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

ORDER

INTRODUCTION

Plaintiffs, Citizens for Mobility and several individuals, are challenging the plans of Sound Transit and the Federal Transit Administration (FTA) to build the "Initial Segment" of the proposed "Central Link" light rail system [1] This challenge asserts that defendants,

[1] This Court has twice rejected challenges to the adequacy of the Final Environmental Impact Statement (FEIS) In Friends of the Monorail, Inc v United States, Case No C00-852Z, docket no 49 (W.D Wash March 30, 2001), the Court determined, *inter alia*, that the FEIS was not

contrary to the requirements of 42 U.S C. § 4321 *et seq.*, the National Environmental Policy Act (NEPA), did not perform for the Initial Segment an analysis of alternatives and did not provide an environmental impact statement (EIS) or supplemental environmental impact statement (SEIS) Defendants counter that the EIS provided in connection with planning for the Central Link, supplemented by an environmental assessment (EA) for the urban portion and a supplemental EIS for the suburban portion of the Initial Segment, satisfies NEPA requirements. These issues now come before the Court on cross motions for partial summary judgment The Court heard oral argument on March 19, 2003, and took the matter under advisement.

I. Background

In November 1996, voters in the Puget Sound area approved "Sound Move," a proposal for the construction of a north-south light rail line running through downtown Seattle. After extensive study, Sound Transit proposed to construct the "Central Link"; it was to provide service over a 21-mile alignment extending from a northern terminus at Northeast 45th Street in the University District to a southern terminus at South 200th Street. So planned, the Central Link would connect the cities of Seattle, Tukwila, and SeaTac, and it was to include a station at the Seattle-Tacoma International Airport (Sea-Tac Airport) The plans also included an option to extend the line northward from the University District to the Northgate Shopping Center

The Central Link project was evaluated in the CENTRAL LINK LIGHT RAIL TRANSIT PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS), issued in November, 1999

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inadequate for failing to consider the monorail and other transit alternatives to light rail In Save Our Valley v Sound Transit, Case No. C00-715R, docket no 176 (W.D.Wash. July 13, 2001), the Court determined, *inter alia*, that (1) the FEIS was not defective in regard to the extent which it considered, as an alternative to an at-grade alignment, building a tunnel through the Rainier Valley portion of the proposed alignment in order to minimize the impact of the light rail line on the Rainier Valley community; (2) the FEIS adequately analyzed the adverse impacts that light rail construction would have on the minority and low-income members of the Rainier Valley community, and (3) the FEIS adequately defined mitigation measures.

Administrative Record (AR) at 3043-4012 The FEIS described the project and evaluated alternatives, environmental impacts, and mitigation measures After consideration of objections from the City of Tukwila, Sound Transit and the FTA conducted a study of an alternate alignment for the suburban segment between south Seattle and Tukwila. *Id* At the conclusion of the study, Sound Transit and FTA issued, on November 16, 2001, the CENTRAL LINK LIGHT RAIL TRANSIT PROJECT FINAL SUPPLEMENTAL IMPACT STATEMENT TUKWILA FREEWAY ROUTE (Suburban FSEIS) *See* CENTRAL LINK LIGHT RAIL TRANSIT PROJECT INITIAL SEGMENT, NEPA ENVIRONMENTAL ASSESSMENT (Urban EA), AR 502491, 502500. Thus, as a result of the FEIS and the subsequent Suburban FSEIS, the Central Link project was fully evaluated. Prior to the issuance of the Suburban FSEIS, Sound Transit decided to build the Central Link in segments rather than all at once. *Id* Sound Transit's choice of the "Initial Segment" as the first portion to be constructed was announced on September 27, 2001 *Id.* The Initial Segment would provide light rail service over a 14-mile line running from Convention Place,[2] in downtown Seattle, to South 154th street, near (but not including a station for) Sea-Tac Airport. *Id* From Convention Place through the Boeing Access Road (i.e., the Urban Portion), the Initial Segment would follow the same alignment as planned for the Central Link. *Id* From the Boeing access road to South 154th Street (i.e., the Suburban Portion), the Initial Segment would follow the "Tukwila Freeway Route," studied in the Suburban FSEIS (rather than the Tukwila International Boulevard Route, as in the proposed Central Link). *Id* The Initial Segment would provide for joint bus/rail use in the Downtown Seattle Transit Tunnel (DSTT) and shuttle bus service between the South 154th Street station and Sea-Tac Airport. *Id* Plaintiffs do not now challenge the Central Link project in the pending motion for partial summary judgment Rather, the May 2002 Amended Record of

[2] Westlake Station would serve as the northern passenger terminus of the Initial Segment, and the Convention Place would serve as its northern rail terminus *See* CENTRAL LINK LIGHT RAIL TRANSIT PROJECT INITIAL SEGMENT, NEPA ENVIRONMENTAL ASSESSMENT, AR 502491-502693.

Decision (Amended ROD) and the "Initial Segment" plan are at issue here [3]

Plaintiffs allege that Sound Transit and the Federal defendants violated NEPA by failing (1) to evaluate the Initial Segment in a new EIS or in an SEIS, (2) to analyze (a) the Initial Segment as a distinctly identified alternative in any EIS or SEIS and (b) any alternative to the Initial Segment aside from the no-action alternative; (3) to analyze the environmental effects of joint bus/rail use of the DSTT in an EIS or SEIS; and (4) to address the safety impacts of the Initial Segment in the Rainier Valley Plaintiff's Memorandum, docket no. 43, at 4 [4]

II. Standard of Review

Because the National Environmental Policy Act of 1969 (NEPA) does not contain a separate provision for judicial review, a Federal agency's compliance with NEPA is reviewed under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) *See* Northwest Resource Info Ctr., Inc. v. National Marine Fisheries Serv., 56 F 3d 1060, 1066 (9th Cir 1995). Factual disputes which implicate substantial agency expertise are reviewed under the arbitrary and capricious standard [5] Price Road Neighborhood Ass'n v. U.S. Dept. of Transp., 113 F 3d 1505, 1508 (9th Cir. 1997) In particular, if, in the light of new information or a change in a project which occurs after NEPA documents have already been completed, an

[3] Plaintiffs presently do not move for summary judgment on Count One (NEPA violation for the Central Link) or Count Two (violation of the Clean Air Act). Plaintiffs state in their Motion for Partial Summary Judgment, docket no 42, that if defendants later "seek to revive their 21-mile Central Link project proposal," plaintiffs reserve the right to seek partial summary judgment on those Counts. In addition, Count Three (APA violation pertaining to the Full Funding Grant agreement) is not now before the Court.

[4] In some respects, this action is a continuation of Friends of the Monorail, Inc. v. United States, C00-852Z (W D. Wash. 2001); the parties have agreed that the AR used in that case may be used in this case as well.

