No. 03-35540

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Citizens for Mobility, et al.,

Plaintiffs/Appellants

v.

Norman Mineta, et al.,

Defendants/Appellees.

On Appeal From the United States District Court for the Western District of Washington

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Opening Brief of Appellants

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I. STATEMENT OF JURISDICTION

(a) The statutory basis for subject matter jurisdiction of the district court is 5 U.S.C. § 706, the Administrative Procedure Act.

(b) The final judgment of the district court is appealable under Fed. R. Civ. P. 54(b). The Ninth Circuit has appellate jurisdiction under 28 U.S.C. § 1291.

(c) The final judgment was entered June 11, 2003. The Notice of Appeal was filed June 23, 2003. The appeal is timely pursuant to FRAP 4(a)(1).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, require preparation of an Environmental Impact Statement ("EIS") or Supplemental Environmental Impact Statement ("SEIS") for the proposed "Initial Segment" rail transit project in Seattle and Tukwila, Washington?

2. Is appellees' Environmental Assessment ("EA") for the Initial Segment rail project, including its finding of nonsignificance ("FONSI"), invalid and unlawful under NEPA?

3. Have appellees failed to comply with NEPA's requirements for discussion of reasonable alternatives?

4. Have appellees failed to include adequate mitigation measures under NEPA for the proposed Initial Segment rail project?

III. STATEMENT OF THE CASE

Nature of the Case

Plaintiffs-appellants are the unincorporated association Citizens for Mobility and six individual members (collectively, "CFM"), organized to promote environmentally friendly, cost-effective solutions to the transportation and traffic congestion problems in the Central Puget Sound region of Washington state. CFM challenges appellees' decision not to prepare an EIS or SEIS for their planned "Initial Segment" rail transit project.

Defendant-appellee Norman Mineta is the Secretary of the U.S. Department of Transportation, and defendants-appellees Dorn and Krochalis are officials of the Federal Transit Administration, an agency or division of the U.S. Department of Transportation. These individuals are sued in their official capacities. These individual and agency defendants-appellees are referred to, collectively, as "FTA."

Under federal law, FTA is charged with administering a program of grants for proposed rail transit projects. *See, e.g.,* 49 U.S.C. § 5309(e). In connection with that federal authority, it must ensure compliance with NEPA on all proposals for federal funding of rail transit projects.

Defendant-appellee Central Puget Sound Regional Transit Agency ("Sound Transit") is a public agency created under the laws of Washington State. Sound Transit is the agency proposing to build and operate the multibillion dollar "Initial Segment" rail project, and seeks FTA grant funding of at least $500 million for the project.

Course of Proceedings

In November 1999, FTA and Sound Transit published a final EIS ("FEIS") for a proposed 21-mile "Central Link" rail project. In 2001, with this lawsuit pending, Sound Transit decided not to build Central Link and instead defined a new (or newly revised) 14-mile rail project called "Initial Segment." FTA determined an EA would be needed for the newly defined "Initial Segment" project, and the district court stayed proceedings pending publication of the EA. FTA's final EA, published in May 2002, included the FONSI which is challenged here. FTA issued an Amended Record of Decision ("Amended ROD"), incorporating the final EA and its FONSI.

In August 2002, CFM filed its Second Amended Complaint, asserting that FTA's failure to prepare an EIS or SEIS for the Initial Segment violated NEPA. The parties submitted the NEPA issues to the district court on cross summary judgment motions.

Disposition Below

On March 19, 2003, the district court conducted a hearing on the cross summary judgment motions. It issued a written order on April 22, 2003 (docket no. 72, hereinafter "Order"), in which it ruled in favor of FTA and Sound Transit, and against CFM, on all issues presented. The district court entered final judgment on June 11, 2003 (docket no. 74). From that judgment, and from the district court's Order of April 22, 2003, CFM appeals.

IV. STATEMENT OF RELEVANT FACTS

In November 1996, Sound Transit obtained approval to pursue a proposed "Central Link" rail project, consisting of a 21-mile line extending from a northern terminus at Northeast 45th Street in Seattle to a southern terminus at South 200th Street, just south of the Seattle-Tacoma International Airport ("Sea-Tac Airport"). (AR 502696; *see also* AR 502505-06.)[1]

FTA and Sound Transit published an FEIS for the Central Link project in November 1999. (AR 3043-4012.) An alternative route southward (the "Tukwila freeway route") was later identified and analyzed in a November 2001 SEIS. (*See* AR 502500.)

By 2001, however, Sound Transit determined it could not afford to build the 21-mile Central Link project. (AR 502506.) Accordingly, Sound Transit made two important decisions. First, it agreed to study new, alternative rail routes north of downtown Seattle; Sound Transit is presently in the process of preparing an SEIS for those northern alternatives. (AR 502500.)

