIS, no supplementation was required); *Enos v. Marsh*, 769 F.2d 1363 (9th Cir. 1995) (plant species added to ESA list).

Arizona Cattle offers no support to defendants here. It involved a *planning* EIS, not a *project* EIS. The material in question was contained in the Final EIS (although apparently not in the Draft EIS); here, by contrast, the Initial Segment changes in question were *not* addressed in the Final EIS. In *Arizona Cattle*, the scope and nature of impacts was not entirely clear, since no implementation could occur until defendants completed further NEPA procedures at the *project* stage; here, by contrast, defendants seek permission to build the Initial Segment project *now.*

Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp. 2d 1205 (D. Utah 1998), *rev'd in part on other grounds*, 222 F.3d 819 (10th Cir. 2000), involved a complaint that certain vehicle access to government lands was not addressed in an *EA.* The case did not involve an EIS, and therefore is inapposite here. The court nevertheless was "troubled" by the fact that disclosure even in an *EA* had not been more complete, *id*. at 1213, but upheld the agency action upon finding that the proposed vehicle use had been contemplated by the no-action alternative and several other alternatives that *were* addressed in the EA. *Id*. at 1214. That case, therefore, falls into that category of cases, like *Lujan,* in which the new development under review did not relate to any actual change in environmental impact. That is not the case here.

D. Defendants' "Sub-Part" Analysis Misses the Mark

Defendants try to ignore or minimize the actual, real impacts of Initial Segment that they did not address in the FEIS, and they argue instead that Initial Segment is just a "sub-part" of Central Link.

The FTA seems to acknowledge, however, that Sound Transit is no longer pursuing the Central Link project: "When it became apparent that *Sound Transit was not ready to proceed with the project specified in the FFGA*, the U.S. Department of Transportation decided to withhold appropriated Federal 'New Starts' funds." FTA brief at 5 (emphasis added). The FTA

then labors over what is evident from its own concession: The "project" now is "Initial Segment."[9] It is awkward at best for the FTA now to argue that Initial Segment is a "sub-part" of a project—Central Link—that no longer is being funded.

This puts us in relatively uncharted territory. It is uncommon to see a major federally funded project proceed as far as did Central Link in project planning and development, only to witness such wholesale changes, made after the Final EIS was written.[10] It is as if a highway department decided to build a highway from Seattle to Spokane, wrote the Draft and Final EISs, then decided it only had enough funding to build from Seattle to Issaquah, but then also wanted to put a bus corridor down the highway median, something not addressed in the EIS. At the *project* stage, such dramatic changes do not often occur, hence the parties' difficulty in citing cases directly on point to this one.

Where the parties disagree, of course, is regarding the *effect* of Sound Transit's decision to build one project, instead of another. FTA's position, it seems, is contained in its footnote 10 at page 14, where it proposes that FTA was "obligated to study the environmental impacts of the entire [Central Link] proposal, including those portions of the system which will not receive federal funding." *See also* FTA brief at 23 (FTA is obligated under NEPA "to consider the [Central Link] project in its entirety"). This seems just to be a different way of insisting that the

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[9] Defendants also labor over whether Initial Segment meets the "purpose and need" defined for the Central Link project. FTA declares, somewhat bashfully, that Initial Segment "comport[s]" with the defined purposes and needs. FTA brief at 23. Sound Transit suggests that it "fulfills" certain purposes and needs but studiously avoids discussing the specific Central Link project purposes and needs identified in the 1999 FEIS and quoted in plaintiffs' opening memorandum. *See* Sound Transit brief at 15-16. In *Sierra Club, Illinois Chapter v. U.S. DOT*, 962 F. Supp. 1037, 1043-45 (N.D. Ill. 1997), the court held that the agency had acted arbitrarily and capriciously by preparing a manifestly unreasonable definition of "purpose[ ] and need [ ]." By analogy, defendants' present decision to promote an Initial Segment project that manifestly will not fulfill the very purpose and need identified in the 1999 FEIS is evidence of arbitrary and capricious conduct.

[10] *Stop H-3* and the other highway construction cases discussed in the text accompanying n. 7, above, involved generally similar situations.

project is still "Central Link"—a point contested by plaintiffs and contradicted by the record. Regardless, the FTA's "entire proposal" defense founders on the very case cited in support of it.

Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1117-18 (9th Cir. 2000), *cert. denied*, 151 L. Ed. 2d 14 (2001), requires NEPA consideration of the "entire project [proposal]," which means that "connected or cumulative actions *must* be considered together to *prevent* an agency from dividing a project into multiple actions . . . ." (Internal quotation marks and citation omitted; emphasis added). *See also Northwest Res. Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1067 (9th Cir. 1995).

If, as defendants contend, the project still is "Central Link," they simply have not followed *Wetlands.* They have a southern section of Central Link, in Tukwila, that was not addressed in the 1999 FEIS but rather was first addressed in the 2000-01 Tukwila SEIS. AR 502888; 503003 et seq. They expect Central Link will proceed from Tukwila to the SeaTac Airport but have not yet documented that plan. *See* AR 502500. They expect Central Link will proceed north to the University District from downtown Seattle, but the SEIS for that endeavor has not yet been published. AR 502500. And, of course, they have the Initial Segment plan, for which only an EA was prepared.

Central Link has been chopped up into so many different and disparate pieces, and its project-wide environmental documentation now is so confusing, complex, or nonexistent, that one can scarcely fathom how the *Wetlands* requirement for comprehensive treatment can be met or is being met in this case. To date, no court has *prevented* defendants from impermissibly dividing the Central Link project into "multiple actions." *Wetlands*, 222 F.3d at 1118 (internal quotation marks and citation omitted). The time to do so is now.

Here is one useful way to consider the issue: Suppose one were simply to read the 1999 FEIS and then be asked these questions: Can you determine what the environmental impacts of

routes north of downtown Seattle will be, assuming that none of the options addressed in the FEIS is selected? Can you determine what the environmental impacts of routes between the south end of Boeing Field and S. 154th Street will be, assuming that none of the options addressed in the FEIS is selected? Can you determine what the environmental impacts of routes between S. 154th Street and SeaTac Airport will be, assuming that none of the options addressed in the FEIS is selected? Can you determine what the environmental impacts in the DSTT will be, assuming that the mixed bus-train plan *rejected* in the FEIS is actually *selected*? The answer to all of these questions is NO, assuming as posited that the only source of information is the 1999 FEIS.[11] *See Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1356 (9th Cir. 1994) (district court should examine EIS and make "'a pragmatic judgment whether [its] form, content and preparation foster both informed decision-making and informed public participation'") (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

This is not a situation in which defendants may "have it both ways." The law does not allow the FTA to say that it is only funding the Initial Segment project but is performing the environmental review for the whole Central Link plan—without in fact performing the coordinated, comprehensive review required by *Wetlands* for all of Central Link.[12] Plaintiffs suggest that defendants' unwillingness to provide a comprehensive environmental review of the

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[11] Indeed, the *only* portion of the entire, original, 21-mile Central Link plan that still remains substantially as described in the 1999 FEIS is the surface segment, approximately five miles long, from the south end of the DSTT extending south through Rainier Valley to the south end of Boeing Field at the Boeing Access Road. Everything else has changed dramatically.

[12] Nor can defendants escape the *Wetlands* requirement by some form of "segmentation" argument. As Sound Transit acknowledges, *FOM* Reply Brief at 11 [Exhibit A to Second Alkire Dec.], this doctrine is reserved to support review of a *project* that is a segment of a larger program. Since in their briefing here, defendants do not seem to acknowledge that Initial Segment by itself is a "project," segmentation analysis is not available. Segmentation analysis may not be employed to justify limiting the scope of review to just a *part* of a project, for such a result would fly directly in the face of *Wetlands'* prohibition against "dividing a *project* into multiple actions." 222 F.3d at 1118 (internal quotation marks and citation omitted; emphasis added).

entire Central Link project, as it has been materially modified since 1999, is a tacit admission that Central Link is not the project after all.[13]

II. AN EA, EVEN AN EA "ON STEROIDS," IS NOT A SUBSTITUTE FOR AN EIS OR SEIS

In determining whether supplementation of an EIS is necessary, the court seeks to determine whether the agency has made "substantial changes" in the proposal or whether there are "significant new circumstances or information," within the meaning of 40 C.F.R. § 1502.9(c). In conducting this inquiry, the court should apply a rule of reason similar if not identical to the rule of reason applied in *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998).

