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' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

Note for Hearing: Dec. 20, 2002

Pursuant to Fed. R. Civ. P. 56, plaintiffs respectfully submit this Renewed Motion for Partial Summary Judgment.

Plaintiffs request entry of an order of summary judgment in their favor on Count Four of the Second Amended Complaint filed in this action, in that defendants have violated the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA") with respect to their 14-mile "Initial Segment" project proposal.

Plaintiffs do not presently seek partial summary judgment on either Count One or Count Two; if at some later time defendants should seek to revive their 21-mile "Central Link" project proposal, plaintiffs reserve the right to seek partial summary judgment on those counts.

Plaintiffs' Count Three, pertaining to Full Funding Grant Agreement actions and the Administrative Procedures Act ("APA"), in plaintiffs' judgment is not ripe for decision in that defendants have not yet entered into a Full Funding Grant Agreement ("FFGA") for the pending Initial Segment project proposal.

Plaintiffs assert partial summary judgment should be entered in their favor on Count Four because there are no genuine issues of material fact pertinent to those claims, and plaintiffs are entitled to judgment as a matter of law.

Plaintiffs' renewed motion for partial summary judgment is supported by:

- Plaintiffs' Memorandum in Support of Renewed Motion for Partial Summary Judgment, September 17, 2002;
- Declaration of John S. Niles, September 12, 2002, with exhibits;
- Second Declaration of Richard Nelson, September 12, 2002;
- Declaration of John D. Alkire, September 13, 2002, with exhibits;
- The Administrative Record ("AR") in this case, as supplemented; and

- The other records and files in this action.

This motion is respectfully submitted this 18th day of September, 2002.

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs respectfully submit this Memorandum in Support of Renewed Motion for Partial Summary Judgment herein. This case involves defendants' plans to finance and build a newly defined, so-called "Initial Segment" light rail project. Defendants propose to build this project without first writing an EIS or SEIS for it. This new, "Initial Segment" project was first identified in the autumn of 2001, after Sound Transit admitted failure with respect to its earlier—and now abandoned—1999 "Central Link" light rail plan. Defendants have taken the position that the 1999 Final EIS for the "Central Link" project somehow covers this new and different "Initial Segment" project. From this faulty premise they conclude that no EIS or SEIS is needed for Initial Segment. This is error.

ISSUES

The primary issue presented is whether defendants may proceed with their "Initial Segment" project, even though it has not been subjected to required alternatives analysis, and no EIS or SEIS has been written for it. This is the essence of the case.

STATEMENT OF FACTS

The following is a brief summary of undisputed facts. Details are set forth in the declarations and source materials cited.[1]

The 21-Mile "Central Link" Project

In 1996 Sound Transit placed on the ballot, and the voters approved, a plan called *Sound Move* that included a $1.7 billion "light rail" proposal (sometimes called "Central Link"). That proposal consisted of a 21-mile project extending from Seattle's University

[1] The parties to this action agree that the Administrative Record ("AR") used in *Friends of the Monorail, Inc. v. United States,* No. C00-852Z (W.D. Wash.) (hereinafter *"Monorail"* case), may be used in this case as well. Plaintiffs contend it is not the entirety of the record to be used here, and certain additional documents are included as attachments to declarations filed earlier and accompanying this Memorandum.

District to S. 200th Street, south of the Seattle-Tacoma International Airport ("SeaTac Airport"), with an option to extend northward three miles to the Northgate Shopping Center if funds became available. 1999 Final EIS at S-1, AR at 3079; see also Declaration of Richard Nelson, July 11, 2001 ("Nelson Decl."), ¶¶ 28, 29. The projected ridership of "Central Link" was to be over 127,000 passengers per day. (February 2002 Environmental Assessment ("EA") at ix; Exhibit S to accompanying Declaration of John D. Alkire, September 13, 2002 ("Alkire Decl.").)

This "Central Link" project was at issue before the Court when it issued its *Monorail* Decision in early 2001.

New, 14-Mile "Initial Segment" Project

By year 2001, however, it became apparent that Sound Transit could not afford to build the 21-mile "Central Link" light rail project approved by the voters in 1996. Accordingly, Sound Transit and the Federal Transit Administration ("FTA") made two important decisions. First, Sound Transit decided to study new, less expensive routes to the north of downtown Seattle; and it is now preparing an SEIS for those new alternatives to the north. (See EA at vii; Exhibit S to Alkire Decl.)