Second, in September 2001, Sound Transit identified an "Initial Segment" rail project, consisting of 14 miles of line running from Convention Place in Seattle's CBD to South 154th Street in Tukwila, short of the Sea-Tac Airport. (AR 502500.) The Initial Segment plan calls for the mixed use of buses and rail in the

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[1] The abbreviation "AR" refers to the Administrative Record, lodged by FTA with the district court, docket no. 48. The page numbers listed immediately after the abbreviation "AR" are the page numbers of that administrative record.

Downtown Seattle Transit Tunnel ("DSTT") in Seattle's CBD. (AR 502500.) By contrast, the Central Link plan had rejected such mixed use for many reasons, including efficiency and safety, and called instead for exclusive rail use of the DSTT. (AR 3224-25; 502216; 502500; Order at 25.) The Initial Segment project, including its proposed mixed bus/rail use of the DSTT, was *not* evaluated as an alternative in the 1999 FEIS. (*See* AR 3224-25.)[2]

The DSTT presently handles 23,000 boardings per day. (AR 502641-42.) Extending 1.3 miles and including five in-tunnel passenger stations, it is the most important public transit facility in Washington State. In contemplation of the new Initial Segment plan to mix buses and rail in this important facility, Sound Transit conducted a study, the August 2001 "Evaluation of Joint Operations in Downtown Seattle Transit Tunnel [DSTT]." (AR 502637-93.) In that study Sound Transit included a report on "Fire/Life/Safety Issues" that found in pertinent part: "[T]he introduction of light rail vehicles [with buses] in the transit tunnel will *significantly change* the operation of the tunnel." (AR 502688; emphasis added.) FTA and Sound Transit also found that mixed bus/rail use inside a tunnel, with tunnel stations, as now proposed for Seattle's DSTT, has not been attempted anywhere else in the world. (AR 502817.) It is a unique and untested project proposal.

In November 2001, Sound Transit presented to FTA for review and

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[2] Also, the record makes it clear that the "TSM Baseline alternative," evaluation of which is required by FTA regulations, was not addressed in the 1999 FEIS. *See* Order at 23.

comment both its August 2001 "Evaluation of Joint Operations in Downtown Seattle Transit Tunnel" (AR 502637-93), and its preliminary review draft EA. (AR 502221-301.) In response, FTA staff raised a number of questions and concerns (AR 502326-41) and stated: "*[m]any issues* below raised by the proposed joint use of the tunnel and the various tunnel bus technology alternatives *remain murky.*" (AR 502329; emphasis added.)

Among the FTA questions were specific queries about fire/life/safety issues. (AR 502336; *see also* the listing of questions in the Order at 19.) Two of those questions were: (1) Do "[fire/life/safety issues] need to be resolved to safely accommodate joint bus/rail operations?" and (2) Do "[fire/life/safety issues] need to be resolved in order to fully evaluate the safety impact?" (Order at 19.)

In February 2002, FTA submitted a draft EA to the public for review and comment. (AR 502491-693.) FTA received some 139 written comments regarding the Initial Segment EA. (*See* AR 502789 *et seq.)* It elected not to include the written comments from the public in the record, but FTA's own responses to these comments consist of 79 pages. (AR 502789-867.)[3]

FTA issued its Amended ROD in May 2002 (AR 502694-887), and concluded that the proposed changes reflected in the Initial Segment proposal,

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[3] Public comment is a factor to consider in assessing a proposal's environmental impact. *California v. Block,* 690 F.2d 753, 771-72 (9th Cir. 1982). *See also* 40 C.F.R. § 1508.27(b)(4) (degree of controversy); *Public Citizen v. Dep't of Transp.,* 316 F.3d 1002, 1027 (9th Cir. 2003) (same).

"will have no new significant adverse impacts on the environment beyond those previously evaluated in the [1999 Central Link EIS]." (AR 502706.) Accordingly it determined an SEIS was not required. (*Id*.)

The mixed bus/rail safety questions raised by FTA staff are not answered in the final EA, except with conclusory statements that amount to dismissal of those questions:

- "an improved signal system has been developed to . . . increase safety";
- "Analysis has shown that fire/life/safety and other issues can be addressed with joint operations"; and
- agencies "have developed solutions" regarding "fire/life/safety . . . signaling, and other issues."

(AR 502513.) The referenced "Analysis" and "solutions" are not included, and the referenced "other issues" are not defined or discussed.[4] The unprecedented mixed bus/rail system has not been tested.[5]

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[4] *Compare* AR 502239-42, in the November 2001 preliminary review draft EA, *with* AR 502514-17 and 502530-31, in the final EA.

The district court states that under the new plan: "Joint operations will not be dependent on operator judgment . . . ." (Order at 27, ¶ 6E.) This statement is incorrect. In the summary of the "Bus/Train Separation and Signal System" FTA states that both trains and buses *"would remain under the control of on-board operators."* (AR 502514; emphasis added.) FTA notes further that: "If the new signal system fails, *the backup is . . . the central control operator* . . . . If this system also failed, *personnel would be dispatched in the tunnel to control traffic.*" (AR 502530; emphasis added.)

