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Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

NORMAN MINETA, Secretary of
Transportation; JENNA DORN,
Administrator of the Federal Transit
Administration; RICHARD 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

**SOUND TRANSIT'S REPLY IN
SUPPORT OF CROSS-MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

NOTE FOR HEARING:
December 18, 2002

(Without Oral Argument)

SOUND TRANSIT'S REPLY IN SUPPORT
OF CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT- i
Case No. C00-1812Z

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1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Plaintiffs Citizens for Mobility, et al. ("CFM") have failed to demonstrate that the
3 November 1999 Central Link Light Rail Transit Project Final Environmental Impact
4 Statement ("FEIS"), the November 2001 Central Link Light Rail Transit Project Final
5 Supplemental Impact Statement-Tukwila Freeway Route ("Tukwila SEIS") and the February
6 2002 Central Link Light Rail Project Initial Segment NEPA Environmental Assessment
7 ("Initial Segment EA") are insufficient under the National Environmental Policy Act, 42
8 U.S.C. § 4321 *et seq.* ("NEPA"). These analyses and the other documents in the
9 Administrative Record make clear that Defendant Central Puget Sound Regional Transit
10 Authority ("Sound Transit") identified and evaluated the environmental impacts of the Initial
11 Segment, considered appropriate alternatives to the Initial Segment, considered the safety
12 impacts of the Initial Segment and conducted the Initial Segment EA to determine whether
13 further NEPA analysis of the Initial Segment was necessary. Accordingly, the Federal
14 Defendants United States Department of Transportation, Federal Transit Administration,
15 Norman Mineta, Jenna Dorn, and Rick Krochalis (collectively, "FTA") complied with NEPA
16 when they decided on May 8, 2002 in the Amended Record of Decision ("Amended ROD")
17 to provide funding for the Initial Segment. The Court should deny CFM's Renewed Motion
18 for Summary Judgment and enter summary judgment in favor of Sound Transit and FTA.

19 **II. STANDARD OF REVIEW**

20 CFM agrees both that the Court reviews agency factual determinations under an
21 arbitrary and capricious standard of review and that the Court reviews agency legal
22 determinations under a reasonableness standard. Plaintiffs' Reply Memorandum in Support
23 of Renewed Motion for Partial Summary Judgment ("CFM Reply"), 1-2; *see also Price Road*
24 *Neighborhood Assoc., Inc. v. United States Dep't of Transp.*, 113 F.3d 1505, 1508 (9th Cir.
25 1997); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Moreover,

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1 there is also no dispute that NEPA "does not mandate particular substantive results, but
2 instead imposes only procedural requirements." *Laguna Greenbelt, Inc. v. United States*
3 *Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994). Accordingly, the Court must simply
4 determine whether the Administrative Record demonstrates that Sound Transit and FTA
5 complied with the procedural dictates of NEPA while evaluating the Initial Segment of the
6 Central Link Project in the 2002 Initial Segment EA, 1999 FEIS and 2001 Tukwila SEIS.

7 **III. RENEWED MOTION TO STRIKE EXTRA-RECORD** 8 **DECLARATIONS AND DOCUMENTS**

9 Sound Transit renews its motion to strike the extra-record declarations of Richard
10 Nelson, John S. Niles and Thomas Rubin and all extra-record exhibits attached thereto
11 pursuant to CR 7(b). Sound Transit also now moves to strike the additional extra-record
12 documents attached to the Second Declaration of John D. Alkire in Support of Plaintiffs'
13 Renewed Motion for Partial Summary Judgment ("Second Alkire Declaration"). CFM has
14 not moved to supplement the Administrative Record and has failed to offer any legal basis
15 suggesting that supplementation is necessary or appropriate. *See* CFM Reply, 1, n. 1 (merely
16 reciting legal standard for supplementation without suggesting if any of the factors apply to
17 CFM's materials).

18 Courts have long recognized that in NEPA cases "judicial review of agency action is
19 generally limited to review of the administrative record." *Northcoast Environmental Center*
20 *v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998). The administrative record in a NEPA case is
21 composed of the documents and materials considered by agency decision makers at the time
22 the agency made the decision at issue. *Id.* Courts rarely allow the introduction of extra-
23 record evidence in NEPA cases, and then only in specifically defined circumstances.¹ CFM
24 has failed to argue the existence of any such circumstances.