Second, and most germane here, the FTA voided its Record of Decision ("ROD") of January 2000 pertaining to the full, 21-mile Central Link project, and in May 2002 promulgated an "Amended Record of Decision" ("Amended ROD") for a newly defined 14-mile project called "Initial Segment." (See Exhibit T to Alkire Decl.) This new, "Initial Segment" project extends from the Downtown Seattle Transit Tunnel ("DSTT") southward to a terminus in Tukwila at S. 154th Street, one mile distant from SeaTac Airport. (*Id.* at page 1.) "Initial Segment" includes *no* routing north of downtown Seattle.

The May 2002 Amended ROD, and the newly defined "Initial Segment" plan, are at issue here.

"Central Link" and "Initial Segment" are Different Projects

This "Initial Segment" is *not* the "Central Link" project that was promised to the voters in 1996, and is *not* the project considered by the Court in its *Monorail* Decision. The following table displays some of the major differences between the "Central Link" and "Initial Segment" projects:

Subject	Central Link	Initial Segment	Citation of Authority
Length	21 miles	14 miles	EA at ix (Ex. S to Alkire Decl.)
Projected Ridership	127,000 passengers per day	42,500 passengers per day	EA at ix
Completion Date	2006	2009	EA at ix
Environmental Analysis	1999 Final EIS	2002 EA	
Northern Terminus	N.E. 45th Street	Downtown Seattle	EA at ix
Southern Terminus	S. 200th Street (including SeaTac Airport)	S. 154th Street (not including SeaTac Airport)	EA at ix
Use of Downtown Seattle Transit Tunnel (DSTT)	Exclusive Rail Use	Mixed Rail-Bus use	EA at ix
Federal Funding Status	Voided	Pending	Amended ROD at 1, 2 (Ex. T to Alkire Decl.)

EIS Written for "Central Link," Not for "Initial Segment"

Defendants have not prepared an EIS or SEIS for Initial Segment, and they have not analyzed Initial Segment as an alternative in any prior EIS or SEIS. The *only* environmental

documentation prepared under NEPA for the Initial Segment project was an "Environmental Assessment" published in February 2002.

SUMMARY OF ARGUMENT

Defendants have violated the law in the following respects:

- They propose to implement an "Initial Segment" project that has not been addressed in the 1999 Final EIS or any other EIS or SEIS;

- They have failed to address Initial Segment as an alternative in any EIS or SEIS, and have failed to analyze any alternative to Initial Segment with the exception of "no action";

- They have failed to analyze adequately, in any NEPA documentation, the effects of proposed mixed bus-rail use of the Downtown Seattle Transit Tunnel (DSTT); and

- They have failed to address adequately the safety impacts in the DSTT and in the Rainier Valley corridor.

Each of the acts and omissions described above is arbitrary and capricious, an abuse of discretion, unreasonable and in violation of NEPA and the APA.

LEGAL DISCUSSION

The legal principles pertaining to summary judgment, standard of review, NEPA and the APA are set forth in the Court's Decision in the *Monorail* case at page 8, line 7 through page 10, line 13 (including footnotes 2 and 3) (Exhibit A to Nelson Decl.). Plaintiffs will

not consume space here nor waste the Court's time re-stating these legal principles. Plaintiffs accept and affirm these legal principles as applicable to this case.

I. DEFENDANTS HAVE VIOLATED NEPA BECAUSE "INITIAL SEGMENT" IS A NEW PROJECT FOR WHICH THERE IS NO EIS OR SEIS, AND NO ALTERNATIVES ANALYSIS

When Sound Transit decided to withdraw the Central Link light rail project proposal, and substitute the 14-mile "Initial Segment" project, FTA determined it should prepare an "Environmental Assessment" (EA) on the Initial Segment proposal. See 40 C.F.R. § 1508.9; 23 C.F.R. § 771.119. The EA was prepared and distributed in February 2002. Following a comment period, and without preparing or causing to be prepared an EIS or SEIS, on May 8, 2002 the FTA issued its Amended ROD for the Initial Segment project.

The federal government has offered guidance indicating that generally an EA should be approximately 10-15 pages in length, and that "in most cases a lengthy EA indicates that an EIS is needed." (NEPA Forty Most Asked Questions, Excerpt, Alkire Decl., Ex. V.) Here, the text of the EA is 49 pages long (not including the Executive Summary), and it has approximately 100 pages of attachments. (See Alkire Decl., Ex. S.) Thus, following the federal government's own guidelines, the suggestion is strong that an EIS is needed here.

Yet we need not rely simply on the proxy of page-length for our deliberations. Far more specific factors also point to the need for an EIS or SEIS here.

A. No EIS

NEPA, 42 U.S.C. § 4332(2)(C), requires federal agencies to include a "detailed statement" for all "major Federal actions significantly affecting the quality of the human environment." This is the statutory environmental impact statement (EIS) requirement. The U.S. Department of Transportation's NEPA regulations define the statutory term "action" to

include proposals for federal funding. 23 C.F.R. § 771.107(b); *accord* 40 C.F.R. § 1508.18(a). They also define new light rail construction projects as "Class 1" actions that "normally require [] an EIS." 23 C.F.R. § 771.115(a)(3).