[5] FTA has suggested that "[l]ive tests using a proxy for a light rail train may be considered in the future"(AR 502817), and that "[t]he safety of joint operations will be demonstrated before revenue service begins" through "extensive testing" during tunnel closure. (AR 502818.) In other words, this unprecedented mixed

Thus, with respect to Initial Segment the record reflects a "significant change," "murky" issues, unanswered questions, no analysis of alternatives, and no testing. Despite this, FTA has failed and refused to prepare an EIS or SEIS for Initial Segment.

V. SUMMARY OF ARGUMENT

Sound Transit and FTA propose to build a multibillion dollar "Initial Segment" rail project that would include, as a main feature, a first-of-its-kind mixed bus/rail system in the DSTT, in the heart of Seattle's CBD. FTA and Sound Transit have admitted that the new mixed-use plan for the DSTT will "significantly change" the operation of the tunnel, implicating fire, life and safety issues. Yet the environmental analysis of this proposal consists only of an EA.

The 1999 FEIS, prepared for a different project ("Central Link"), did not evaluate "Initial Segment" as a defined alternative, and did not evaluate the mixed bus/rail system proposed for the DSTT. Indeed, Initial Segment never has been evaluated as an alternative in any FEIS or SEIS, and never has been compared with the "Transit Systems Management [TSM] Baseline alternative" as required.

The district court failed to insure that FTA took a "hard look" at environmental consequences. The court failed to identify any convincing statement of reasons in the record showing that the environmental effects at issue are not significant. It erred further by concluding that an EA could act as a

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use plan has yet to be tested. *See* Order at 28.

substitute for an EIS or SEIS, that binding requirements for evaluation of alternatives could be ignored, and that mitigation measures need not be established.

The Ninth Circuit should reverse the district court's order, and remand with instructions that an EIS or SEIS be prepared for "Initial Segment."

VI. ARGUMENT

A. STANDARD OF REVIEW

This court reviews *de novo* a district court grant of summary judgment. *Wetlands Action Network v. U.S. Army Corps of Eng'rs,* 222 F.3d 1105, 1114 (9th Cir. 2000) *cert. denied*, 534 U.S. 815 (2001).

The judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, govern review of agency action to determine its conformity with NEPA. *Public Citizen v. Dep't of Transp.,* 316 F.3d 1002, 1020 (9th Cir. 2003). The reviewing court must determine that agency actions are not "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

"In considering whether an agency acted in an arbitrary and capricious manner, a court 'must determine whether the agency articulated a rational connection between the facts found and the choice made.'" *Id.* (quoting *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife,* 273 F.3d 1229, 1236 (9th Cir. 2001)). Courts must carefully review the record to ensure that "agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989). A court may not "rubber-

stamp administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ariz. Cattle,* 273 F.3d at 1236 (quoting *NLRB v. Brown,* 380 U.S. 278, 291 (1965)). The reviewing court must "ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." *Public Citizen,* 316 F.3d at 1021 (quoting *Wetlands Action Network,* 222 F.3d at 1114).

As this court recently explained:

> This means that we "must defer to an agency's decision that is fully informed and well-considered," *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) . . ., but "need not forgive 'a clear error of judgment,'" *id. (*citing *Marsh*, 490 U.S. at 378, 109 S. Ct. 1851), or credit "conclusions that do not have a basis in fact," *Ariz. Cattle*, 273 F.3d at 1236.

Public Citizen, 316 F.3d at 1021.

In *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989), the Supreme Court addressed specifically the question of review of a determination not to supplement an EIS under NEPA. The 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, 416 (1971)). The inquiry should be "searching and careful," but the

ultimate review standard "is a narrow one." *Volpe*, 401 U.S. at 416.

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). *See also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998).

B. THE INITIAL SEGMENT PROPOSAL INCLUDES SUBSTANTIAL CHANGES WITH POTENTIALLY SIGNIFICANT IMPACTS THAT WERE NOT EVALUATED IN THE 1999 FEIS

Because of the presence of potentially significant impacts not evaluated in the 1999 FEIS, FTA should have prepared an EIS or SEIS for Initial Segment.