[5] The arbitrary-and-capricious standard is limited and decidedly deferential to the agency's expertise. National Resources Defense Council v Hodel, 819 F.2d 927, 929 (9th Cir 1987) And where the review involves the interpretation of an agency's regulation, "[t]he 'agency's interpretation [thereof] is to be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Alhambra Hosp v Thompson, 259 F 3d 1071, 1074 (9th Cir. 2001) (quoting Thomas Jefferson Univ v Shalala, 512 U S 504, 512 (1994)).

agency decides *not* to prepare a supplemental environmental assessment, the agency's decision is reviewed under the APA's arbitrary-and-capricious standard [6] Marsh v. Oregon Natural Resources Council, 490 U.S 360, 376-77 (1989), *see* 5 U.S.C § 701-706, *et seq.*[7] Legal disputes, on the other hand, are reviewed under the reasonableness standard Price Road, 113 F 3d at 1508 "In evaluating whether an agency's [environmental impact statement] complies with NEPA's requirements, we must determine whether it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[8] Muckleshoot Indian Tribe v U S. Forest Service, 177 F.3d 800, 809 (9th Cir. 1999) (internal quotation omitted). "In short, we must ensure that the agency has taken a 'hard look' at the environmental consequences of its proposed action." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir 1998). The rule of reason analysis and the review for an abuse of discretion are essentially the same, and differences between these standards of review are often difficult to discern *See* Marsh v Oregon Natural Resources Council, 490 U S 360, 377 n.23 (1989), Idaho Sporting Congress v. Thomas, 137 F 3d 1146 (9th Cir. 1998) (Idaho I).

III. Discussion

A. Scope of Review.

Generally, a court's review of FTA's decisions is limited to the Administrative Record. Friends of the Monorail v United States, C00-852Z, Minute Order, docket no. 48

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[6] In such a review under the arbitrary-and-capricious standard of the APA, agency action is presumed to be valid in the absence of a *substantial showing* to the contrary A C L U v F.C.C., 823 F.2d 1554, 1564 (D C. Cir 1987).

[7] An agency's "decision to prepare an EA rather than an EIS is reviewed under the APA's arbitrary-and-capricious standard." Marsh, 222 F 3d at 1114 An agency's decision whether to prepare an EA or an EIS is heavily fact-dependent.

[8] If the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences," a reviewing court may not "fly speck" an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies Oregon Environmental Council v Kunzman, 817 F 2d 484, 492 (9th Cir. 1987)

(March 28, 2001) (citing Northcoast Environmental Center v. Glickman, 136 F 3d 660, 665 (9th Cir. 1998) and granting Sound Transit's motion to strike extra-record evidence). The Administrative Record (AR) in this case was the same record the Court reviewed in Monorail, as supplemented by FTA on September 18, 2002. A court may consider material outside the AR if respondents have relied on documents that are not in the AR, if supplementation is necessary to explain technical terms or complex subject matter, or if an agency's failure to explain its actions frustrates judicial review. Friends of the Payette v Horseshoe Bend Hydroelectric Co., 988 F 2d 989, 997 (9th Cir. 1993). As none of these three conditions obtains here, the Court GRANTS Sound Transit's motion, docket 56, to strike the extra-record declarations of Richard Nelson, John S. Niles, and Thomas Rubin, along with all extra-record declarations attached to these declarations. By Minute Order dated April 14, 2003, the Court granted in part Sound Transit's motion to correct the AR; Exhibit A to the Declaration of Theodore Uyeno, docket no. 66, is considered part of the AR.[9] The Court's review will be limited to the AR

B. NEPA and Its Implementation.

In order for the policy goals and general directives of NEPA to become effective, they must be interpreted and implemented Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500-1508, provide guidance in the continuing process of interpretation and implementation of NEPA and are entitled to substantial deference. Robertson v Methow Valley Citizens Council, 490 U S 332, 355-56 (1989). Thus, in the words of the CEQ, NEPA "is our basic national charter for protection of the environment." 40 C F.R. § 1500 1(a). "The NEPA process is intended to help public

[9] Exhibit A to the Uyeno Declaration is Sound Transit's response to FTA's comments of December 18, 2001 This response had been inadvertently omitted from the AR It was received by the FTA on January 8, 2002, and the FTA considers Sound Transit's response as part of the AR Uyeno Declaration at ¶ 5. However, defendants make no showing in the record as to whether the Exhibit A response was considered in the decision making process As a result, the Court's opinion does not rely on Exhibit A materials

officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F R § 1500.1(c)

NEPA therefore requires that when "proposals for legislation and other major Federal actions significantly affect[ ] the quality of the human environment," the responsible Federal agency must prepare a detailed statement which includes (1) the environmental impact of the proposed action, (2) any unavoidable negative environmental effects of the proposal, and (3) alternatives to the proposed action *See* 42 U S C. § 4332(C) This detailed written document is an EIS 40 C F.R. § 1508.11. An EIS serves

> 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 [EIS] 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 The alternatives section, which should "present the environmental impacts of the proposal and the alternatives in comparative form [in order to] sharply defin[e] the issue," is therefore "the heart of the" EIS. 40 C.F R. § 1502 14

NEPA also recognizes the "continuing responsibility of the Federal government to use all practical means to improve and coordinate Federal plans, functions, programs and resources" for long-term, environmentally sound ends. 42 U.S C. § 4331(b) (emphasis added) For that reason, NEPA imposes on Federal agencies a continuing duty to supplement existing EISs in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F R. § 1502 9(c)(1)(ii); Warm Springs Dam Task Force v Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980); Idaho Sporting Congress, Inc v. Alexander, 222 F 3d 562, 566, n.2 (9th Cir. 2000) (Idaho II) On the other hand,

> an agency need not supplement an EIS [i e , prepare a supplemental EIS] every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made

Marsh, 490 U S at 373 Although NEPA itself does not prescribe how agencies are to determine the significance of new information (Marsh, 490 U.S. at 370, Idaho II, 222 F.3d at 566), the CEQ has provided for means to avoid the endless loop of iterated EISs that concerned the Marsh court[10] when, as in the present case, an EIS has been prepared for a project, but the project has been altered to the extent that significant, new environmental impacts may occur, the agency should perform an EA [11] *See* 42 U.S.C. § 4332(2)(D)(iv) (notification is to be provided of any Federal "action or alternative thereto which may have significant impacts ..., and, if there is any disagreement on such impacts, . a written assessment of such impacts ... [is to be prepared] for incorporation into [a] detailed

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[10] The possibility of an endless loop of EISs arises from the requirements of 40 C F R § 1502.9(c)(1):

> (c) Agencies·
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns, or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts

If every change is taken to be "substantial" or every new circumstance or datum "significant," then no Federal action could go forward Clearly, there have to be some criteria whereby substantiality and significance can be determined

[11] According to 40 C.F R. § 1508.9 , an "Environmental Assessment":

> (a) Means a concise public document for which a Federal agency is responsible that serves to
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> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary
>
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted

statement") (emphases added).[12] The function of an EA is precisely to determine whether the project may significantly affect the environment, if so, an EIS is mandatory, but if the EA results in a finding of no significant impact (FONSI),[13] NEPA does not require an EIS [14] 40 C.F.R § 1508 9(a)(1), 40 C F.R. § 1501.4(c) (the environmental assessment provides the grounds for the Federal agency's "determination whether to prepare an environmental impact statement")

If an EIS has been prepared for a given project, it can form the basis for the subsequent NEPA documentation occasioned by any set of changes in the project, provided that the initial EA performed because of those changes results in a FONSI Under those circumstances, the agency may incorporate by reference prior discussions of general issues and focus on the specific issues relevant to the subsequent action, "tiering" these documents off the existing EIS *See* 40 C F R § 1502.20.