The FTA quotes 40 C.F.R. § 1508.9(a) for the proposition that an EA is "a concise public document . . . that serves to *[b]riefly* provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact ["FONSI"]." FTA brief at 9 (emphasis added).[14] The FTA then contrasts the EA with the EIS, which is a " 'detailed written statement' that requires *in-depth analysis* of all potential environmental impacts

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[13] Federal defendants accuse plaintiffs—wrongly—of using "semantics," of turning NEPA into a "game," and of studying "a project of the magnitude of the Central Link Light Rail Project 'to death.'" In truth, defendants' own actions have placed them in their current predicament. Their material project changes, their refusal to define the scope of the project properly, and their unwillingness to give either Initial Segment or Central Link the full and comprehensive environmental review that NEPA requires, are the causes of the problem.

[14] Federal defendants complain of plaintiffs' citation to an answer in the "NEPA Forty Most Asked Questions" guideline for the proposition that a lengthy EA tends to suggest an EIS is needed. Yet they themselves cite to not one but two regulations requiring EAs to be "brief." 40 C.F.R. § 1508.9(a), 1508.9(b). Federal defendants urge, properly, that these regulations are to be given "substantial deference." FTA brief at 9, citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989).

It is hard to see any real analytical separation between regulations calling for brevity and a guideline suggesting: "[I]n most cases a lengthy EA indicates an EIS is needed." Thus, it is hard to understand how, as defense would have it, FTA brief at 12 n.7, the quoted guideline is "an inaccurate representation of what the law requires" or imposes "additional requirements" beyond those in the NEPA regulations cited. Importantly, neither of the cases cited by federal defendants in their footnote 7 deals with the page-length guideline plaintiffs have cited. Both *Friends of the Earth* and *Cabinet Mountains* involved the guideline pertaining to *mitigation* measures; neither case supports defendants' contention that the EA guideline is an inaccurate representation of the "brevity" regulations in question.

as well as an extensive and lengthy public participation process." *Id.* at 10 (citing 40 C.F.R. § 1502, 1508.11) (emphasis added). Plaintiffs agree that contrasting the purposes and function of an EA with those of an EIS (or SEIS) is a useful exercise.

Defendants have argued that issues such as the environmental effects of mixed bus-train use in the DSTT have been "fully explored" and "exhaustively analyz[ed]" in the EA. *See* FTA brief at 22 n.18. Plaintiffs do not agree that defendants analyzed these issues adequately (*see, e.g.*, Section I of this Reply Memorandum), but in a very real sense that may not matter.

By emphasizing the allegedly "full" and "exhaustive" analysis regarding mixed bus-train use in the DSTT, defendants implicitly recognize the importance of the issues addressed and implicitly suggest that they conducted a form of analysis that should have been conducted in an SEIS or EIS, rather than in a "brief" EA. They are acknowledging what is obvious: They have generated an EA "on steroids" in this case. The length, breadth, and depth of defendants' analyses in the EA speak to the significance of the DSTT issues and other issues they now would minimize.

Defendants should not be allowed to circumvent NEPA's requirements simply by generating a "super-sized" EA and then arguing, in effect, that somehow it is "enough." As explained above, the EA and the EIS serve very different functions, and the EA is not a substitute for an EIS. By arguing, in so many words, that "the EA is enough," defendants really are asking this Court not to do its job. In essence, they are asking the Court not to review the agency action, and to simply defer to defendants' desire for finality. This would not be right.

III. DEFENDANTS' FAILURE TO CONDUCT REQUIRED ALTERNATIVES ANALYSIS IS UNJUSTIFIED

As the Ninth Circuit has stated, "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Citizens for a Better Henderson v.*

Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985). *See also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995). Presuming defendants would argue Initial Segment now is a viable alternative, the record shows it was not an alternative identified, let alone fully evaluated, in the 1999 FEIS; and it never has been compared with any other alternative except no action. In other words, defendants ask this Court to "clear the boulders aside" for an Initial Segment project that never has been compared to anything except *doing nothing*.

Plaintiffs agree with defendants that review of their alternatives analysis is subject to the "rule of reason" standard. Plaintiffs argue it is *reasonable,* even *necessary,* to *integrate* defendants' own alternatives analysis requirements, which are applicable to consideration of possible FTA funding, with alternatives analysis under NEPA—and, conversely, *unreasonable* not to do so. Defendants argue the opposite. (See FTA brief at page 17, n.14.)