The primary purpose of preparing an EIS is as follows:

> The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are *infused* into the ongoing programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It *shall* be used by Federal officials *in conjunction* with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.1 (emphasis added).

Defendants' failure and refusal to prepare an EIS for the Initial Segment project violates the essential purpose of the environmental impact statement requirement of NEPA, as expressed in 40 C.F.R. § 1502.1.

Defendants have suggested, and likely will argue here, that the 1999 Final EIS written for Central Link is sufficient to cover Initial Segment. This assertion is incorrect because Central Link and Initial Segment are two different projects, and each must have its own EIS. (*See* Alkire Decl., ¶¶ 9-13, 16, 17.)

It is well settled that: "Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined." 40 C.F.R. § 1502.4(a). As this Court has noted, the FTA's statutory framework requires consideration of "the relevant project for which funding is sought." *Monorail* Decision at 12. Here, the project defined in 1999 for purposes of federal funding and study in the 1999 Final EIS plainly was Central Link—not Initial Segment. Just as plainly, the project now defined for purposes of federal funding is Initial Segment—not Central Link.

The FTA itself affirms that distinguishing between separately defined, and different, projects is essential. For example, published FTA Guidelines state: "The New Starts project [here, Initial Segment] should be evaluated as a stand alone project." (FTA New Starts Submission Requirements, section 2.1.4.2; Copy enclosed as Exhibit B to Alkire Decl.) "Initial Segment" is the only project for which federal funding presently is sought.[2]

As FTA and Sound Transit correctly emphasize, "funding issues related to future extension of the system are not relevant to this NEPA environmental analysis [for Initial Segment] and need not be addressed." (Amended ROD, Attachment F "Responses to Comments", page 16; Exhibit T to Alkire Decl.) Here, the law follows logic: One cannot sensibly analyze an actual, current proposal (Initial Segment) by contemplating an abandoned dream (Central Link). This is particularly true in this case, inasmuch as Sound Transit has withdrawn its "dream" project—Central Link—and FTA has declared its ROD for that dream project to be "null and void." The real project proposal—Initial Segment—has no EIS.

B. No SEIS

In its Amended ROD, at page 11, FTA cites and relies upon 23 C.F.R. § 771.130, apparently for the proposition that an "Environmental Assessment" ("EA") is sufficient for this newly defined Class 1 light rail project called "Initial Segment." Section -.130 describes generally the situations in which project changes may require a full "Supplemental Environmental Impact Statement" ("SEIS") on the one hand, or the far less rigorous "Environmental Assessment" ("EA") on the other hand.

[2] Sound Transit presently has no other federal funding application pending for any other Seattle-area light rail project. Alkire Decl., ¶ 16.

Yet 23 C.F.R. § 771.130 in its entirety pertains only to *changes to the proposed action*. *Accord* 40 C.F.R. § 1502.9(c). It does not address the question of environmental documentation for a *newly defined project*.[3]

None of these provisions addresses, or applies to, the situation we have here: The voiding of the earlier "proposed action", and the definition of a completely new "proposed action," *i.e.*, Initial Segment. This makes sense: Were these USDOT regulations to be interpreted to permit a *newly defined, and different, project* to be characterized merely as a "change to the proposed action," this result would effectively "gut" the EIS requirement for such new projects. Clearly this is not USDOT's intent, and it would not be permissible under NEPA if it were.

Accordingly, by relying on -.130 to suggest no EIS is required for "Initial Segment," FTA just misreads its own regulation. Stated simply, with the voiding of the old action and institution of the new action, under FTA's regulations there is nothing to supplement. It is unlawful for defendants to proceed with "Initial Segment" based only on an "Environmental Assessment" supplementing an EIS for a project (Central Link) that has been voided and is no longer proposed by Sound Transit.

Title 23 C.F.R. § 771.130(b)(2) highlights the point even further. That provision indicates an SEIS is not necessary if the agency "decides to approve an alternative *fully evaluated* in an approved final EIS." *Id.* (Emphasis added). *Accord* 23 C.F.R. § 771.127(b). As discussed earlier in this Memorandum, Initial Segment was not even identified, much less "fully evaluated," in the 1999 Final EIS.

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[3] Thus, -.130(a) calls for an SEIS in the event of certain "[c]hanges to the proposed action", or if new information or circumstances bear on the "proposed action." Likewise, -.130(b)(1) suggests an SEIS is *not* necessary in the event of certain other "changes to the proposed action" or other new information or circumstances. *Accord* 40 C.F.R. § 1502.9(c).