25 ¹ Extra-record evidence may be considered only:
26

CFM is simply attempting to create a "battle of the experts" by offering competing critiques of Sound Transit's NEPA compliance from Messrs Nelson, Niles and Rubin. See *Price Road*, 113 F.3d at 1509. Courts "have consistently rejected such attempts, noting that 'when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" *Id.* (rejecting competing studies outside the administrative record expressing a conflicting view of an agency's NEPA action) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). Accordingly, the Court should strike the extra-record declarations of Messrs. Niles, Rubin and Nelson and strike all of the documents conveniently noted in Mr. Alkire's Second Declaration as outside the Administrative Record.

IV. CROSS-MOTION FOR SUMMARY JUDGMENT REPLY

A. The Administrative Record Makes Clear That The Environmental Impacts Of The Initial Segment Are Not Significantly Different Or Greater Than The Impacts Of The Central Link Project.

Sound Transit prepared the 2002 Initial Segment EA in part to determine whether the decision to proceed with the Initial Segment of the Central Link Project would generate significant environmental impacts not evaluated in the 1999 FEIS and the 2001 Tukwila SEIS. (AR 502500-01) Sound Transit concluded through the analysis in the Initial Segment EA that construction and operation of the Initial Segment would not cause any significant environmental impacts not already addressed in the 1999 FEIS, as modified by the 2001

-
- (1) if necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,'
 - (2) 'when the agency has relied on documents not in the record,' or
 - (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' and
 - (4) 'when the plaintiffs make a showing of agency bad faith.'

Northcoast Environmental Center, 136 F.3d at 665 (quoting *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1447 (9th Cir. 1996)); see also *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436-37 (9th Cir. 1988).

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1 Tukwila SEIS. (AR 502500) CFM's Reply does not show otherwise. FTA, then, after
2 reviewing the Initial Segment EA, complied with NEPA when it issued the May 2002
3 Amended ROD authorizing federal funding for the Initial Segment. (AR 502706)

4 **1. Joint Bus and Rail Use of the Downtown Seattle Transit Tunnel Does Not**
5 **Constitute a Substantial Change with Significant Impacts.**

6 CFM's contention that construction of the Initial Segment with joint bus and rail use
7 of the Downtown Seattle Transit Tunnel ("DSTT") constitutes a substantial change in the
8 Central Link Project such that an additional SEIS or FEIS is required is without merit. CFM
9 simplistically assumes that because the Initial Segment EA anticipates joint use of the DSTT
10 and the 1999 FEIS rejected joint bus and rail use of the DSTT, current plans for joint use must
11 therefore constitute a substantial change to the Central Link Project. CFM Reply, 4-5. CFM
12 discounts, however, a new study on joint use of the DSTT that post dates the 1999 FEIS. This
13 new study demonstrates that modifying the Project for joint use is not a "significant" change
14 requiring an SEIS or new FEIS.

15 As explained in Sound Transit's initial Cross-Motion, Sound Transit commissioned a
16 study, *Evaluation of Joint Operations in the Downtown Seattle Transit Tunnel*, dated August
17 21, 2001 ("2001 DSTT Study") that concluded that joint use is feasible. (AR 502530-31,
18 502637-93) The 2001 DSTT Study contradicted a previous 1998 report that concluded joint
19 use impracticable at that time. Sound Transit had relied on the earlier study in the 1999 FEIS.
20 (AR 502645) The Initial Segment EA and 2001 DSTT Study, however, explain that new
21 information and design solutions now make joint bus and train operation in the DSTT viable.
22 (AR 502530-31, 502637-93) The Initial Segment EA incorporates and includes the 2001
23 DSTT Study and concludes that joint use will not cause any new significant impacts. (*Id.*)

24 CFM singles out *Stop H-3 Ass'n v. Lewis*, 538 F. Supp. 149, 170 (D. HI 1982), *aff'd in*
25 *part and rev'd in part sub nom., Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), as
26 "instructive" of its contention that the Initial Segment EA's endorsement of joint use of the

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1 DSTT constitutes a major change of the Central Link Project. The facts of *Stop H-3 Ass'n.*,
2 however, simply do not support CFM's position. In *Stop H-3 Ass'n.*, the district court held
3 that a SEIS was necessary in part because the Federal Highway Administration selected a
4 project alternative based on a government study that was not made available to the public and
5 that was not addressed in an SEIS or any other NEPA document. *Id.* at 170. This is entirely
6 different than the present situation. Here, the joint use proposal for the DSTT was evaluated
7 and incorporated in the Initial Segment EA, made available to the public for comment, and
8 incorporated into the Administrative Record for use by FTA in making its funding decision.