1. Significant Changes Related to Safety Issues

FTA's NEPA regulation, 23 C.F.R. § 771.130(a), states that an EIS "*shall*" be supplemented whenever it is determined that: "(1) Changes to the proposed action would result in *significant environmental impacts that were not evaluated in the EIS*[.]" (Emphasis added.)[6] Title 40 C.F.R. § 1502.9(c)(1) states in a slightly

[6] Title 23 C.F.R. part 771 sets forth the NEPA implementing regulations for

different fashion that agencies "*[s]hall*" prepare an SEIS if: (i) "The agency makes *substantial changes* in the proposed action that are *relevant to environmental concerns*[.]" (Emphasis added.) Here, it is undisputed that Initial Segment was not evaluated in the FEIS, "[t]he FEIS did not include joint use of the tunnel" (AR 502216; *see also* Order at 25), and no safety issues associated with mixed bus/rail use were evaluated in the FEIS.[7]

In the August 2001 "Evaluation of Joint Operations in the Downtown Seattle Transit Tunnel," Sound Transit stated in part:

> 10. FIRE/LIFE/SAFETY ISSUES
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> . . . . Bus-only operations in the DSTT will continue to meet all fire/life/safety requirements established by the Seattle Fire Department. However, the introduction of light rail vehicles in the transit tunnel will *significantly change* the operation of the tunnel and require that *fire/life/safety standards* are met for both light rail and buses. The *safety issues associated with joint bus/rail operation* in the DSTT fall into *five major categories,* which are summarized below.

(AR 502688; emphasis added.) The referenced "five major categories" of safety issues are collision prevention, ventilation, evacuation, fire suppression, and

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FHWA and UMTA. *See* 23 C.F.R. § 771.101. FTA is the successor to UMTA.

[7] The 1999 FEIS identifies but does not evaluate "safety concerns" regarding mixed bus/rail operations in the DSTT, stating: "The system must depend on operator judgment to maintain a safe stopping distance due to the lack of a fail safe signal system." (AR 3224.) That is the entirety of the discussion in the FEIS of mixed bus/rail safety issues.

hazards analysis. (AR 502688-89.)[8]

Clearly fire/life/safety issues are environmental concerns, within the meaning of 40 C.F.R. § 1502.9(c). *See, e.g.,* 40 C.F.R. § 1508.27(b)(2) (impacts to be studied include effect on "public health or safety"). Obviously, a tunnel collision could cause injury or death not only from the impact of collision itself, but also from fire, smoke inhalation, electrocution, and other causes.

The question remains whether the "significantly change[d] . . . operation of the tunnel" (AR 502688), constitutes a "substantial change" within the meaning of 40 C.F.R. § 1502.9(c). The court below suggests not, offering that the two phrases are not "self-defining" and that "significant operational changes need not result in significant environmental impacts." (Order at 16 & n.19.)

The court's offering scarcely ends the inquiry, however. For, as the court itself acknowledged in a separate portion of its opinion:

> [The issue is not whether the new information is directly environmental but whether, whatever its nature, it] "raises new concerns of sufficient gravity such that another, formal in-depth

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[8] The district court stated that the August 2001 report, "concluded that joint bus/rail use was feasible and safe." (Order at 21.) Setting aside the question of feasibility (an issue not raised by CFM in this case), it is clear that the August 2001 report did *not* conclude the plan was "safe." Quite to the contrary, and as described in the text accompanying this footnote, the report concluded that *safety issues* in five *major* categories were presented by the significant changes associated with the mixed bus/rail plan. The district court also suggested, Order at 26, that the 1999 rejection of mixed bus/rail operations was not based on safety concerns, and that safety issues were not "seen as a showstopper." The court provides no citation to the record in support of this statement.

> look at the environmental consequences of the proposed action is necessary."

(Order at 12 (quoting *Wisconsin v. Weinberger,* 745 F.2d 412, 418 (7th Cir. 1984)).

In this case, Sound Transit's own discussion under the heading "FIRE/LIFE/SAFETY ISSUES" (AR 502688), together with FTA's remarks that (a) "*many 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), (b) "[t]he FEIS did not include joint use of the tunnel" (AR 502216), and (c) the new decision to have mixed bus/rail use in the tunnel "ha[s] generated significant public interest" (AR 502218), certainly *suggest* the presence of significant environmental impacts not evaluated in the FEIS.

2. Absence of a Convincing Statement of Reasons Why Initial Segment's Impacts Are Insignificant

This court has held consistently that uncertainties about whether identified environmental impacts are "significant" must 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.

Idaho Sporting Cong., 137 F.3d at 1149-50 (citations omitted; emphasis added).

Similarly, in *West v. Secretary of DOT*, 206 F.3d 920, 927 (9th Cir. 2000),

this court stated that 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* cause significant degradation of some human environmental factor,' it must prepare an EIS." (Citation omitted; emphasis added.)[9]

It is settled law in this circuit that before upholding an EA, the reviewing court must first identify in the record "'a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Public Citizen,* 316 F.3d at 1021, (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 730 (9th Cir. 2001)).[10] Where the record has not disclosed a statement of convincing reasons, this court has been resolute in its holdings; thus it has reversed lower courts and ordered that EISs be prepared *(Public Citizen, Nat'l Parks, Blue Mountains),*

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[9] Title 40 C.F.R § 1508.27(b) sets forth factors to be considered in applying the term "significantly." The regulation requires analysis of both the context and the intensity of the impacts, and of considerations including: "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); and other considerations.