C. The Sequence of Environmental Studies

In January 2000, the FTA, pursuant to 23 C F.R § 771 127, found that the NEPA requirements had been satisfied for the Central Link. Amended ROD, AR 502696. The locally preferred alternative (LPA) approved in the 2000 ROD was a light rail line running from the Northgate Urban Center through downtown Seattle and the City of Tukwila to the City of SeaTac *Id* At the insistence of the City of Tukwila, Sound Transit altered plans for the segment of Central Link running between the Boeing Access Road and South 154th

[12] Thus NEPA itself recognizes the distinction between an "assessment" and a "detailed statement," the distinction from which derives the difference between the scope of an EA and that of an EIS

[13] The regulations define a FONSI as "a document by a Federal agency briefly presenting the reasons why an action . will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared " 40 C F R § 1508.13

[14] "If the EA establishes that the agency's action *may* have a significant effect upon the environment, an EIS must be prepared If not, the agency must issue a [FONSI], accompanied by a convincing statement of reasons to explain why a project's impacts are insignificant " Public Citizen v. United States Dep't of Transp., 316 F 3d 1002, 1021 (9th Cir 2003)

Street. AR at 502350, 502736 Then, on November 29, 2001, the Sound Transit Board preliminarily adopted Initial Segment as its revised LPA AR at 502696. This decision to build the Initial Segment rather than the Central Link "effectively altered" the original LPA to the extent that, "for Federal Record-of-Decision-making purposes under NEPA," the revised LPA became a project that required additional environmental review *Id* That review consisted of (1) the Urban EA of the portion of the LPA from downtown Seattle to the South 154th station in the City of Tukwila, and (2) the Suburban FSEIS on the portion of the LPA running from the Boeing Access Road station through the City of Tukwila to the South 154th station.

A consideration of the reasons for FTA's requiring Sound Transit to produce an EA for the Urban Portion but an SEIS for the Suburban Portion is instructive. As to the Suburban Portion, it was immediately clear that a supplemental EIS was necessary because an entirely different alignment was chosen.[15] As to the Urban Portion, the alignment itself is a subset of the Central Link alignment, and the changes made from the original plan were not obviously of environmental significance.[16] A comparison of the Initial Segment and the original project was presented in the Urban EA.

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[15] The decision to proceed with the Suburban SEIS was a direct application of 23 C F.R. § 771.130(f)· "In some cases, a supplemental EIS may be required to address issues of limited scope, such as the evaluation of location or design variations for a limited portion of the overall project."

[16] Similarly, FTA's direction to Sound Transit that an EA was necessary was a direct application of 23 C.F R. § 771 130(c): "Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances "

	Initial Segment	Original Project
Begin Construction	Mid 2002	2000
Begin Passenger Service	Mid 2009	2006
Length	14 miles	21 miles
North Terminus	Trains Tunnel under Pine St Passengers Westlake Station	North 45th Street [same]
South Terminus	South 154th Street (with shuttle bus to Sea-Tac)	South 200th Street
Daily Ridership in 2020	42,500	127,600
Stations	*** *** *** *** Westlake University Street Pioneer Square International District [Royal Brougham – deferred] Lander Beacon Hill McClellan Edmunds [Graham – deferred] Othello Henderson [Boeing Access Road – deferred] South 154th with Park & Ride ***	North 45th Street Pacific Capitol Hill First Hill Westlake University Street Pioneer Square International District [Royal Brougham – deferred] Lander [Beacon Hill – deferred] McClellan Edmunds [Graham – deferred] Othello Henderson Boeing Access Road (with deferred Park & Ride) South 154th with Park & Ride South 200th Street
Maintenance and Operations Facilities	Some elements deferred	Facility at Rainier Brewery/ Roadway Express
DSTT Operations	Joint Bus/Rail Operations	Rail Only Operations
DSTT Construction	2007-2009	2004-2006

AR at 502352. To be sure, there are differences in the two proposals, aside from the obvious ones of length, number of stations, completion date, and estimated ridership. The most notable of the additional differences – and, as will become clear, the one of most concern to plaintiffs – is that the original project called for rail-only operations in the DSTT, whereas the Initial Segment calls for joint bus/rail operations.

In Wisconsin v Weinberger, the Seventh Circuit has set forth a framework which may guide courts in reviewing an agency's response:

> The principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information is the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS. [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 look at the environmental consequences of the proposed action is necessary

745 F.2d 412, 418 (7th Cir 1984) (emphasis in original) *See also* California v Block, 690 F 2d 753, 771-72 (9th Cir 1982) (Public comment is a key input in assessing a decision's environmental impact.) Recognizing that the changes in the Urban Portion might have significant environmental impacts different from those foreseen in the original EIS and the supplemental Tukwila EIS, Sound Transit prepared an "Environmental Re-evaluation," which asserted that "[t]here would be no significant changes in impacts or mitigation for the project." AR at 502184-186 After reviewing this document, FTA, finding that mere assertions of "no significant changes" did not satisfy NEPA requirements, responded that an EA would be needed "to evaluate the significance of the new and changed impacts that would result from the proposed changes." AR 502215. FTA emphasized that Sound Transit was not to reexamine the important decisions already made as a result of the existing final EIS, decisions as to the purpose and need of the project, the primary transportation mode (i e., light rail), the particular alignments, and the station locations. *Id.* Rather, Sound Transit was to concentrate on the impacts caused by the changes from the Central Link to the Initial Segment. *Id* FTA directed Sound Transit to pay particular attention in the EA to the proposed joint bus/rail use of the DSTT FTA also noted that "a supplemental EIS may be required if the EA does identify significant new or significant changed impacts." *Id*

On November 19, 2002, Sound Transit presented to FTA a "preliminary review draft" of the required EA. Along with that document, Sound Transit included a report dated August

21, 2001, entitled EVALUATION OF JOINT OPERATIONS IN THE [DSTT] A R at 502637-693. FTA reviewed the draft and responded that additional analysis was needed, including a discussion of alternative joint uses of the DSTT *Id* On January 8, 2002, Sound Transit submitted to FTA a "second review draft" of the EA, which FTA approved for publication pending Sound Transit's addressing several remaining issues. On February 4, 2002, FTA approved the finalized supplemental EA (the Urban EA) A.R at 502491-502693 The Urban EA concluded that construction of the Initial Segment would result in "similar or lower environmental impacts than the original proposal or other projects analyzed" in the FEIS or the Suburban FSEIS. A.R. at 502503 Accordingly, on May 8, 2002, FTA issued its Amended ROD. A R. at 502694-502695; 502696-502887. Therein, FTA found, in general, that "the requirements of NEPA have been satisfied for the construction and operation of" the Initial Segment A.R at 502697 And in particular, FTA found, under 23 C.F R. §§ 771.121 and 771 130,

> that the proposed changes to the project, with the mitigation to which Sound Transit has committed, will have no new significant adverse impacts on the environment beyond those previously evaluated in the FEIS and the Tukwila Freeway Route Final Supplemental EIS. The record provides sufficient evidence and analysis for determining that another supplemental EIS is not necessary.