9 CFM also suggests that FTA's questions to Sound Transit confirm that joint use
10 constitutes a significant change. CFM Reply, 6-7. Before Sound Transit completed the final
11 Initial Segment EA, FTA inquired about specific issues raised in the 2001 DSTT Study. (AR
12 502326-502341) Specifically, FTA provided Sound Transit various comments on the
13 preliminary version of the Initial Segment EA that Sound Transit prepared as the project
14 applicant. (*Id.*) Sound Transit responded to FTA's questions in the final Initial Segment EA
15 and revised the final Initial Segment EA in response to FTA's comments. FTA confirmed
16 that Sound Transit had satisfactorily addressed all of its comments and issues by adopting the
17 Initial Segment EA in the Amended ROD. (See AR 502514-502517, 502530-31, 502697,
18 502706) CFM's fixation on FTA's questions regarding joint use of the DSTT ignores that
19 Sound Transit addressed FTA's questions in the Initial Segment EA to FTA's satisfaction.

20 **2. The Additional Case Law CFM Offers Does Not Support a Finding that**
21 **the Initial Segment Involves Significant Changes from the Central Link**
22 **Project.**

23 In addition to *Stop H-3*, CFM lists a series of other cases in support of its contention
24 that the joint use of the DSTT constitutes a new significant impact. The facts of these cases,
25 however, all differ substantially from the present situation and do not support CFM's position:
26

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- 1 • *Preservation Coalition of Erie County v. Federal Transit Administration*, 129
2 F. Supp.2d 551 (W.D.N.Y. 2002), a case outside the Ninth Circuit, involved the
3 discovery of archaeological resources during construction of a project after
4 completion of an EIS. The district court ordered supplementation of the EIS
5 because the EIS only considered the possibility of an archaeological discovery but
6 not the impact of the discovery. *Id.* at 569-70. Here, there is no dispute that
7 Sound Transit considered the impact of joint use of the DSTT in the Initial
8 Segment EA.
- 9 • *Association Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101
10 (N.D. Tex. 1985), another case outside the Ninth Circuit, involved substantial
11 changes in the agency's noise analysis for a highway project *and* changes in the
12 route directing the highway through public park land. *Id.* at 1113-14. The court
13 noted that the route change through park land was "*per se* criterion for
14 supplementation." *Id.* at 1113 (relying on *Stop H-3*).
- 15 • *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir.
16 1995), involved an EIS that discussed forest management alternatives only in the
17 context of satisfying a particular timber contract. *Id.* at 727. After the timber
18 contract was voided, the court declared a supplemental EIS was necessary to
19 consider alternatives not dependent on satisfying the timber contract. *Id.*

20 All of the above cases involve new, unexpected and unanalyzed events. In the instant
21 case, there is no dispute that Sound Transit and FTA considered the impact of joint bus and
22 rail use of the DSTT under NEPA in the Initial Segment EA (which attached the 2001 DSTT
23 Report). Joint use of the DSTT is not an unexpected or an unanalyzed event requiring a
24 supplemental EIS.

1 A case on point is *Price Road*, *supra* at 1. In *Price Road*, the Ninth Circuit made clear
2 that when faced with an alteration in a project previously reviewed under NEPA, the project
3 proponent agency must conduct a reevaluation to determine if further NEPA review is
4 necessary:

5 Thus, we conclude that, when faced with a project change, the [agency]
6 may conduct a reevaluation to determine the significance of the new
7 design's environmental impacts and the continuing validity of its initial
8 [NEPA document]. A supplemental [NEPA document] is not
automatically required under the regulations, but rather its necessity is
dependent upon the findings and conclusions reached by the [agency]
through its reevaluation process.

9 *Id.* at 1510. Sound Transit more than satisfied the requirements of *Price Road* by reevaluating
10 joint use of the DSTT and by then proceeding even further with formal NEPA review through
11 the Initial Segment EA to determine that an SEIS was not necessary. *See* 40 C.F.R. § 1502.9
12 (regarding supplementation of an EIS).

13 3. CFM Misapprehends the Law Addressing Segmentation of Projects.

14 The Initial Segment is a subpart of the Central Link Project and is a stand alone
15 project with independent utility. (AR 502801) Sound Transit previously studied the route
16 and stations for the Initial Segment in the 1999 FEIS and 2001 Tukwila SEIS. (*Id.*) Sound
17 Transit incorporated minor changes to the Central Link Project in the Initial Segment,
18 evaluated those changes in the Initial Segment EA, and found the Initial Segment not to cause
19 any major change in the analogous sections of the Central Link Project or to create any new
20 significant impacts. (AR 502500-01) Moreover, Sound Transit made clear that further
21 extensions of the Initial Segment to the north or south will receive additional NEPA analyses
22 as required. (AR 502500) For instance, Sound Transit is currently preparing a supplemental
23 EIS for the North extension of the Central Link Project because new route and station
24 alternatives may result in significant impacts different from those studied in the 1999 FEIS.