[10] *See also 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). "'[T]he statement of reasons is crucial' to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.* at 717 (citations omitted).

reversed a FONSI *(Metcalf),* and found an EA so deficient as to require enjoining a timber sale *(Save the Yaak)*.

The district court seemed to acknowledge the requirement for a convincing statement of reasons in the record (Order at 15, 9 n.14), but it simply did not apply the rule here. Specifically, it did not identify or confirm in the record any convincing statement of reasons why the potential environmental effects of Initial Segment, not previously evaluated in the FEIS, are insignificant. By failing to do so, the court shirked its duty to ensure that the agency decision is based on a "reasoned evaluation" of the relevant factors. *Marsh,* 490 U.S. at 378.

3. The District Court and FTA Relied on Incomplete Information

FTA and Sound Transit knew "additional issues should be addressed in order to arrive at a *complete* evaluation of the overall safety of joint bus/rail use in the DSTT." (Order at 29 (citing the 2001 DSTT report); emphasis added.) For example, Sound Transit stated that a "complete" hazards analysis would be available by the end of August 2001 (AR 502689), but that has not been done. (AR 502542.) Also, FTA referred to "Analysis," Solutions," and "other issues" pertaining to fire/life/safety, but did not disclose the relevant information in the EA. Even though the hazards analysis is not complete, the district court concluded that FTA's "preliminary" hazards analysis was sufficient (Order at 29)[11] and it

[11] In January 2000, FTA promulgated "Hazard Analysis Guidelines for Transit Projects." (Docket No. 45, Exhibit A to Niles Declaration.) Obviously these guidelines were not considered in FTA's 1999 FEIS, which predated their

simply ignored FTA's failure to disclose the other matters.

Title 40 C.F.R. § 1502.22 provides that when an agency is evaluating reasonably foreseeable significant adverse effects it either should obtain and disclose the relevant information or explain in detail why it has not done so. *See also Animal Defense Council v. Hodel,* 840 F.2d 1432, 1439 (9th Cir. 1988) (interpreting prior version of § 1502.22).

Here, the issues remain "murky" and the analysis is absent in many cases, "preliminary" in others. Instead of providing complete analysis and answering the substantial doubts presented in the record, FTA has simply offered the *ipse dixit* that Initial Segment has "no new significant adverse environmental effects that result from the changes to the project's construction or operation as identified in the Initial Segment EA and that were not already evaluated in the FEIS." (AR 502706.) Because FTA's decision is not "fully-informed," it deserves no judicial deference. *Blue Mountains,* 161 F.3d at 1211. By simply deferring to FTA's ill-informed decision, the court below has committed reversible error. *Id.*

4. Decisions in Analogous Cases Suggest the Need for an EIS or SEIS Here

The court below ignored the weight of the many Ninth Circuit[12] and other

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publication. The district court would not consider these new guidelines, but instead granted FTA's motion to strike this information from the record. (Order at 6.)

[12] *See* the Ninth Circuit decisions cited in subparts B.1 through B.3 of this brief, above.

persuasive[13] authorities suggesting the need for an EIS or SEIS for Initial Segment. Instead, it relied on just two inapplicable cases.

In *Northern Plains Res. 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 project's actual impacts in the affected environment. In fact, the court held that the actual environmental consequences of the alternative were "indistinguishable" from the action first proposed. *Northern Plains*, 874 F.2d at 666. In this case, no one has even argued that the changes from all-rail use to mixed bus/rail use in the DSTT are "indistinguishable;" to the contrary, Sound Transit has stated these changes are "significant."

The district court also relied on *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000), citing it for the proposition that "the mere existence of substantial comments questioning the feasibility" of the

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[13] *See Stop H-3 Ass'n v. Lewis*, 538 F. Supp. 149, 154-56, 170 (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) (newly proposed highway realignment, SEIS required); *Preservation Coalition of Erie County v. Federal Transit Admin.*, 129 F. Supp. 2d 551, 569-71 (W.D.N.Y. 2000) (artifacts newly found; SEIS ordered); *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), *aff'd*, 779 F.2d 41 (3d Cir. 1985) (revisions to expressway project required preparation of an SEIS); *Ass'n Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101, 1113-14 (N.D. Tex. 1985) (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—need to be addressed fully in an SEIS).

project in question would not be enough to require an SEIS, provided that the record demonstrates the agency had "considered those issues." (Order at 19.)