A.R. at 502706 Or, to use the term of art, the EA resulted in a FONSI

The Supreme Court in Marsh determined that an agency decision not to prepare a supplemental EIS is reviewed under the APA's arbitrary-and-capricious standard This is a "highly deferential" standard of review, it "presumes agency action to be valid" and imposes a "heavy burden" upon petitioners Short Haul Survival Committee v. United States, 572 F 2d 240, 244 (9th Cir. 1978) (citations omitted).[17] An agency's decision whether to supplement an EIS is a "classic example of a factual dispute the resolution of which

[17] Plaintiffs, noting that Short Haul, the case in which the expression "heavy burden" appears, has to do with rulemaking by the Interstate Commerce Commission, not with agency action under NEPA, argue that Short Haul's "heavy burden" does not apply to a NEPA case However, there is only one arbitrary-and-capricious standard that applies under the APA Petitioners therefore labor under a heavy burden

implicates substantial agency expertise" and therefore is reviewed under the arbitrary-and-capricious standard Marsh, 490 U.S at 376-77.

In this case, FTA's analysis of the Initial Segment was in accord with NEPA requirements For the Suburban Portion, an FSEIS was prepared, plaintiffs make no allegation of insufficiency with regard to it. For the Urban Portion, the Urban EA was prepared, it concluded with a FONSI. Therefore, FTA deemed no SEIS to be necessary for that portion Since the original FEIS for the Central Link was not called into question by the Urban EA or by the Suburban FSEIS of the Initial Segment, the FEIS stands as a document from which the later documents may tier

D. Analysis of Plaintiffs' Challenges to Agency Actions

Plaintiffs urge, as a general matter, that Initial Segment and Central Link are in fact "two different projects." Plaintiffs' Memorandum, docket no. 43, at 6 Taken in the generality with which it is asserted, this claim does not find support in the Administrative Record.[18] If these were completely different projects, to each of which substantial Federal funding was to be committed, then an EIS for each would be required Or, if an EIS had been completed for one project, but a Federal agency proposed to fund a larger project of which the first was a substantially smaller subset, a new EIS for the larger project would again be required However, the situation here is the reverse· an EIS for the whole has been completed, of which what is essentially a subset is now proposed for Federal funding. It is true that Initial Segment is not precisely a subset of Central Link; the differences are displayed in the foregoing table. It is the subsequent environmental review of those differences which must be considered The question is: do those differences make a significant environmental difference Plaintiffs claim that they do

[18] Plaintiffs repeatedly conflate the requirements of NEPA with the requirements of FTA's funding decisions to be found in 49 C F R. § 611, "Major Capital Investment Projects." For purposes of FTA funding, Initial Segment and Central Link are indeed separate projects. That fact has nothing whatever to do with the NEPA requirements; it is those requirements which are the subjects of this action

Specifically, plaintiffs' challenges to the actions of Sound Transit and the Federal defendants are four in number: (1) Initial Segment's environmental impacts are significantly different from those of Central link, (2) under those circumstances, an EA is not an adequate substitute for an EIS or an SEIS; (3) defendants' failed to conduct alternatives analysis; and (4) defendants failed to address safety issues adequately, and they did not order safety risks to be mitigated The Court will address each of these in turn.

1. Are the Environmental Impacts Significantly Different?

In this case, the parties dispute the significance of certain facts, not the facts themselves. It follows that determining whether the change from Central Link to Initial Segment results in environmental impacts that are significantly different is a legal, rather than a factual, question Plaintiffs cite to West v. Secretary of the DOT, 206 F.3d 920, 927 (9th Cir. 2000), and Idaho I, 137 F 3d at 1149-50, for the proposition that any doubts whether changes in a project are "substantial" or that the actual environmental impacts arising from those changes are "significant" are to be resolved in favor of full environmental disclosure, i e , preparation of a full EIS rather than an EA. Plaintiffs' Response, docket no 58, at 3. Plaintiffs then cite to additional Ninth Circuit cases for the proposition that absent record evidence of convincing reasons why potential effects on the environment are insignificant, an agency's decision to avoid an EIS is unreasonable. *Id.* at 4; Metcalf v Daley, 214 F 3d 1135, 1142 (9th Cir. 2000) (quoting Blue Mountains Biodiversity Project v Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (("If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant ") (quoting Save the Yaak Comm v Block, 840 F.2d 714, 717 (9th Cir. 1988)))), *see also* Oregon Natural Desert Ass'n v. Green, 953 F Supp 1133, 1146-48 (D. Or. 1997) (If an agency's decision supporting a finding of nonsignificance ("FONSI") is not based on evaluation of relevant factors, it is arbitrary and capricious) On the other hand, the Ninth Circuit has determined that, absent some unaddressed significant environmental impact, no

further compliance with NEPA is required, even if an adopted alternative is not analyzed as such in an EIS Northern Plains Resource Council v. Lujan, 874 F.2d 661, 665-66 (1989) ("NEPA does not require a separate analysis of alternatives with consequences indistinguishable from the action proposed...") Plaintiffs have the burden of producing evidence of some potentially significant environmental impact that went unexamined in the Urban EA

a. Significant Changes?

Plaintiffs first focus on successive reports that considered joint use of the downtown tunnel [19] The first of these, the 1998 DOWNTOWN SEATTLE TRANSIT TUNNEL REPORT, examined both exclusive rail use and mixed bus-train use in the DSTT and concluded that the latter was "undesirable." AR 502691 ("Key findings of the 1998 DSTT report were the cost of tunnel modifications and need to purchase a new dual mode bus fleet with the potential of [ ] operating [only] 30 buses in each direction for 2-10 years.") *See* EVALUATION OF JOINT OPERATIONS IN DOWNTOWN SEATTLE TRANSIT TUNNEL, dated August 21, 2001, referring to earlier 1998 report. AR 502691. These findings led to the original conclusion that joint operations, "[although] feasible, were undesirable " Accordingly, mixed-use was rejected in the 1999 FEIS. AR 3224-25. Then, faced with unexpected funding constraints and seeking, therefore, possible means of reducing the scope of Central Link, defendants commissioned another report to investigate the feasibility of mixed use in the DSTT, the result was

[19] It is useful here to note that plaintiffs cite to 40 C F R 1502 9(c)(1)(i) and (ii), which require that an agency prepare a supplemental EIS if it "makes *substantial changes* in the proposed action that are relevant to environmental concerns, or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" (emphasis added). Plaintiffs then make much of the fact that the 2001 Evaluation asserts that "the introduction of light rail vehicles in the transit tunnel will *significantly change* the operation of the tunnel " AR 502688 (emphasis added) Plaintiffs conclusion is that the appearance of the phrase "significant change" is alone sufficient to mandate an EIS However, as the Block court noted, the allied phrase "'substantial change' ... [is] not self-defining " 690 F.2d at 771. The context in which the phrase appears must be considered. Furthermore, as will be seen in Sections D 5 and D 6, *infra*, significant operational changes need not result in significant environmental impacts, and it is environmental impacts, not operational changes *per se* (however significant they may be), that are the concern of NEPA.