1 (Id. ("Sound Transit is . . . undertaking further study of alternatives for the north segment . . .
2 in a supplemental EIS"))

3 CFM offers no reason why FTA cannot fund a subpart of the Central Link Project
4 even though it performed environmental review for the entire Project. The principle case
5 CFM cites regarding project segmentation, *Wetlands Action Network v. United States Army*
6 *Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), merely stands for the proposition that
7 agencies must consider connected or cumulative actions together in order "to prevent an
8 agency from dividing a project into multiple actions . . ." to escape NEPA review. Here,
9 rather than evading NEPA review, Sound Transit subjected the entire Central Link Project to
10 NEPA review through the 1999 FEIS, the 2001 Tukwila SEIS and the 2002 Initial Segment
11 EA. The Initial Segment has not been divided out to evade NEPA. Moreover, as noted
12 above, Sound Transit has acknowledged that at least the northern section of the Project will be
13 subject to a new supplemental EIS.

14 **B. The Initial Segment EA Properly Concluded Based On Agency Expertise That**
15 **No Further NEPA Review Of The Central Link Project Was Necessary.**

16 CFM contends that the length and breadth of the Initial Segment EA demonstrates that
17 Sound Transit should have prepared a supplemental EIS. CFM offers no legal support for this
18 position and confuses form with function. It is the nature, quality and result of a project
19 proponent's analysis under NEPA that is important, not the number of pages used to reach a
20 specific conclusion. CFM apparently seeks to penalize Sound Transit and FTA for the
21 thoroughness of their consideration of the impacts of the Initial Segment.

22 There is no regulatory page limit for an environmental assessment. Consistent with 23
24 C.F.R. § 771.130(c), Sound Transit prepared an Environmental Assessment to determine if
25 the modifications to the Central Link Project reflected in the Initial Segment proposal resulted
26 in significant environmental impacts not addressed in the 1999 FEIS and 2001 Tukwila SEIS.
FTA then, after consideration of the Initial Segment EA and public comments on the Initial

1 Segment EA, determined that the Initial Segment presented similar or less adverse impacts
2 than those studied in the 1999 FEIS and 2001 Tukwila SEIS. (AR 502500-01, 502706) FTA
3 then found that NEPA had been satisfied for the Initial Segment and issued an Amended
4 ROD. (AR 502706) The process was entirely appropriate. Any other conclusion elevates
5 form over substance and makes a game of NEPA compliance.

6 **C. Sound Transit Conducted A Full And Complete Alternatives Analysis Consistent**
7 **With The Requirements Of NEPA In The 1999 FEIS, 2001 SEIS And 2002 Initial**
8 **Segment EA.**

9 CFM continues to argue that the Initial Segment somehow constitutes an alternative to
10 the Central Link Project never subject to NEPA review. CFM's Reply, 16-17. The
11 Administrative Record does not support CFM's contentions. All modifications to the Initial
12 Segment that differ from the 1999 FEIS and 2001 Tukwila SEIS were considered in the 2002
13 Initial Segment EA.

14 The Initial Segment consists of the same route and stations used for the corresponding
15 segment of the full Central Link Project. The 1999 FEIS and 2001 Tukwila SEIS together
16 evaluated over 28 individual light rail route alternatives, 83 individual station alternatives, 7
17 maintenance base alternatives and 5 project length alternatives. (AR 3070-3126) The route,
18 stations and maintenance base comprising the Initial Segment were selected from these
19 alternatives. (AR 502500-01) Accordingly, all material elements of the Initial Segment were
20 fully evaluated in the 1999 FEIS or 2001 Tukwila SEIS. Non-significant modifications were
21 discussed and evaluated in the Initial Segment EA. (*Id.*) Thus, the analysis of the Initial
22 Segment in the Initial Segment EA was conducted within the context of, and in comparison
23 to, all of the other alternatives evaluated in the previous environmental documents for the
24 Project. The Initial Segment EA simply concluded that there were no significant changes in
25 the environmental impacts of the project caused by any of the modifications reflected in plans
26

1 for the Initial Segment. The Initial Segment has been "considered" in relation to all the
2 alternatives analyzed previously and was not evaluated in a vacuum.