In this case, because CFM has not questioned the "feasibility" of the Initial Segment project, the district court's reliance on the "feasibility" analysis in *Wetlands* is misplaced. Here, in contrast to *Wetlands*, CFM has raised questions regarding potential degradation of the human environment, including important fire, life and safety questions.[14]

C. AN EA IS NOT A SUBSTITUTE FOR AN EIS OR SEIS

Title 40 C.F.R. § 1508.9(a) states 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']." (Emphasis added.) By contrast, an EIS is a "detailed written statement" that includes a "full and fair" analysis of all potential environmental impacts as well as an extensive and lengthy public participation process. 40 C.F.R. §§ 1502.1,

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[14] *Wetlands* involved a FONSI for a proposal to fill 16 acres of existing wetlands in order to *create* a new freshwater wetlands area of some 51 acres, more than three times the size of the area to be filled. 222 F.3d at 1111. Not surprisingly, the U.S. Army Corps of Engineers determined that execution of this plan "would result in a *net increase* in wetland values." *Id*. at 1112 (emphasis added). Nevertheless, the district court in *Wetlands* believed an EIS was necessary to address questions of adequate mitigation and questions about the "feasibility" of the new system. *Id*. at 1119. On appeal, this court reversed the district court and upheld the Corps, holding that the agency relied on "substantial evidence in making its determination that the [new] freshwater system was feasible," *id*. at 1120, and that accordingly the conclusion of no significant impact was appropriate, *id*. at 1121.

1508.11.

The court below demonstrated its misunderstanding of controlling law here when it stated: "Plaintiffs have the burden of producing evidence of some potentially significant environmental impact *that went unexamined in the Urban EA*." (Order at 16; emphasis added.) That, of course, is not appellants' burden; rather, their burden is to show such an impact went unexamined *in the 1999 FEIS. See Idaho Sporting Cong.*, 137 F.3d at 1149.[15]

The words of this court in *Anderson v. Evans,* 314 F.3d 1006, 1023 (9th Cir. 2002), carry special importance here:

> There is no doubt that the government put much effort into preparing the lengthy environmental assessment now before us. . . . No matter how thorough, *an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.*
>
> We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. *Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration.* As such, an EIS is more likely to attract the time

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[15] The court, remarkably, also misquotes CFM's position below when it states, at page 25, line 7 of the Order: "Plaintiffs concede that defendants have generally identified safety risks in the DSTT. . . ." What plaintiffs actually said at docket no. 43, page 17, was: "Defendants have identified generally *the need to mitigate* safety risks in the DSTT . . . ." (Emphasis added.) *See* Part VI.E of this Brief, below, on mitigation issues.

and attention of both policymakers and the public.

(Citation omitted; emphasis added.)

The district court's suggestion that discussion in an EA obviates the need for an EIS or SEIS simply cannot be squared with this court's ruling in *Anderson*: "No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment." 314 F.3d at 1023. When potentially significant effects have been identified, as in this case, the Ninth Circuit has repeatedly invalidated EAs, notwithstanding the amount of detail in them. *See, e.g., Public Citizen,* 316 F.3d at 1024-28*; Nat'l Parks,* 241 F.3d at 735-36*; Metcalf,* 214 F.3d at 1141-46.

FTA may not 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," FTA and Sound Transit essentially are asking the courts not to review agency action, but rather to simply defer to their interest in finality. This would be wrong. *See Marsh*, 490 U.S. at 378.

D. APPELLEES' FAILURE TO CONDUCT REQUIRED ALTERNATIVES ANALYSIS

A proper alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14; *City of Carmel-by-the-Sea v. United States Dep't of Transp.,* 123 F.3d 1142, 1155 (9th Cir. 1997). "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).

FTA's NEPA regulations make clear that for each project requiring an EIS: "The *final EIS shall* identify the preferred alternative and *evaluate all reasonable alternatives considered*." 23 C.F.R. § 771.125(a)(1) (emphasis added).[16] In this case, FTA has violated the alternatives requirement in two separate and independent respects: (1) Initial Segment was not evaluated as an alternative in the 1999 FEIS; and (2) FTA did not examine the TSM Baseline alternative in that FEIS.

1. Failure to Evaluate Initial Segment as an Alternative

As the district court acknowledged, Initial Segment and its mixed bus/rail use in the DSTT were not evaluated as an alternative in the 1999 FEIS. (Order at 21; - - "all of the alternatives in the FEIS specified rail-only use of the DSTT"; *see also* AR 3085; 3165-3212; 3591-3621.) FTA first identified Initial Segment as a "new MOS-1" alternative in October 2001—nearly two years after publication of the FEIS. (AR 502215.) Yet the court below apparently found it sufficient that the new Initial Segment alternative was examined in the EA, concluding that the EA discussion "expanded, rather than illegally constricted, the overall alternatives for

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[16] *See also* 40 C.F.R. § 1502.14 (the EIS should "present the environmental impacts of the proposal and the alternatives in *comparative form,* thus sharply defining the issues and providing a *clear basis for choice* among options") (emphasis added). (*See* Order at 7.)

utilizing the DSTT." (Order at 21.)

By failing to identify or evaluate Initial Segment ("new MOS-1") in the 1999 FEIS, FTA has violated controlling law. 23 C.F.R. § 771.125(a)(1) (EIS must "evaluate all reasonable alternatives considered"). *See also* 23 C.F.R. § 771.127(b) (alternatives to be "fully evaluated" in FEIS); 49 C.F.R. § 611.7(a)(4) ("locally preferred alternative must be selected from among the evaluated alternative strategies"). This failure is fatal; the defect is not cured by any amount of discussion in the EA. As discussed above, for important policy reasons fully applicable here, an EA simply is not a substitute for an EIS.