EVALUATION OF JOINT OPERATIONS IN THE [DSTT], dated August 21, 2001. AR 502638-93 Like its predecessor, this report also determined that mixed use was now feasible. AR 502513; AR 502641 More importantly, it clearly implied that, in view of "advances in equipment and operational changes" under which mixed use would occur, it was no longer undesirable. *See* Sections D 5 and D.6, *infra*. Plaintiffs then cite to Stop H-3 Ass'n v. Lewis, 538 F Supp. 149 (D. HI. 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), as describing a situation similar to that presented in this case. In Stop H-3, the district court held that an SEIS was necessary in part because the Federal Highway Administration selected a project alternative based on a government study that was neither made available to the public for comment nor addressed in an SEIS or any other NEPA document On appeal, the lower court's NEPA ruling was affirmed, but other portions of the decision were reversed Here, however, the mixed-use proposal was evaluated and incorporated in the EA, made available to the public for comment, and incorporated into the AR for use by FTA in making its final decision.

Plaintiffs next reference the fact that FTA raised in its review of the draft EA (AR 502222-301), which included the August 2001 DSTT mixed-use report, a number of specific questions relating to safety which Sound Transit would have to answer satisfactorily in order for FTA to approve the EA *See* AR at 502336. However, plaintiffs cite nothing in the AR that supports its assertion that "these questions [arose] because the Initial Segment proposal would change materially the conditions in the affected environment from those contemplated and discussed in the FEIS " Plaintiffs' Response, docket no 58, at 7 Nor do plaintiffs dwell on the fact that FTA considered the questions to have been answered in the final EA As FTA concluded in its findings in its Amended ROD dated May 8, 2002, "the proposed changes to the project, with the mitigation to which Sound Transit has committed, will have no significant adverse impacts on the environment beyond those previously evaluated in the

FEIS and the [Suburban] FSEIS " AR at 502706 This finding finds support in the AR and is not arbitrary and capricious.

Plaintiffs cite to several cases in each of which, after an EIS had been completed, unexpected developments occurred, as a result of those developments, courts determined that new EISs were required In the present case, nothing unexpected occurred Joint bus/rail use was considered in the FEIS, it was reconsidered in the Urban EA *cum* "Joint Operations" study

b. Illegitimate Division into Multiple Actions?

In Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir 2000), the court emphasized the importance of the CEQ's NEPA-implementing regulations, which require that an agency consider "connected actions" and "cumulative actions" within a single EA or EIS 40 C F R § 1508.25; Wetlands Action, 222 F 3d at 1118. Plaintiffs contend that defendants have divided Central Link into multiple actions, each of which has been studied, but the whole has not Plaintiffs' Response, docket no. 58, at 13-14 If the adequacy of only the two documents, the Suburban EIS and the Urban EA, were at issue, then plaintiffs' argument would have some merit. However, plaintiffs' argument ignores the fact that an EIS was prepared for the whole of Central Link and that the other two documents, not having brought its findings into question, may tier from it In Wetlands Action, the court determined that the impact of the (unassessed) whole might well be greater than, or different from, the sum of the impacts of the (assessed) parts. Here, instead, the whole was studied, and variant parts of that whole were found neither to have unacceptable environmental impacts of their own, nor to result in unacceptable environmental impacts to the whole

The Wetlands decision is also instructive in considering plaintiffs' argument that substantial questions of safety relating to the joint use of the downtown tunnel were raised by

the FTA in its Comments on the Draft Urban EA *See* AR 502328-340 Plaintiffs focus on the following questions propounded, at AR 502336, by the FTA [20]

1 "Concerning the signal system and the potential for collisions between rail cars and buses, how and when will you know [whether] the signal system works?"

2 "Will there be testing [of the signal system]?"

3 "How confident are you in the [signal system]?"

4 "Is there any hazard of crossover collisions in the station area?"

5. "Why are bus-to-bus collisions estimated to be the same?" Are there any operating conditions that may change accident rates? Buses will travel through in platoons. If there are no conditions of concern, please explain, briefly, and support."

6. Do "[fire/life/safety issues] need to be resolved to safely accommodate joint bus/rail operations?"

7. Do "[fire/life/safety issues] need to be resolved in order to fully evaluate the safety impact?"

8. "What are the fire/life/safety issues that need to be resolved?"

9. "How and when will they be resolved?"

10. "Is this why buses and trains are not allowed in the tunnel at the same time? Is it related to hybrid buses? Please explain and address "

In Wetlands, the district court found that the mere existence of substantial comments questioning the feasibility of the wetland system being proposed was sufficient to require an EIS. This finding was reversed on appeal by the Ninth Circuit, which concluded that the Corps of Engineers in fact had considered these issues. Similarly, in the present case, the questions by the FTA were considered and responded to in the Amended ROD Thus, Wetlands does not assist plaintiffs given the AR in this case

[20] FTA's questions are addressed at AR 502514-15

2. Is an EA Sufficient?

Plaintiffs argue that the length of the EA is justification for the depth that would be provided by another EIS for all of Initial Link. Plaintiffs' Response, docket no 58, at 15-16. Plaintiffs suggest that the government's guidelines of 10-15 pages for an EA are not met when the EA is 49 pages long. Plaintiffs argue that the very fullness of the August 2001 Evaluation is another reason why another EIS for all of Initial Link is needed. *Id.* at 16. It is unusual, to say the least, that a plaintiff complains that a (completed) study is too thorough, rather than too cursory. Indeed, the main reason for the EA's length is the presence of the August 2001 Evaluation, but that document was an appropriate means for considering the only part of Initial Segment that was arguably new. In any case, it has as well the status of a free-standing document, which then became one more piece of information already collected that could then become a point of reference for the EA. Finally, plaintiffs argue that since the FTA has declared the Central Link ROD "null and void," a new project now exists requiring a new EIS or SEIS. Plaintiffs argument is without merit. The FTA merely stated the obvious by issuance of the Amended ROD The original ROD of January 5, 2000, was no longer the record of decision.