The last sentence of section 771.130 also reinforces the point that an EA is inadequate for a new project such as Initial Segment:

> If the changes in question are of such magnitude to require a *reassessment of the entire action, or more than a limited portion of the overall action,* the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

(Emphasis added.)

In this case, we have a "reassessment of the entire action" or at the least "more than a limited portion of the overall action." The entire Northern section of Central Link has been eliminated. The proposed use of the DSTT has been materially changed. (See Part I.E below.) "Initial Link" will not reach the SeaTac Airport. We have FTA's declaration that the ROD for the earlier-defined Central Link action is "NULL AND VOID" and its concomitant definition of a new action and project—Initial Segment. (Alkire Decl., ¶ 17.) The case for suspension of activities here is strong indeed under the language of -.130.

Defendants have yet to offer any persuasive authority for the proposition that they may avoid the EIS or SEIS requirement for the Initial Segment project. Likewise, no authority has been proffered for the proposition than an EIS written for one project is sufficient for a different project.

C. No Alternatives Analysis for Initial Segment

In *City of Carmel-by-the-Sea v. United States Department of Trans.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (hereinafter *"Carmel"*), the Ninth Circuit quoted favorably the affirmation in 40 C.F.R. § 1502.14 that alternatives analysis "is the heart of the environmental impact statement." NEPA's alternatives analysis requirement includes the following:

> Title 40 C.F.R. § 1502.14(a) requires that an Environmental Impact Statement: *Rigorously explore* and *objectively evaluate* all reasonable alternatives, and for alternatives which were eliminated from the detailed study, briefly discuss the reasons for their having been eliminated.

Carmel, 123 F.3d at 1155 n.10 (emphasis added). Defendants did not "[r]igorously explore" or "objectively evaluate" Initial Segment as an alternative in the 1999 Final EIS. Indeed, they did not address it at all. Alkire Decl., ¶¶ 10, 18,19.

Title 49 U.S.C. § 5309(e)(1)(A) requires an adequate "alternatives analysis" from each FTA project proponent. FTA's Major Capital Investments ("New Starts") Rule, 49 C.F.R. Part 611, implements this statutory command for designated projects, including light rail projects.

Title 49 C.F.R. § 611.5 defines "Alternatives Analysis" for new starts projects as:

> [a] corridor level analysis which evaluates *all reasonable mode and alignment alternatives* for addressing a transportation problem, and results in the adoption of a locally preferred alternative by the appropriate State and local agencies and official boards *through a public process.* [Emphasis added.]

Initial Segment was never given this treatment. (Alkire Decl., ¶¶ 10, 18, 19.)

As discussed above, USDOT's NEPA Regulations suggest that an EIS or SEIS may not be needed for "an alternative *fully evaluated* in an approved final EIS." 23 C.F.R. § 771.127(b); *id.*, -.130(b)(2) (emphasis added). Initial Segment does not meet this test, as it was never fully evaluated in any EIS.

Title 49 C.F.R § 611.7(a)(4) specifies that the "locally preferred alternative must be selected from among the evaluated alternative strategies." Yet, Initial Segment was not so selected. (Alkire Decl., ¶ 19.)

To sum up: "Initial Segment" was neither rigorously explored nor objectively evaluated, let alone "fully evaluated", as an alternative in the 1999 Final EIS; and the Initial Segment LPA ("locally preferred alternative") was not selected from among the alternatives discussed in that EIS. Therefore, defendants may not escape the requirement of an EIS or SEIS for Initial Segment.

Title 40 C.F.R. § 1502.2(e) specifies: "The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker." Undoubtedly defendants will argue that "Initial Segment" is within the "range" of alternatives considered in the 1999 Final EIS. Yet this general, "range of alternatives" requirement does not supplant the specific requirements, noted above, that the proposed project be one of the alternatives "fully evaluated" in the Final EIS, 23 C.F.R. § 771.127(b), and be selected from "among the evaluated alternative strategies." 49 C.F.R. § 611.7(a)(4).

In any event, the contention that Initial Segment somehow was within the "range of alternatives" discussed in the 1999 Final EIS for Central Link does not withstand scrutiny. Examination of FTA's "New Starts" Regulation is a useful starting place in attempting to give appropriate meaning to the phrase "range of alternatives." Specifically, the definition of "Alternatives analysis" in 49 C.F.R. § 611.5 includes evaluation of "all reasonable *mode* and *alignment* alternatives" to address a transportation problem. *Id.* (emphasis added). Initial Segment was not within the range of alternatives addressed in the 1999 Final EIS with respect to *either* mode *or* alignment.