An illustrative case is *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995). There, the EIS 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.[17] Here, Sound Transit discovered the availability of a new alternative – Initial Segment – two years after publication of the EIS, and failure to address it in an SEIS is also error.

California v. Block, 690 F.2d 753 (9th Cir. 1982), is also helpful here on the subject of alternatives analysis. In *Block*, a NEPA and Wilderness Act case, this

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[17] By contrast, in *Half Moon Bay Fishermans Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 509 (9th Cir. 1988), the alternative in question, "site B1," was specifically identified as an alternative, and addressed as such, in the challenged SEIS. Therefore no further supplementation was required.

court determined that the agency failed to consider sufficient alternatives in the FEIS. Specifically, by failing to consider alternatives to designate more forestland for wilderness use, the FEIS 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 in the FEIS. *Id.* at 762-67

The district court attempts to distinguish *Block* by finding that the trade-off in this case was analyzed *in the EA* (Order at 22), and that: "To require Sound Transit to produce another document that distills the findings of the entire record into a trade-off analysis of this point would be to elevate form over substance" (*id*. at 22-23). On this basis it found no SEIS was necessary. (*Id.*)

The court below does not explain how or why requiring an SEIS would elevate form over substance. It does not explain how an EA's treatment of a trade-off analysis can substitute for that in an EIS (or SEIS). In sum, it fails to acknowledge the central point in *Block*, namely, that the trade-off analysis is to be *in an EIS*.[18]

2. Failure to Evaluate the TSM Baseline Alternative

Not only was the Initial Segment alternative itself not evaluated in the 1999

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[18] Following this basic misunderstanding of the law, the district court would distinguish *Stop H-3 (supra* n.13), on the grounds that here, unlike in *Stop H-3*, "the mixed use proposal was evaluated and incorporated *into the EA*, made available to the public for comment, and incorporated into the AR for use by FTA in making its final decision." (Order at 17; emphasis added.) The district court studiously ignores that the infirmity identified in *Stop H-3* was *not* the failure to address the issues, but rather the failure to evaluate them *in an SEIS.*

FEIS, but also it has not been compared to the TSM Baseline alternative as required by federal law. (*See* Order at 23.)[19]

The district court determined that FTA's "New Starts" regulation, 49 C.F.R. § 611.7, "sets forth the preparation of a TSM Baseline alternative as a requirement of applications for federal funding for major capital investment projects," but then concluded that this requirement is "unrelated to NEPA." (Order at 23.) The court suggested: "Plaintiffs repeatedly conflate the requirements of NEPA with the requirements of FTA's funding decisions to be found in 49 C.F.R. § 611." In the opinion of the district court, the latter have "nothing whatever to do with the NEPA requirements." (Order at 14 n.18.)

Yet 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 "considered" here means "considered by the agency." If FTA is required to "consider" an alternative—such as the TSM Baseline alternative—pursuant to 49 C.F.R. part 611, is that not an alternative that must be identified and evaluated in the EIS? What permissible reading of the regulation would allow for a contrary conclusion?

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[19] FTA defines the TSM Baseline alternative as "[t]he alternative against which the proposed new starts [rail] project is compared [in order] to develop project justification measures." 49 C.F.R. § 611.5. The TSM Baseline alternative must include transit improvements in addition to the "no build" alternative. *Id.*

The lower court's conclusion on this issue is also puzzling in light of its earlier acknowledgment that the EIS serves as a mechanism to ensure that NEPA considerations are "infused" into the programs and actions of federal agencies, and that the EIS should be used "in conjunction with" other material so that federal agencies may make decisions. (Order at 7, quoting 40 C.F.R § 1502.1).) As the Supreme Court observed in *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981), one of the essential aims of NEPA is to "inject environmental considerations into the federal agency's decision making process." It is settled that 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). In sum, NEPA process is to be integrated with agency decision making, not divorced from it.

The statutes and regulations pertaining to FTA funding for rail projects, and environmental analysis of those project proposals, apply these general principles of integration to the specific matter of alternatives analysis. Thus, both NEPA and FTA's governing statute for rail projects require alternatives analyses. 42 U.S.C. § 4332(2)(c); 49 U.S.C. § 5309(e)(1)(A).[20]

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[20] Title 49 U.S.C. § 5309(e) provides the statutory authority for FTA's "New Starts" rule, 49 C.F.R. part 611. *See* 49 C.F.R. § 611.1(a). Title 49 U.S.C. § 5324(b) (cited as authority by 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*

Title 49 U.S.C. § 5309(e)(1)(B) requires the agency to decide if a 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, 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).[21]

FTA determines whether a rail project is "justified" in accordance with 49 U.S.C. § 5309(e)(1)(B), by comparing it to the TSM Baseline alternative: "[The TSM] Baseline alternative is the alternative against which the proposed new starts [rail] project is compared to develop project justification." 49 C.F.R. § 611.5. Title 49 U.S.C. § 5328(a)(1) explains that when a rail project advances to the "*alternatives analysis* stage," the agency "*shall* cooperate with the applicant in

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environment." (Emphasis added). Thus, environmental analysis under NEPA is connected directly to FTA's analysis of project factors under 49 U.S.C. § 5309.

[21] In this case, the 1999 Central Link FEIS specifically addressed the statutory factors identified in 49 U.S.C. § 5309(e)(1)(B) and referenced above. It addressed the need to "Enhance Mobility" (AR 3593); to "Preserve Environmental Quality" (AR 3594); to build a system that is "cost-effective" (AR 3596; *see also* AR 3597); and to build a system that can be "operated and maintained within available revenues" (AR 3595). With respect to the requirement of 49 U.S.C. § 5309(e)(3)(A) that the EIS address identified factors for each alternative evaluated, that discussion is found throughout the chapter of the 1999 FEIS entitled "Evaluation of Alternatives." (AR 3591-3622.)

alternatives analysis and in preparing a *draft environmental impact statement.*" (Emphasis added.) Yet in this case, nowhere in the 1999 FEIS or 2002 EA is the TSM Baseline alternative evaluated or compared.

By ignoring these clear statutes and regulations, and refusing to require evaluation of the Initial Segment alternative or the TSM Baseline alternative in an EIS or SEIS, the district court has validated agency action that is inconsistent with statutory mandates and in frustration of congressional policy underlying those statutes. This is reversible error. *Ariz. Cattle,* 273 F.3d at 1236.

E. MITIGATION OF SAFETY RISKS HAS NOT BEEN ORDERED

Under NEPA identified risks must be mitigated if possible, and mitigation plans "must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Carmel-by-the-Sea*, 123 F.3d at 1153-54 (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 v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotation marks and citations omitted).

Title 23 C.F.R. § 771.125(a)(1) states in pertinent part: "The final EIS shall . . . describe mitigation measures that are to be incorporated into the proposed action. *Mitigation measures* presented as *commitments* in the final EIS *will be incorporated into the project*. . . ." (Emphasis added.) Yet here, it is undisputed that "[t]here was no discussion in the 1999 FEIS of mitigation of safety issues associated with mixed bus-train use of the DSTT because mixed use was originally

rejected." (Order at 25 (citing AR 502691).)

Title 23 C.F.R § 771.127(a) requires FTA in its Amended ROD to "summarize any mitigation measures that *will be incorporated in the project*." (Emphasis added.) Here, in its Amended ROD, 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 any commitment to mitigation of risks associated with mixed bus-train use of the DSTT (*see* AR 502755).[22] Thus, FTA simply has given "lip service" to the concept of mitigation, and no more; it has not even *listed* the mitigation requirements, let alone discussed them in the requisite detail. (*Cuddy Mountain* and *Carmel-by-the-Sea*).

The district court acknowledges that safety mitigation in the DSTT is not spelled out in the Amended ROD or EA, but avers, "this does not compel the conclusion that FTA and Sound Transit have not committed to such measures." (Order at 31.) The court suggests that general reference to plans and objectives

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[22] 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.)

contained in the August 2001 report and EA "constitutes appropriate mitigation" (*id*.), but that conclusion conflicts with *Cuddy Mountain* and *Carmel by the Sea*, and with 23 C.F.R §§ 771.125(a)(1) and – 127(a), cited above.

V. CONCLUSION

The district court has erred as a matter of law by failing and refusing to require an EIS or SEIS, accepting an EA in lieu of an EIS or SEIS, and ignoring requirements for evaluation of alternatives and mitigation of risks.

For the reasons stated above, this court should reverse the district court and order that an EIS or SEIS be prepared for the "Initial Segment" rail transit project.

Respectfully submitted: October 7, 2003.

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STATEMENT OF RELATED CASES

Save Our Valley v. Sound Transit, Ninth Circuit No. 01-36172 (D.C. No. 00-00715-BJR), decided by the Ninth Circuit July 10, 2003.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Opening Brief of Appellants is proportionately spaced, has a typeface of 14 points or more and contains 7,218 words.

_____ _____

Date Signature of Filing Party

CERTIFICATE OF SERVICE

I, June Starr, certify that on October 8, 2003, caused to be delivered by hand, two copies of Opening Brief of Appellants and one copy of the Excerpts of Record, upon the following parties, and by United States mail, postage prepaid for next day delivery, the original and fifteen copies of Opening Brief of Appellants, and five copies of the Excerpts of Record on the Clerk of the Ninth Circuit Court of Appeals at 95 Seventh Street, San Francisco, California 94103-1526:

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