3. Alternatives.

Plaintiffs assert that defendants 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 " Plaintiffs' Memorandum, docket no 43, at 4. Plaintiffs refer to this failure as the "essence of the case " *Id.* at 1. Plaintiffs cite to 40 C F R §1502.14 and City-of-Carmel-by-the-Sea v. United States Dep't of Transp., 123 F 3d 1142 (9th Cir. 1997), which holds that the alternative analysis "is the heart of the environmental impact statement." Carmel, 123 F 3d at 1155

Title 49 C F R § 611.5 defines "Alternatives Analysis" for new 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 " According to plaintiffs, Initial Segment was never given this treatment Plaintiffs' Memorandum, docket no 43, at 10. However, that the FEIS for Central Link did undertake a thorough alternatives analysis, including an evaluation of all reasonable mode and alignment alternatives and appropriate opportunities for public input, is a finding of both Save our Valley and Friends of the Monorail (*see* note 1, *infra*), that finding will not be revisited here As the Court has now found that Initial Segment is a subset of Central Link, the alternatives analysis already conducted in the Central Link FEIS applies directly to Initial Link, except insofar as there are differences in the two proposals. Any differences would call for additional analysis But such analysis was conducted It is true, as plaintiffs point out (Plaintiffs' Memorandum, docket no 43, at 12), that all of the alternatives in the FEIS specified rail-only use of the DSTT [21] It follows that the evaluation of joint bus/rail use in the Urban EA expanded, rather than illegally constricted, the overall alternatives analysis for utilizing the DSTT. The Court notes that the Urban EA was supplemented by a specific study on joint bus/rail use, the 2001 Evaluation, a report prepared jointly by Sound Transit and King County. AR 502638-693. The report concluded that joint bus/rail use was feasible and safe. As noted, the only changes that were not subject to a supplemental EIS were the changes to the interim northern and southern termini and the joint bus/rail use of the DSTT As to all three, the EA concluded with a FONSI That conclusion

[21] Plaintiffs make much of the fact that the 1999 FEIS considered and rejected joint bus/rail use of the DSTT: "Defendants may not lawfully proceed with an Interim Segment project when one of Initial Segment's main embodiments – [joint bus/rail 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 " Plaintiffs' Memorandum, docket no 42, at 15 (emphasis in original) However, that defect has been thoroughly remedied by the Supplementary 2001 Evaluation.

effectively nullifies plaintiffs' assertion that the agencies must conduct an EIS-level analysis of the environmental effects of joint bus/rail use on DSTT

Plaintiffs cite to Block for the proposition that environmental trade-offs must not be only enumerated, but analyzed. 690 F.2d at 762-67. Plaintiffs also cite 23 C F.R § 771 130(b)(1), which provides (with emphasis added) that an SEIS need not be performed if the changes to the proposed action "result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in an EIS " Plaintiffs then argue that Block is relevant to the present case because moving from rail-only use of DSTT in Central Link to joint use in Initial Segment resulted in an unanalyzed trade-off. Plaintiffs' Reply, docket no 58, at 20 Plaintiffs conclude that the absence of an alternatives analysis renders the FEIS insufficient *Id.*

Block's directive to *analyze* environmental trade-offs is to be interpreted as requiring the FTA to consider the entire set of environmental findings in the record, including those of the FEIS, the Suburban FSEIS, and the Urban EA with its incorporated 2001 Evaluation. Taken together, the findings of those three documents *do* satisfy the Block directive. The FEIS identified the aforementioned undesirable environmental consequences of rail-only use of the DSTT. The proposed joint-use would clearly ameliorate those consequences. The possibility of other undesirable environmental consequences prompted FTA to require Sound Transit to conduct the Urban EA. The Urban EA incorporated the 2001 Evaluation and its findings On the basis of those findings, Sound Transit concluded that joint bus/rail use of the DSTT did *not* result in significant undesirable environmental consequences Thus, it follows that the overall record does include dovetailing analyses, the pertinent results of which are tantamount to a single analysis of the environmental trade-off plaintiffs identify. 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 Accordingly, no further supplemental EIS is necessary.

4. TSM Baseline Alternative.

Plaintiffs argue that the agencies violated NEPA because they did not consider a Transit Systems Management (TSM) Baseline Alternative "Baseline alternative," according to 49 C.F.R. § 611.5,

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

Plaintiffs base their argument on Section 611, Major Capital Investment Projects," of Title 49 (Transportation) of the C F.R. In particular, plaintiffs cite to 49 C.F.R. § 611 7, "Relation to Planning and Project Development Processes":

> (a) Alternatives Analysis
>
> .....
>
> (3) 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.

However, as is evident from its title, Section 611.7 sets forth preparation of a TSM Baseline Alternative as a requirement of applications for federal funding for major capital investment projects, it is unrelated to NEPA. It follows that preparation of a TSM Baseline Alternative is not part of NEPA alternative analyses Plaintiffs cite no authority for their argument that "TSM alternatives analysis for project funding purposes may [not] be separated from NEPA alternatives analysis " Plaintiffs' Reply, docket no 58, at 21.

5. Safety Impacts.

Plaintiffs argue that NEPA requires the agencies to address the safety impacts of the Initial Segment, but that they have failed to do so. Plaintiffs cite Carmel, 123 F.3d at 1151, for the proposition that the FEIS must contain a "'reasonably thorough' discussion of the environmental consequences in question," and 40 C F.R. § 1502.1 for the proposition that the discussion must be "full and fair."

a. Safety Issues in Rainier Valley

Plaintiffs discount the agencies' discussion of light rail safety data, including fatalities, in the "Public Services" section of the 1999 FEIS (AR 3460-61), asserting that only national safety data are there discussed. Plaintiffs then cite Citizens Against Burlington v. Busey, 938 F.2d 190, 196 (D C Cir 1991) for the proposition that the agencies' failure to include any discussion whatsoever of potential fatalities that might result from the surface grade, mixed intersection, light rail planned for the Martin Luther King Way corridor "clearly violates ... plain legal requirements." Plaintiffs' Memorandum, docket no. 43, at 22.

In making their argument plaintiffs ignore the clear findings of Judge Rothstein in Save Our Valley:

> In its FEIS, Sound Transit evaluated the likelihood that an at-grade alignment would increase both fatal and non-fatal traffic accidents, and concluded that it would not appreciably do so. Sound Transit's conclusion was based on *local and national* traffic data, an extensive study of traffic patterns in the Rainier Valley, and comparisons with data from numerous other new light rail systems. ... *See* FEIS Chapter 3 3 2.4, 3-58 to 3-59, Transportation Technical Report at 194-95, FEIS Chapter 4 13 1, 4-161 to 4-162. In such a circumstance, where the issue presented "requires a high level of technical expertise, [the court] must defer to the informed discretion of the responsible federal agencies." Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F 3d 569, 576 (9th Cir. 1998) (internal quotation omitted). Given that experts on both sides were dealing with extensive bodies of data on the potential for traffic safety impacts and were at least equally well informed, the Court defers to the reasoned decision reached by the responsible agency. Carmel-by-the-Sea, 123 F 3d at 1551 (NEPA does "not [require] unanimity of opinion, expert or otherwise")

C00-715R, docket no 176, Order on Summary Judgment Motions, at 30-31 (emphasis added) The FEIS concluded that collisions in the Rainier Valley would be lower with the at-grade alignment than without it AR 3271, 8408. Given the facts that the FEIS did adequately consider the safety issues in the Rainier Valley and that the Urban EA resulted in a FONSI, the Court finds that plaintiffs' objections on this point are without merit [22]

b. Operational Safety Issues with Joint Bus/Rail Use of the DSTT.