Addressing first the question of *alignment*, defendants have conceded that "Initial Segment was not one of the length alternatives specifically considered in the 1999 FEIS. . . ." (Amended ROD, Attachment F—Responses to Comments, page 13; Exhibit T to

Alkire Decl.) Initial Segment does not even satisfy one of the *least common denominators* of the length alternatives studied in the 1999 FEIS—namely, construction from the DSTT northward at least as far as Capitol Hill. (Alkire Decl., ¶ 19. *See also* EA at 15; Exhibit S to Alkire Decl.) (every alternative considered in the 1999 Final EIS proceeded at least as far northward as Capitol Hill).

With respect to *mode,* Initial Segment's proposed mixed bus-train use of the DSTT contrasts starkly with all of the alternatives that were addressed fully in the 1999 Final EIS: All of those 1999 alternatives specify exclusive rail use of the DSTT. (Alkire Decl., ¶ 20.) The chiaroscuro effect could not be more pronounced: On the one hand a 1999 Final EIS rejecting mixed use in the DSTT; and on the other hand a current "Initial Segment" proposal adopting the very same mixed use approach that had been rejected in 1999.

By failing and refusing to require an EIS or SEIS for "Initial Segment", the FTA has not engaged in the requisite "hard look" necessary in assessing environmental issues. *See, e.g., Wetlands Action Network v. United States Army Corps of Eng'rs,* 222 F.3d 1105, 1114-15 (9th Cir. 2000), *cert. Denied*, 122 S. Ct. 41 (2001). The requisite "hard look"—indeed, even a not-so-hard look—suggests the folly of concluding: (a) "Initial Segment" was not selected from among the evaluated alternative strategies, but (b) nevertheless it is somehow within the range of alternatives examined, so (c) the project should proceed without any EIS or SEIS. Such a conclusion would make a mockery of USDOT's NEPA Regulations, the FTA's own alternatives analysis regulations, and NEPA's requirement for discussion of alternatives, the "heart" of the EIS. Stated differently, such a conclusion would cut the heart out of NEPA.

Nor is this merely a "technical," or purely "legal" conclusion. It is also grounded in the common sense of public policy underpinning NEPA, including the core concept of "purpose and need."

D. Initial Segment Does not Fulfill the Purpose and Need Identified in the 1999 Final EIS

Delineation of project alternatives stems directly from an EIS's description of "purpose and need." *Carmel*, 123 F.3d at 1155. As this Court noted in the *Monorail* case, an agency's authorizing statutes and regulations play an important role in assessing the reasonableness of the purpose and need statement, and correlatively the agency's discussion of alternatives. Decision at 10 (Nelson Decl., Exhibit A.) *Initial Segment was not addressed in the 1999 Final EIS because it did not and does not fulfill the purposes identified for the 1999 Central Link project.*

One of the purposes of the then-proposed Central Link project was identified in 1999 as follows:

> The purpose of the proposed light rail project is to construct and operate a starter electric light rail system connecting several of the region's major activity centers: the city of Seattle, *Roosevelt, the University District, Capitol Hill, First Hill,* downtown and Rainier Valley areas; the city of Tukwila; the city of SeaTac; and *Sea-Tac Airport.*

(1999 FEIS at 1-1; AR at 3147 (emphasis added). (*See also* this Court's *Monorail* Decision, at 11-12.)

Another of the stated purposes of Central Link was: "Implementation of the light rail element of the *Sound Move* plan . . . ." (*Monorail* Decision at 12.)

The 14-mile Initial Segment proposal will not fulfill *either* of the purposes set forth above. It will not connect any of the five major activity centers italicized in the above

quotation, and it will not implement the light rail element defined in the *Sound Move* plan approved by the voters.[4]

For these obvious reasons, Initial Segment was not addressed as an alternative in the 1999 Final EIS. As this Court has noted: "The range of alternatives that must be considered in [an] EIS need not extend beyond those reasonably related to the purposes of the project." *Monorail* Decision at 9 (Nelson Decl., Exhibit A), (citing *Laguna Greenbelt, Inc. v. United States Dep't of Transp.,* 42 F.3d 517, 534 (9th Cir. 1994)).

This Court elaborated: "An alternative that fails to fulfill the stated project purpose is not a reasonable alternative . . . When the purpose is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be achieved." *Monorail* Decision at 9-10, citing cases. Accord, FHWA Policy on "Development and Evaluation of Alternatives" at 3 ("If an alternative does not satisfy the purpose and need for the project, as a rule, it should not be included in the analysis as an apparent reasonable alternative.") (Copy attached as Exhibit C to Alkire Decl.)

By failing to identify or discuss "Initial Segment" in any prior EIS or SEIS, defendants have demonstrated, through their own conduct, that the current "Initial Segment" proposal is not a reasonable alternative that fulfills the purposes identified in the 1999 Final EIS. They have violated the express terms of NEPA and FTA Regulations, and have ignored the important policy underpinnings of those regulations.

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[4] Sound Transit has noted, for example, that a line "approximately 13 miles long [is] far shorter than the light rail line component of *Sound Move*." (Sound Transit Brief, *Monorail* case, Exhibit E to Declaration of Thomas Rubin, July 11, 2001, at p.26.)

E. Defendants Have not Compared Mixed Rail-Bus Use in the DSTT With any Other Alternative in any SEIS or EIS

As discussed above, 49 C.F.R § 611.5 defines "Alternatives Analysis" as an evaluation of "all reasonable *mode* and alignment alternatives for addressing a transportation problem." (Emphasis added.) Title 40 C.F.R. § 1502.14 requires the alternatives section of the EIS to "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 by the decisionmaker and the public." It also requires agencies to: "Rigorously explore and objectively evaluate all reasonable alternatives", 40 C.F.R. § 1502.14(a), and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits" -(b).

Mixed modal (bus-train) use in the DSTT was neither "rigorously explored" nor "objectively evaluated" in the 1999 Final EIS; nor did that Final EIS "devote substantial treatment" to the mixed mode concept. Rather, the mixed mode option was "eliminated from . . . study", with brief reasons provided "for [its] having been eliminated." *Id.*, -(a). See Alkire Decl., ¶¶ 20-22. As stated by this Court in the *Monorail* case, in the 1999 Final EIS the FTA "limited its examination of alternatives to the scope and preferred embodiments of the project." (*Monorail* Decision at 11, Exhibit A to Nelson Decl.) That scope and those preferred embodiments excluded mixed bus-train use in the DSTT, the very project now being proposed. Defendants may not lawfully proceed with an Interim Segment project when one of Initial Segment's main embodiments - - mixed bus-train use in the DSTT - - was *eliminated from study* in the 1999 FEIS, and since then has not been subject to any further alternatives analysis in any EIS or SEIS.

The Ninth Circuit stated in *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1439 (9th Cir. 1988):

> Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide "a reasonable, good faith, and objective presentation of the subjects required by NEPA."

(Quoting *Johnston v. Davis,* 698 F.2d 1088, 1095 (10th Cir. 1983)).

As mixed mode was *rejected without further study* in the 1999 Final EIS, to say that "the decisionmaker and the public could not make an informed comparison of the alternatives" based on the 1999 Final EIS is to understate significantly; they were unable to make *any* meaningful comparison, because mixed mode was not even discussed as an alternative. Evaluation of "comparative merits", within the meaning of 40 C.F.R. § 1502.14(b) was impossible because mixed mode was not addressed in the requisite detail. Correlatively, nothing about the alternatives analysis pertaining to "Initial Segment" suggests there has been "'a reasonable, good faith, and objective presentation of the subjects required by NEPA.'" *Hodel,* 840 F.2d at 1439 (*quoting Johnston*, 698 F.2d at 1095). *See also*, *Carmel,* at 1155, n.10 (quoting requirement of 40 C.F.R. § 1502.14(a) to "[r]igorously explore and objectively evaluate all reasonable alternatives . . . .").

F. Defendants Have Failed to Address Adequately the Safety Issues Associated with Mixed Bus-Train Use of the DSTT

Defendants have admitted their proposed mixed tunnel use is unprecedented throughout the world; that there is a potential for bus-train collisions in the DSTT; that the signal system is not yet tested so as to be certain it will work; that the system ultimately will depend on operator judgment which, of course, is fallible; and that a number of other significant DSTT operational safety issues remain unresolved. (Alkire Decl., ¶¶ 21-26.)

These issues have not been addressed adequately in either the 1999 Final EIS or the 2002 EA. Declaration of John S. Niles, September 12, 2002, ¶¶ 4, 5, 12-14 ("Niles Decl.").

Title 40 C.F.R. § 1502.22 provides that "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects," as is the case here with DSTT safety issues, it either should obtain and disclose relevant information, or explain in detail why that has not been done. Defendants have done neither.

An earlier version of section 1502.22 was interpreted and applied by the Ninth Circuit in *Hodel,* 840 F.2d at 1440-41 & n.1. The court observed that the regulation comes into play when risks generally are identified but their specific scope and magnitude are "unknown or uncertain." *Id.* Here, it is evident from defendants' own statements that risks generally have been identified, but that their specific scope and magnitude may remain unknown and uncertain. (*See* Alkire Decl., ¶¶ 21-26; Niles Decl.) This being so, defendants must comply with section 1502.22. They have not done so.

Defendants have identified generally the need to mitigate safety risks in the DSTT, but their discussion is incomplete and inadequate. At best, FTA has given Sound Transit's treatment of this issue a very "soft" look, if any look at all. In *Carmel,* 123 F.3d at 1153-54, the court stated:

> An Environmental Impact Statement must include a detailed statement regarding adverse environmental effects that cannot be avoided. 42 U.S.C. § 4332(2)(C)(ii). This requirement entails a duty to discuss measures to mitigate adverse environmental requirements . . . . *Mitigation must "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated."* . . . An Environmental Impact Statement need not contain a "complete mitigation plan" that is "actually formulated and adopted." . . . An Environmental Impact Statement cannot, however, omit a reasonably thorough discussion of mitigation measures because to do

> so would undermine the action-forcing goals of the National Environmental Policy Act.

(Emphasis added; citations omitted). There is, of course, no discussion in the 1999 Final EIS of mitigation of safety issues associated with mixed bus-train use of the DSTT—because such mixed use was *summarily rejected* as an alternative in that document. Mitigation discussion in the 2002 EA is inadequate, since no mitigation details are provided. (Niles Decl., ¶¶ 4,5, 12-14; Alkire Decl., ¶¶ 21-21 and referenced Exhibits.) Thus, defendants have failed to meet the quoted *Carmel* requirements with respect to discussion of safety issues associated with mixed bus-train use of the DSTT.

II. DEFENDANTS HAVE VIOLATED NEPA BY FAILING AND REFUSING TO ADDRESS OTHER ISSUES AS REQUIRED

Some of defendants' failures pertain not only to their currently-proposed Initial Segment proposal, but also to their Central Link proposal as well. These failures are discussed below.

A. Failure to Address TSM "Baseline" Alternative as Required

Defendants' failure to discuss Initial Segment as an alternative in any EIS or SEIS is compounded by their failure to discuss any alternative to light rail except "no action." This also violates the law.

"An Environmental Impact Statement must discuss 'reasonable alternatives' to the proposed action." *Carmel,* 123 F.3d at 1155 (citing 42 U.S.C. § 4332(2)(C)(iii) and *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison,* 67 F.3d 723, 729 (9th Cir. 1995)). Title 49 U.S.C. § 5309(e)(1)(A) requires an adequate "alternatives analysis." Agency rules and guidelines help determine, in particular cases, which alternatives are "reasonable" and whether the analysis is "adequate."

In implementing the alternatives analysis requirement of 49 U.S.C. § 5309(e)(1)(A), the FTA's "New Starts" Rule, 49 § C.F.R 611.7(a)(3), requires discussion of a proper "baseline" alternative:

> The alternative strategies evaluated in an alternatives analysis must include a *no-build alternative, a baseline alternative, and an appropriate number of build alternatives.* Where project sponsors believe the no-build alternative fulfills the requirements for a baseline alternative, FTA will determine whether to require a separate baseline alternative on a case-by-case basis.

(Emphasis added.)

"Baseline alternative" is defined at 49 C.F.R. § 611.5 as follows:

> Baseline alternative is the alternative against which the proposed new starts project is compared to develop project justification measures. Relative to the no build alternative, it should include *transit improvements* lower in cost than the new start which result in a better ratio of measures of transit mobility compared to cost than the no build alternative.

(Emphasis added.) This definition, and its reference to "transit improvements", is generally referred to by the FTA as "Transit Systems Management" or "TSM." (Second Declaration of Richard Nelson, September 12, 2002 ("Second Nelson Decl.") at ¶¶ 1-4.)

Sound Transit concedes that "Initial Segment" has never been compared to a TSM baseline alternative, as defined above, in any EIS or EA. It admitted in earlier briefing, "FTA did not use the [1999] FEIS to evaluate alternative technologies." (Sound Transit Brief, *Monorail* case, Exhibit E to Declaration of Thomas Rubin, July 11, 2001 ("Rubin Decl."), at p. 22.) Similarly: "The Initial Segment EA . . . does not involve a reconsideration of other technologies, transportation modes, or demand management alternatives or strategies." (Amended ROD, Attachment L at 10; Exhibit T to Alkire Decl.)

Defendants have attempted to circumvent the requirement to address the TSM baseline alternative by treating the no-build and baseline alternatives as "equivalent."[5] Yet in the 1993 programmatic EIS the authors clearly distinguished between No-Build (no action) and Baseline (TSM) as separate alternatives. Nelson Decl. at ¶ 21; *see, e.g.*, 1993 EIS at 2-15, AR at 11701; *id.* at xxxi – xxxiii, AR at 11177-79. Likewise, Sound Transit knows that these alternatives are not "equivalent."

Further, under FTA's procedures:

> FTA will determine on a case-by-case basis whether the TSM alternative or the no-build alternative satisfies the definition of the New Starts baseline alternative for each proposed New Starts project. *As general guidance, the use of the no-build or no-action alternative as the New Starts baseline is expected to be rare and limited to highly urbanized portions of major metropolitan areas with saturated transit coverage already present.* Prior to approval of preliminary engineering, FTA must approve the definition of the baseline alternative.

(FTA's Frequently Asked Questions re. New Starts Rule, Part II. Key Changes, page 2 of 13 (emphasis added)) (copy attached as Exhibit A to Alkire Decl.) The FTA explains: "Most metropolitan areas where New Starts projects are proposed would likely fit in this category where additional transit actions short of a New Starts major capital investment are feasible." (*Id.*)

In this case, Seattle is like most metropolitan areas. Additional transit actions short of a light rail project are feasible. (*See* Second Nelson Decl., ¶¶ 12-31; Rubin Decl., ¶¶ 23-42, and Exhibits G, H, and I thereto.) The Seattle area does not now have "saturated" transit coverage. (Second Nelson Decl.) Even in the key DSTT corridor, by defendants' own

[5] November 6, 1998 letter from Sound Transit to FTA, and Sept. 24, 2001 letter from Sound Transit to FTA, copies enclosed as Exhibit G to Alkire Decl.

admission bus volume could be nearly *double* what it is today. (Second Nelson Decl., ¶¶ 26-31.) Accordingly, defendants' failure and refusal to address a baseline alternative other than "no action" is arbitrary and capricious under FTA's own regulations and guidelines.

Plaintiffs agree with federal defendants that the FTA was required to define and examine the light rail project proposal in light of "Congressional directives defining FTA's statutory authority to act", and that within that framework the FTA has an independent duty to insure that the scope of project analysis is not unduly narrowed. (FTA Brief, *Monorail* case, Dec. 22, 2000, at pp. 11, 13.) As explained above, it was *consistent,* not inconsistent, with FTA's "basic policy objectives" (FTA Brief, *id.*, at 9-10) to examine a true TSM baseline alternative.

Because the defendants never examined a true TSM baseline alternative as required, they have violated 49 U.S.C. § 5309(e)(1), 49 C.F.R. § 611.7(a)(3), and the alternatives requirement of 40 C.F.R. § 1502.14. By failing to discuss the TSM baseline alternative at all, let alone "in reasonable detail," *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), defendants have violated NEPA.

B. Failure to Address Adequately the Safety Issues in the Rainier Valley

Safety issues in the Rainier Valley continue to persist for Initial Segment, just as for the earlier, 21-mile proposed Central Link project. Turning to the issue of accident rates, especially fatalities, as discussed in the Declaration of Thomas Rubin, July 11, 2001 ("Rubin Decl."), at ¶¶ 6-22, even Sound Transit now admits that surface grade, mixed intersection light rail such as that proposed for the MLK corridor has caused many fatalities across the country. In other words, fatalities caused by light rail along MLK are predictable. (*Id.* at ¶¶ 19-21. *See also* Niles Decl.) Yet there is no discussion in the FEIS of the prospect of fatalities caused by the project along MLK.

In the related *Save Our Valley*, Civil Action No. C00-0715R (W.D. Wash., pending on appeal), Sound Transit has argued that it discusses "light rail safety data, including fatalities" in the "Public Services" section of the 1999 Final EIS at pp. 4-161 and 4-162. Yet these obscure references deal only with National safety data; there is no discussion or analysis of this project's particular impacts.

NEPA requires analysis of effects on the "human environment." 42 U.S.C. § 4332(2)(C). The FEIS must contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action. *Carmel,* 123 F.3d at 1152-53. The discussion must be "full and fair." 40 C.F.R. § 1502.1. Defendants' failure to discuss fatalities along MLK *at all* clearly violates these plain legal requirements. *Busey*, 938 F.2d at 196.

Further, the FTA promulgated "Hazard Analysis Guidelines for Transit Projects", in January 2000. (Niles Decl., and Attachment D thereto.) Obviously these were not addressed in the 1999 Final EIS, which pre-dated the publication of those Guidelines. Yet inexplicably, there is no discussion in the 2002 EA of these FTA Guidelines or Initial Segment's compliance or lack of compliance with them.

CONCLUSION

Defendants have failed to abide by their own regulations and guidelines. They have not written an EIS or SEIS for the Initial Segment project that they now propose. They continue to propose "Initial Segment" project even though it was not subjected to requisite alternatives analysis, and even though its key component, mixed bus-train use in the DSTT, was summarily rejected in the 1999 Final EIS. They have violated NEPA and the APA. Partial summary judgment should be issued in favor of plaintiffs.

This motion is respectfully submitted this ____ day of September, 2002.

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