Elsewhere federal defendants admit, as they must, that one of the essential aims of NEPA is to "inject environmental considerations into the federal agency's decision making process." FTA brief at 9 (citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981)). Sound Transit admits, as it must, that "[t]he scope of a NEPA EIS must be assessed in the context of the other federal statutes and regulations at issue."[15]

NEPA Regulations require agencies to "integrate the NEPA process with other planning." 40 C.F.R. § 1501.2. The EIS is to serve as an "action-forcing device," so that NEPA policies and goals are "infused" into federal decision-making. 40 C.F.R. § 1502.1. An EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g).

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[15] ST Reply in *FOM* at 3 [Exhibit A to Second Alkire Dec.] (citing *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986)).

The statutes and regulations pertaining to funding for light rail projects apply these general principles of integration to the specific matter of alternatives analysis. Both NEPA and FTA's governing statute for light rail projects require alternatives analyses. 42 U.S.C. § 4332(2)(c); 49 U.S.C. § 5309(e)(2)(A). 49 U.S.C. § 5309(e)(2)(B) requires the agency to decide if a light rail project is "justified based on a comprehensive review of its mobility improvements, *environmental benefits*, cost effectiveness, and operating efficiencies." (Emphasis added.) In order to render this decision, the agency is to "consider the direct and indirect costs of *relevant alternatives*" and consider "factors such as congestion relief, improved mobility, air pollution, noise pollution, congestion, energy consumption, and all associated ancillary and mitigation costs necessary to carry out *each alternative* analyzed." 49 U.S.C. § 5309(e)(3)(A)–(B) (emphasis added).

Federal defendants do not explain how they can possibly conduct the comprehensive review of alternatives contemplated by § 5309(e) without integrating the alternatives analysis between NEPA and other agency decision-making. In the face of their silence, 49 U.S.C. § 5328(a)(1) does explain what must be done: When a light rail project advances to the "*alternatives analysis* stage," the agency "*shall* cooperate with the applicant in *alternatives analysis* and in preparing a *draft environmental impact statement*." (Emphasis added).[16]

FTA's NEPA regulation, 23 C.F.R. § 771.125(a)(1), states that after circulation of the draft EIS, a final EIS shall be prepared, and it "shall identify the preferred *alternative* and evaluate *all reasonable alternatives considered.*" (Emphasis added). Surely the word

[16] Title 49 U.S.C. § 5324(b) (cited as authority by the FTA in its Amended ROD, page 13, AR 502708) requires the agency, in carrying out 49 U.S.C. § 5309, to determine that "(2) . . . the project application includes a statement on—(A) the *environmental impact* of the proposal; (B) *adverse environmental effects* that cannot be avoided; (C) *alternatives* to the proposal; and (D) irreversible and irretrievable *impacts on the environment*." (Emphasis added). Thus, environmental analysis under NEPA is connected directly to the FTA's analysis of project factors under 49 U.S.C. § 5309.

"considered" here means "considered by the agency." If an agency "considers" an alternative pursuant to 49 C.F.R. pt. 611, is that not an alternative that must be identified and considered in the EIS? What permissible reading of these regulations would allow for a contrary conclusion? Conversely, since Initial Segment is an alternative now being "considered" by FTA, why was it not "evaluated" in the EIS within the meaning of 23 C.F.R. § 771.125(a)(1)? Is that failure not error?

FTA's apparent response is to argue that one must simply apply blinders: One must examine alternatives under 49 U.S.C. § 5309 on the one hand, and under NEPA on the other hand, but the left hand need not know what the right hand is doing. The problem is that FTA's position, as set forth in its legal memorandum in this case, directly contradicts its own governing laws and regulations on point. In such a case, the terms of those laws and regulations—not what government counsel now says about them—must prevail.

California v. Block, 690 F.2d 753 (9th Cir. 1982), is especially helpful here on the subject of alternatives analysis. In *Block*, a NEPA and Wilderness Act case, the Ninth Circuit determined that the agency failed to consider sufficient alternatives in the Final EIS. Specifically, by failing to consider alternatives to designate more forestland for wilderness use, the EIS effectuated a trade-off between wilderness use and development, and potentially curtailed the available range of uses, without *analyzing* the trade-off or potential curtailment. *Id.* at 762-67. The court noted that the decision in question would affect matters for a period of 10 to 15 years, and stated: "The foreclosing of the wilderness management option requires a

careful assessment of how this new management strategy will affect each area's benchmark characteristics as identified in the Wilderness Act." *Id.* at 764.[17]

In this case, defendants have effectuated a significant trade-off without subjecting it to full analysis in the FEIS. The original, Central Link plan called for exclusive rail use of the DSTT, but one effect of that configuration was to displace hundreds of Metro buses to downtown Seattle surface streets, causing substantial congestion and potential air pollution problems. *See* Plaintiffs' [First] Memorandum in Support of Partial Summary Judgment, July 13, 2001, filed herein, at pp. 10-15, and authorities cited. With Initial Segment, by abandoning the plan for exclusive rail use of the DSTT, defendants have ameliorated some of the problems on downtown Seattle surface streets, but the trade-off involves implementation of a novel, less safe, less efficient, mixed-use DSTT plan. Defendants have stated this mixed-use plan would remain in effect until at least year 2016, a significant duration not unlike that at issue in *California v. Block*. As in *Block*, the trade-off identified above has not been addressed in the FEIS; the mixed-use plan was *rejected* in the FEIS, not *analyzed* there.

The FTA's own NEPA regulations address an important aspect of this trade-off situation as posited in *Block*. Title 23 C.F.R. § 771.130(b)(1) states than an SEIS is not necessary if the changes to the proposed action "result in a lessening of adverse environmental impacts evaluated in the EIS *without causing other environmental impacts that are significant and were not evaluated in the EIS* . . . ." (Emphasis added). Here, as described above, with the mixed-use plan defendants have lessened certain adverse impacts on downtown Seattle surface streets but have created new environmental impacts in the DSTT that have not been evaluated in an EIS.

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[17] In the passage quote in the text above, the court in *Block* clearly integrated the considerations under both NEPA and the Wilderness Act—precisely the type of integrative analysis advocated by plaintiffs, and opposed by defendants, in this case.

Turning to the matter of TSM baseline alternatives analysis, Sound Transit continues to argue mistakenly that it is not required at the project EIS stage. Both federal and local defendants seem poised to admit, however, that TSM alternatives analysis *is* required at the project stage for FTA funding purposes. Sound Transit brief at 17-18 (citing 49 C.F.R. § 611.7); FTA brief at 24 (citing 49 C.F.R. § 611.5).[18] The argument that TSM alternatives analysis for project funding purposes may be separated from NEPA alternatives analysis is cut from the same defective cloth as the FTA's "left hand-right hand" analysis, discussed above.

Sound Transit's fallback position is that in any event, no harm is done because TSM alternatives analysis was conducted in the 1993 EIS, at the planning stage. Yet it does not explain, and cannot explain, how a local analysis in a 1993 *planning* EIS is sufficient to satisfy requirements of federal law that the TSM baseline alternative be addressed six years later at the *project* stage. *See* 49 C.F.R. § 611.5, -611.7. Equally troubling is the fact—overlooked by Sound Transit—that TSM was not compared to *light rail* as an alternative in 1993; indeed, that comparison never has been made.[19]

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[18] That the FTA's own regulations specifically require analysis of the TSM baseline as an alternative to light rail, but do not require analysis of monorail, separates our argument here from arguments in the previous *Monorail* litigation. Defendants' arguments to the contrary miss this essential point.

[19] In the 1993 planning EIS, TSM was compared with TSM/Transitway and Rapid Rail/TSM. Sound Transit Brief, *FOM* at 2-3 (copy attached as Exhibit D to Nelson Dec). That same 1993 EIS rejected light rail, finding that "surface light rail would not be fast enough to serve the entire, three-county region." *Id.* at 3. The *surface light rail* concept *rejected* in 1993 is now being *proposed*. Nelson Dec., ¶¶ 3-29.) The surface light rail now being proposed for Initial Segment was never compared with TSM—not in 1993, and not at any other time. *Id.*, ¶¶ 30-37).

Mischievously, Sound Transit attempts to "fuzz over" these facts by asserting, at page 1 of its brief, "Sound Transit evaluated alternatives, including non-rail alternatives, to the Central Link Project at the local, non-project level . . . ." A simple review of chronology exposes the falsity: In 1993, the only time TSM was reviewed, there was no "Central Link Project." Central Link was not defined, at the project level, until 1996 (AR 3159-60); from that point onward it never has been compared to TSM.

Sound Transit commits further chronological error in claiming, at page 14, that "Initial Segment and specific alternative routs [sic] were subjected to a complete alternatives analysis as part of the FEIS and Tukwila SEIS." Because Initial Segment was not defined until the autumn of 2001 (*See* AR 502696), it is a bit

IV. DEFENDANTS' SAFETY ISSUES HAVE NOT BEEN ADEQUATELY ADDRESSED, AND MITIGATION OF SAFETY RISKS HAS NOT BEEN ORDERED

Transportation systems—particularly urban mass transportation systems—are accompanied by significant safety concerns. Why, then, have Sound Transit and FTA not addressed those concerns adequately? As explained above in Section I.A, defendants have not adequately addressed the safety issues raised by the FTA itself in connection with consideration of the DSTT mixed-use plan.

Correlatively, risks that may be identified must be mitigated, and mitigation plans "must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *City of Carmel-by-the-Sea v. U.S. DOT*, 123 F.3d 1142, 1153-54 (9th Cir. 1997) (internal quotation marks and citation omitted). The mere "listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 (internal quotation marks and citations omitted).

Here, in its Amended ROD, the FTA has stated that "the proposed changes to the project, *with the mitigation to which Sound Transit has* committed," would not have significant adverse impacts. AR 502706 (emphasis added). However, the Amended ROD contains *not a word* in its mitigation plan, AR 502708, 502751-87, about mitigating any of the risks associated with mixed bus-train use of the DSTT. *See* AR 502755.[20]

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implausible to argue it was subjected to a complete alternatives analysis in an FEIS published in 1999 or an SEIS published in draft form in October 2000. *See* AR 502888.

[20] Assuming, without deciding, that a comprehensive mitigation plan might help obviate the need for an SEIS in a particular case, *see, e.g.*, *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996), there is no such mitigation plan in the Amended ROD, AR 502696 et seq., applicable to the issues presented by Initial Segment's DSTT mixed-use proposal. By contrast, the downtown Seattle surface street problems presented by the Central Link plan were subjected to extensive mitigation requirements in the 1999 FEIS and the original January 2000 ROD. See AR 13802; 13829-31.

In the Rainier Valley, Sound Transit's plan calls for surface light rail, with multiple, mixed-use intersections—the same type of system that was *rejected* by local planners in the 1993 EIS. (*See* footnote 19 and accompanying text). Defendants rely heavily on the court's opinion in *Save Our Valley* for the proposition that Rainier Valley safety issues have been adequately addressed. *See* Sound Transit brief at 21. Plaintiffs do not quarrel with the language in that opinion but merely ask this Court to *examine the pages of the AR cited therein* to confirm that the record does not adequately address the prospect of *fatalities* caused by *this surface light rail project in the Rainier Valley.* [21]

Defendants' statement, at AR 8408, that "[n]o fatalities resulted from light rail collisions in systems surveyed by Korve Engineering in 1999," is plainly wrong.[22] The official U.S. Department of Transportation Bureau of Transportation Statistics (BTS) report for 1999 identifies **91** light rail fatalities between 1990 and 1999, inclusive, or an average of **nine** fatalities **per year** for light rail.[23] Defendants' failure to specifically analyze the likelihood of fatalities caused by surface grade light rail in the Rainier Valley remains unexplained.

CONCLUSION

Considering the relevant factors and the rule of reason, this Court should conclude that an EIS or, at a minimum an SEIS, is required for the light rail project plans at issue in this case.

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[21] FEIS pages 3-58 to 3-59 are found at AR 3270-71; Transportation Technical Report pages 194-95 are found at AR 8407-08; FEIS pages 4-161 to 4-162 are found at AR 3461-62; additional safety discussion regarding Rainier Valley is found at AR 3261-62.

[22] In fact, Korve did identify fatalities resulting from light rail activity at pages 3, 4, 28, and 29 of its report. (Copy attached as Exhibit B to Declaration of John Niles, September 12, 2002 and filed herein.)

[23] *See* Exhibit F to Second Alkire Dec. USDOT-BTS statistics are cited as authority in the FEIS at page 4-161 (AR 3461).

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By _____
John D. Alkire, WSBA #2251
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 583-8458

By _____
Jon W. MacLeod, WSBA #8491
1201 Third Avenue, Suite 5100
Seattle, WA 98101
(206) 621-6581

SAVITT & BRUCE

By _____
James P. Savitt, WSBA #16847
1305 Fourth Avenue, Suite 414
Seattle, WA 98101-2406
(206) 749-0500

Attorneys for Plaintiffs