Plaintiffs concede that defendants have generally identified safety risks in the DSTT, but assert that "[the] specific scope and magnitude [of those risks] may remain unknown and uncertain " Plaintiffs Memorandum, docket no 43, at 17 There was no discussion in the 1999 FEIS of mitigation of safety issues associated with a mixed bus-train use of the DSTT because mixed use was originally rejected AR 502691 The terms in which that rejection was phrased, however, are significant In recording that decision, the Final EIS relied on DOWNTOWN SEATTLE TRANSIT TUNNEL REPORT (SEPTEMBER 1998), the study which was, in pertinent part, amended by the EVALUATION OF JOINT OPERATIONS IN THE DOWNTOWN SEATTLE TRANSIT TUNNEL (AUGUST 2001) (AR 502638-693). The 1998 Report concluded "that joint operations in the DSTT, *while feasible, were not necessarily desirable.*" AR 502513 It is crucial to remember that the 1998 Report was undertaken under the assumption

[22] Plaintiffs wish the Court to consider the facts (1) that FTA's "Hazard Analysis Guidelines for Transit Projects," a document promulgated in 2000, did not provide (and could not have provided) input to the 1999 FEIS and, more importantly, (2) that the Urban EA made no mention of the FTA guidelines nor analyzed whether Initial Segment did, or did not, comply with them In general, the Court relies on Judge Rothstein's finding that safety issues were adequately considered in the FEIS In addition, the Court notes that the depositions of plaintiffs' experts Niles and Rubin are not part of the administrative record and are stricken Furthermore, as defendants point out (Sound Transit's Memorandum, docket no. 56, at 22), plaintiffs did not air their objections on this point during the public comment period; they shall not be heard to do so now. Just as important, plaintiffs request is tantamount to inviting the Court to adjudicate a battle of the experts. However, an agency is free to believe its own experts, and "where an issue requires 'a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies '" Morongo Band, 161 F 3d at 576 (quoting Marsh, 490 U S at 377). Accordingly, the Court declines plaintiffs' invitation.

that the entire Central Link, not merely Initial Segment, was to be built Under that assumption, the key findings of the 1998 Report were

> 1R. Joint operations might be possible for no more than 2–10 years (depending on the growth in rail ridership and the timing of future rail extensions)
>
> 2R. Joint operations, with trains operating every four minutes, would limit to 30 the number of buses allowed to transit the tunnel per hour in each direction Currently, 70 buses per hour operate in the tunnel during the peak hour.
>
> 3R. Joint operations would reduce the speed of light rail operations by an average of two minutes and the speed of bus operations by 2-4 minutes.
>
> 4R. Joint operations would result in less reliable service for both buses and trains because buses could not pass other buses or trains and because there would be additional conflicts in the staging areas
>
> 5R. Joint operations would require replacement of a portion of the current bus fleet with higher-cost, dual-mode bus fleet
>
> 6R. Joint operations would depend on operator judgment to maintain a safe stopping distance because, at the time of the September 1998 report, a fail-safe signal system adapted to joint use was not available.

See AR at 502645.

With respect to these findings, the Court takes particular note of the following. First, only one of the six was addressed to safety concerns Second, the conclusion that joint operations, "while feasible, [were] not desirable," was based, *not* on safety concerns, but on the cost of the transit tunnel modifications, the need to purchase a new dual-mode bus fleet which would be used for at most ten years, and the operational requirement to limit bus transits to 30 per hour. *Id* In other words, the undesirability was based on considerations of cost-effectiveness under the fundamental assumption that the overall project was Central Link. Feasibility, *per se*, was not in question Nor were safety concerns seen as a showstopper

However, this was not the end of the story Faced with reducing the scope of the project, Sound Transit reconsidered joint use of the DSTT In order to determine whether the

September 1998 Report's conclusion that joint operations were "feasible, but not desirable" was subject to amendment in light of the change in fundamental assumption that now Initial Segment, not Central Link, was the overall project, Sound Transit conducted a new study which resulted in publication of the August 2001 Evaluation, incorporated and included in the Urban EA. Not surprisingly, the 2001 Evaluation echoed the 1998 Report in finding that joint use was "feasible." AR 502641.

As to desirability, the findings of the 2001 Evaluation resulted in a conclusion markedly different from that of the 1998 Report On the same issues leading to the latter's conclusion of undesirability, the former's findings were as follows:

> 1E. Joint operations would be possible until 2016, the earliest date at which light rail extensions to the north are now thought to be likely – until, that is, the light rail system comes more nearly to approximate Central Link This substantial extension of the duration of joint operations (before they are replaced by rail-only operations) would make more economical the tunnel retrofit required to accommodate them.
>
> 2E. Joint operations, with trains arriving every six minutes, would allow 60 buses and 10 trains to operate in the tunnel every hour This result compares favorably with the 70 buses per hour currently operating in the tunnel
>
> 3E. Joint operations will result in a reduction in speed of each mode, when compared to single mode operations. However, the result, as noted above, is an improvement over the present situation
>
> 4E New bus technologies are available to improve speed and reliability and to allow for integration with light rail vehicles
>
> 5E A dual-mode bus fleet is now only one of two options Sound Transit and King County Metro Transit are considering. Both organizations prefer to replace buses currently operating beyond their useful life with hybrid diesel/electric buses that would be suitable for use in the DSTT Even if a dual-mode bus fleet were chosen, the longer duration of joint use will make the purchase more cost effective
>
> 6E. Joint operations will not be dependent on operator judgment to maintain a safe stopping distance because an improved signal system allowing the location of both buses and trains to be tracked has been developed.

See AR at 502513-514. Taken together, these findings show that new technologies and changed circumstances have allowed whatever the 1998 Report found to be undesirable (in

findings 1R-5R) or of concern (finding 6R), to be addressed.