3 CFM's alternatives argument again also focuses on joint bus and rail use of the DSTT.
4 As explained at length above, the Initial Segment EA determined that joint bus and rail use of
5 the DSTT presents the same or less environmental impacts as rail only use of the DSTT. (AR
6 502500-01, 502511-13, 502525-31, 502535, 502537-38, 502544-48) CFM's disagreement
7 with Sound Transit's and FTA's conclusions regarding joint use of the DSTT does not mean
8 that the impacts of joint use were not properly evaluated in the Initial Segment EA and the
9 2001 DSTT Study. CFM's actual objections regarding joint use of the DSTT belie the purely
10 factual nature of their objections: "defendants have ameliorated some of the problems on
11 downtown Seattle surface streets, but the trade-off involves implementation of a novel, less
12 safe, less efficient, mixed-use DSTT plan." CFM Reply, 20.

13 Finally, CFM continues to contend that Sound Transit has not properly considered
14 Transportation System Management ("TSM") alternatives when evaluating the Central Link
15 Project. A TSM alternative represents a no-build alternative plus the best that can be done to
16 improve transportation mobility without the construction of major new transit facilities. See
17 49 C.F.R. § 611.5.² The Administrative Record is clear that Sound Transit reviewed three
18 TSM alternatives at the planning stage: a TSM alternative, a "Transitway/TSM" (busway)
19 alternative and a "Rapid Rail/TSM" alternative. (AR 11626-29, 11693-722) CFM offers no
20 authority aside from its own conclusory allegations suggesting that this was somehow
21 inappropriate or insufficient under NEPA.

22
23
24
25 ² A TSM alternatives analysis is required in applications for federal transportation funding but
26 is not a NEPA requirement. See 49 C.F.R. § 611.5.

1 **D. The 2002 Initial Segment EA And The 1999 FEIS Properly Evaluated The Safety**
2 **Issues Associated With Joint Use Of The DSTT And At-Grade Alignment Of The**
3 **Project In The Rainier Valley.**

4 CFM continues to assert that Sound Transit and FTA have not fully evaluated safety
5 considerations of joint DSTT use and the at-grade alignment of the Initial Segment in the
6 Rainier Valley. These assertions are without merit.

7 As Sound Transit previously explained in its Cross-Motion for Summary Judgment,
8 the safety issues regarding joint use of the DSTT were evaluated in the Initial Segment EA
9 (AR 502511-17, 502530-31) and the safety impacts of the at-grade Rainier Valley alignment
10 are evaluated in the 1999 FEIS (AR 2758-93, 3261-62, 3270-71). Specifically, with regard to
11 joint use, the Initial Segment includes a signal system that effectively addresses safety issues
12 and mitigates any potential safety impacts in the DSTT. (AR 502530-31) CFM implicitly
13 acknowledges this when it is reduced to complaining that the Amended ROD does not spell
14 out the mitigation plans. CFM Reply, 22. FTA's reliance in the Amended ROD on a
15 previous discussion of mitigation in the Initial Segment EA does not mean that joint use
16 safety mitigation measures were not fully evaluated.

17 Finally, with regard to the safety concerns associated with the at-grade alignment in
18 the Rainier Valley, CFM is reduced to asking this Court to in essence overrule Judge
19 Rothstein's recent decision in the *Save Our Valley* case that the analysis of at-grade safety
20 considerations in 1999 FEIS complied with NEPA. As detailed in Sound Transit's Cross-
21 Motion, the Administrative Record demonstrates that Sound Transit fully considered the
22 safety impacts of the at-grade alignment in the Rainier Valley. The Rainier Valley citizen
23 plaintiffs *Save Our Valley* extensively argued the safety issues CFM asserts here. Judge
24 Rothstein rejected those arguments.

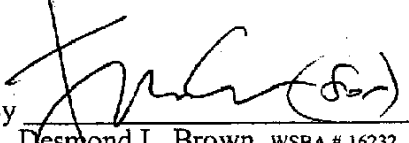
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V. CONCLUSION

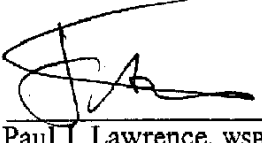
CFM has failed to carry its burden of demonstrating that FTA and Sound Transit violated NEPA. Sound Transit, therefore, respectfully asks this Court to grant judgment to FTA and Sound Transit as a matter of law pursuant to FRCP 56(c).

DATED this 18th day of December, 2002.

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