In particular, "...the bus/light rail vehicle safety issue for joint operations [on which plaintiffs have focused] has been addressed by the addition of the new signal system that would maintain a separation between light rail trains and buses." AR at 502530-31 The Urban EA also made clear that "[t]rains will never operate in a tunnel section in the same direction and at the same time as buses, nor will trains and buses operating in the same direction occupy a station at the same time." *Id*

Several mechanisms are also planned in the event the system fails, further reducing the potential for bus and rail vehicle collisions AR at 502531. The Urban EA anticipated that the safety of joint operations would be demonstrated before revenue service begins, and the signal system in particular will continue to be refined. *Id* During tunnel closure, extensive testing of light rail vehicles and buses both independently and in joint operations will be conducted before the tunnel is reopened for revenue service *Id*

Accordingly, the Court finds that, contrary to plaintiffs' assertions, the safety issues arising in connection with joint bus/rail use of the DSTT have been adequately explored by FTA and Sound Transit.

c. Additional Fire/Life/Safety Issues in the DSTT

As plaintiffs note, the list of FTA questions addressed to Sound Transit in its Comments on the Draft Urban EA included three on the topic of Fire/Life/Safety issues: Do "[fire/life/safety issues] need to be resolved to safely accommodate joint bus/rail operations?" Do "[fire/life/safety issues] need to be resolved in order to fully evaluate the safety impact?" and "What are the fire/life/safety issues that need to be resolved?" The first of these question spans the issue of *operational* safety concerns (particularly collision prevention), considered in the previous subsection, and the issues of ventilation, evacuation, and fire suppression[23], which are *not* concerns about tunnel operations *per se*. Thus, the 2001

[23] These concerns are discussed under the heading "Public Services" in the Urban EA. *See* AR 502541-542

Evaluation recognized that "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 " AR 502688. This question was adequately addressed in the 2001 Evaluation *Id*

The second question inquires whether the overall safety of joint bus/rail use in the DSTT can be evaluated without first evaluating these additional issues In reporting that this question was to be tackled by conducting a hazards analysis, *see* AR 502689, the 2001 Evaluation took the prudent course of assuming that the 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 The purpose of the analysis is to identify any potential safety hazards, determine the risks associated with those hazards, and assign a probability to those risks AR 502542. According to the Urban EA, "[t]he preliminary conclusion of the hazard[s] analysis is that the addition of rail operations to the existing DSTT bus operations will not increase the risk assessment category for either of the two principal areas of [concern,] collision or fire." *Id* This conclusion demonstrates that the second question is being addressed Including this conclusion in the EA, even though it is "preliminary," constitutes a proper response to the requirements of 40 C F R § 1502 22, "Incomplete or unavailable information "

The third question, related to additional issues to be resolved, is largely answered in the course of answering the first two For example, modification of the ventilation system as required by the National Fire Protection Association "would involve the replacement of station fans and some emergency fans. No modifications are needed for the fan rooms or surface ventilation facilities." AR 502542. Likewise, the Seattle Fire Department and the Seattle Department of Design, Construction, and Land Use (DCLU) reported, after review, that no changes in the evacuation facilities and procedures were necessary *Id* Finally, safe operation of light rail vehicles in the tunnel will require a new fire suppression system

capable of delivering an effective spray pattern to all sides and over the entire length of the vehicles AR 502688. The recommended system calls for a new deluge system consisting of valves and sprinklers on both sides of the tunnel. *Id* Accordingly, the Court finds that the questions posed by the FTA at the comment stage have been adequately addressed

6. Mitigation Issues.

Plaintiffs assert that the Amended ROD had nothing to say about mitigating any of the safety risks associated with joint use of the tunnel and that nowhere in the AR are mitigation measures proposed that would eliminate, or even reduce, the possibility of fatalities resulting from situating the light rail line at surface grade in the Rainier Valley Plaintiffs' Reply, docket no 58, at 22-23

a. Mitigation of Risk of Fatalities in Rainier Valley

While not directly challenging the Court's decision in Save Our Valley, plaintiffs invite the Court to examine the AR to determine whether the prospect of fatalities *in the Rainier Valley* occasioned by the placement of the light rail line at surface grade has been addressed. The citations to the AR to which plaintiffs call attention and which were cited by the Court in Save Our Valley (AR 3261-62, 3270-71, 3461-62, 8407-08) do not, by themselves, undertake the tasks of estimating the number of fatalities likely to occur and of proposing mitigation measures. However, as with the question of mitigating operational safety risks in the DSTT, FTA's determination that the proposed surface grade alignment through the Rainier Valley included appropriate safety measures – as well as Save Our Valley's review of that determination – was arrived at by reference to the entire administrative record. This Court will not undertake a second review of that decision

b. Mitigation of Operational Safety Risks in the DSTT

The FTA makes clear that Attachment E of the Amended ROD, "Summary of Required Mitigation Measures for the Initial Segment of the Central Link Light Rail Transit Project," "does not supercede or negate any of the commitments for environmental

mitigation" in any of the relevant documents of the AR. AR 502752 Thus, although a discussion of mitigation measures for safety risks in the DSTT cannot be found in Sections 1 1.2 and 1.1.3 of Attachment E (the sections which include that portion of Initial Segment running through the DSTT), this does not compel the conclusion that FTA and Sound Transit have not committed to such measures. As has been shown above, safety measures that can be taken to avoid risks associated with joint operations *per se* are amply addressed in the Urban EA and its incorporated 2001 Evaluation For example, "[t]he collision prevention issue has been addressed through the signal system." AR 502542 (Urban EA at 38) Commitments to those measures constitutes appropriate mitigation *See* 23 C F.R. 771.125(a)(1)

Plaintiffs present challenge that this more recent study is "inadequate since no mitigation details are provided" is without merit Evaluated under the arbitrary-and-capricious standard, FTA's approval of joint use, based on the 2001 Evaluation, satisfies NEPA requirements.

c. Mitigation Fire/Life/Safety Risks in the DSTT

In the course of identifying these additional risks, Sound Transit has either proposed mitigation measures (e.g., a new signal system, a modified ventilation system, and a new fire suppression system) or found that no additional ones were required (in the case of evacuation procedures). The fact that the hazards analysis is continuing suffices to show that any late-emerging additional safety concerns will be appropriately addressed Thus, suitable mitigation measures addressing fire, life, and safety risks arising from joint bus/rail use of the DSTT were considered in the AR

7. Does Initial Segment Respond to the Goals of Sound Transit?

Plaintiffs cite the following passage from the 1999 FEIS as evidence that Initial Segment does not "fulfill the purposes identified for the 1999 Central Link project." Plaintiffs' Memorandum, docket no. 43, at 13

> 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, [Northgate,] 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) The fact that Initial Segment would not connect *all* of those activity centers does not contradict the fact that it would connect *several* of them Furthermore, Initial Segment represents a substantial step toward realizing the entire light rail system approved by the voters in Sound Move

CONCLUSION

The Court GRANTS defendants' motion to strike the declarations of plaintiffs' experts. Furthermore, for the reasons stated in this Order, the Court concludes that FTA's approval (recorded in the Amended ROD) of the FEIS as supplemented by the Suburban FSEIS and the Urban EA was not arbitrary and capricious Accordingly, the Court DENIES plaintiffs' motion for partial summary judgment. The Court GRANTS the Federal defendants' and Sound Transits' motions for partial summary judgment, and plaintiffs' Count Four of the Amended Complaint is DISMISSED

IT IS SO ORDERED.

DATED this 22nd day of April, 2003

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE