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VIA EMAIL AND U.S. MAIL

July 14, 2011

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Dear Mr. Mendez and Ms. Shepherd:

Attached is our Petition for Extraordinary Relief to the Federal Highway Administration (FHWA). There exist serious problems with the environmental review and funding plan for the Alaskan Way Viaduct Replacement Project in Seattle, Washington. Given the concerns raised in this petition, we believe that the FHWA's legal obligations and its stewardship of federal transportation resources **compel your investigation, an administrative hearing, and the additional relief we request.** Most immediately, because the final environmental impact statement (FEIS) will be complicated and a local referendum concerning the project will be held on August 16, 2011, **we ask for a 90-day comment-and-review period** for the FEIS from the date of its publication in the Federal Register. Due to the short time period remaining, **we expect a response within 14 days.**

The gravity and breadth of the concerns we raise warrant your attention separate from the review process for the FEIS, which is scheduled for publication on July 15, 2011. We intend to submit comments on the FEIS, but more is at stake in this petition than the consideration of environmental impacts. Although environmental review of this project has been underway for several years, WSDOT's bias and the inadequacy of the project's funding plan have only recently become so flagrant that we came to believe that this petition for relief was necessary.

The FHWA's decision whether to grant federal funding for this project is subject to the National Environmental Policy Act (NEPA), the Administrative

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Procedures Act, and other applicable law. The FHWA delegated its responsibilities for preparing an environmental impact statement to the Washington State Department of Transportation (WSDOT). Unfortunately, WSDOT and other state officials have repeatedly engaged in behavior that raises concerns as to whether the hard look required by NEPA has been carried out objectively and in good faith. Despite NEPA's command to the contrary, WSDOT has made a de-facto decision to select a deep-bored-tunnel alternative, with WSDOT and state officials publicly admitting that a final decision has been made. Recently, WSDOT sued to quash a citizen referendum aimed at challenging the preferred alternative. And WSDOT took punitive action to isolate a cooperating agency, the Seattle Department of Transportation (SDOT), in violation of NEPA, preventing SDOT from giving input into and reviewing the FEIS. In sum, WSDOT has breached the integrity of the NEPA process, and the inevitable result will be a tainted FEIS.

The FHWA should also have significant concerns about the project's funding and the low expected usage of the proposed tunnel due to tolls and lack of mid-downtown access. Even if the FHWA contributes the nearly \$500 million assumed in WSDOT's funding plan, the project still suffers from a \$700 million shortfall. The Port of Seattle has not firmly committed the agreed-upon \$300 million. The hoped-for \$400 million in bonds financed with tolls could prove elusive, as changes in state law undermine that plan. And to reach that amount, tolls would have to be priced so high that the proposed tunnel would carry fewer than 40,000 vehicles per day, one-third as many as the existing facility. Traffic diversion would be so severe that the effects would be slightly *worse* than not replacing the viaduct with a freeway. To top it off, the State of Washington will not financially guarantee the project; the legislature has capped its contribution, and the City of Seattle refuses to pay cost overruns as the State insists. Unless the FHWA secures a viable funding plan from WSDOT, the proposed tunnel is neither desirable nor justifiable. The FHWA should refrain from releasing the Record of Decision (ROD) until WSDOT satisfactorily resolves this funding uncertainty.

The Seattle City Council passed ordinance 123542 on February 22, 2011 putting three Memorandum of Agreement (MOA) into place between itself and WSDOT. These MOA's govern various aspects of the proposed tunnel, including authorization to give notice to proceed to bring them into effect if a ROD is issued. The citizens of the city of Seattle have put this ordinance to referendum and, if it is rejected, the city council will lack the authority to grant notice to proceed on these agreements. This vote is a quintessential part of the public process surrounding this project. The FHWA must extend the FEIS review period to avoid interfering in the referendum and its political consequences.

We thank you for your attention to this matter and look forward to your prompt reply.

Sincerely,

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Cc: Ellen Athas, Council on Environmental Quality (via email)
Horst G. Greczmiel, Council on Environmental Quality (via email)

TO THE FEDERAL HIGHWAY ADMINISTRATION
Washington, DC

IN THE MATTER OF
THE ALASKA WAY VIADUCT REPAACEMENT PROJECT—
SEATTLE, WASHINGTON

PETITION FOR EXTRAORDINARY RELIEF

July 14, 2011

Submitted on behalf of

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This petition for extraordinary relief arises from the misconduct of the Washington State Department of Transportation (WSDOT) and the inadequate funding plan for the Alaskan Way Viaduct replacement project in Seattle, Washington. Prompt remedial measures by the Federal Highway Administration (FHWA) are urgently needed and justified. The final environmental impact statement (FEIS) is scheduled for publication in the *Federal Register* on July 15, 2011. The City of Seattle, a cooperating agency and a co-lead agency under Washington's State Environmental Policy Act (SEPA), is holding a citywide referendum relating to the project on August 16, 2011. As a federal-aid funded project constituting a major federal action, this project is subject to the FHWA's final approval, and the requirements of the National Environmental Policy Act (NEPA) and other applicable federal laws must be met. Due to the project's prejudicial environmental-review process and unresolved funding plan, the FHWA should grant the relief requested.

I. REQUESTS FOR RELIEF

The petitioners ask that the FHWA:

1. Extend the comment-and-review period for the FEIS to 90 days.
2. Carefully scrutinize the FEIS in light of WSDOT's prejudice.
3. Take the lead in preparing, free of WSDOT's biased involvement, and in consultation with the Seattle Department of Transportation, any additional environmental documents that prove to be necessary and include these in the ROD.
4. Investigate WSDOT's violation of the regulations governing its responsibilities to a cooperating agency, and report on what occurred, with proposed remedies from the FHWA.
5. Require that WSDOT produce a viable and cost-effective funding plan to complete the proposed tunnel project and actually implement the proposed mitigation measures.
6. In the absence of such a funding plan, withhold support for the proposed tolled deep-bored tunnel.
7. Hold an informal hearing for the FHWA to take more evidence on WSDOT's prejudice and the lack of adequate funding.

O-001-001

See response to Comment O-001-007.

O-001-002

See response to Comments O-001-011 through O-001-015.

II. SUMMARY

The petitioners' requests for relief are based on three categories of facts. First, a lengthy and complex FEIS for this critically important project was recently released, only weeks before local voters will have a chance to show their level of support for the underlying project. Second, WSDOT has shown, since 2009, that it is prejudiced towards its preferred alternative, resulting in a defective environmental-review process. Third, this is an expensive, cost-ineffective project with no financial guarantor; neither the State of Washington nor the City of Seattle is willing to fully commit to paying for it. Each of these circumstances is extraordinary.

O-001-001

A. A 90-Day Comment Period

This is not a typical project documented with a typical FEIS. And so a typical comment-and-review period is not appropriate. The Alaskan Way Viaduct is a north-south highway slicing through the heart of the largest city in the Pacific Northwest. The project is so complicated that the FEIS weighs in at over 7,000 pages. The preferred alternative in the FEIS is significantly different than the preferred alternative named in the 2010 draft EIS; many new impacts will inevitably be revealed for the first time in this document. And WSDOT's preferred replacement for the Viaduct, a tolled deep-bored tunnel, would have total program costs of \$4.2 billion.¹ The City of Seattle would be an essential partner on this project, offering funding, technical assistance, and construction cooperation. Yet city voters might soon show their disapproval of the preferred alternative by rejecting an upcoming referendum on August 16, 2011. More than 30 days will therefore be necessary to assess the impact of the referendum, to give the public and decision-makers the opportunity for meaningful review of, and comment on, the FEIS, and to allow FHWA to fully and adequately respond to this petition.

O-001-002

B. Procedural NEPA Violations

WSDOT has exhibited impermissible prejudice towards a bored-tunnel alternative for this project. WSDOT's judgment has been so clouded by political pressure that it made a premature final decision on alternatives, stifled public participation, intervened in a local election, structured the purpose-and-need statement to favor its preferred alternative, and unlawfully cut a cooperating agency out of the final environmental review. The FHWA must intervene now, carefully scrutinize WSDOT's actions to date, and take a stronger role in oversight of implementing the NEPA process.

¹See FHWA, Case Studies: Alaskan Way Viaduct, http://www.fhwa.dot.gov/ipdt/case_studies/wa_alaskan_way.htm.

O-001-003

C. Inadequate Funding Plan

It has only now become clear to the Seattle public that the proposed project's funding plan and cost performance are inadequate. The project lacks a financial guarantor. The Washington state legislature has capped its financial contribution at \$2.8 billion (\$400 million presumed from tolls), well short of the proposed tunnel project's budgetary needs, while at the same time enacting a state law that assigns liability for cost overruns to Seattle property owners. At the same time, the City of Seattle's official policy is to oppose any plan that makes its taxpayers liable for such costs. Even more immediate than the lack of a guarantor for likely cost overruns, the basic budget is still not whole. WSDOT's hope to raise \$400 million from potential tolls looks more doubtful every day, and so does their hope to persuade the Port of Seattle to give them a \$300 million gift for basic budget. These funding shortfalls and financial risks become more striking in light of the low return on the federal investment in this infrastructure. For roughly \$3 billion, the proposed tunnel would carry fewer than 40,000 vehicles per day. Unless the FHWA successfully obtains a better funding plan from WSDOT, the proposed tunnel is neither desirable nor justifiable.

III. BACKGROUND

The Alaskan Way Viaduct is the elevated portion of State Route 99 that runs north-south through downtown Seattle. WSDOT and the City of Seattle have collaborated on a plan to replace the Viaduct because of damage caused by an earthquake in 2001 and the approaching end of its useful life.

O-001-004

Two leading replacement alternatives, a new elevated highway and a cut-and-cover tunnel, were studied in a 2006 Supplemental DEIS. Both of these alternatives were rejected in a 2007 advisory vote in Seattle and abandoned as unworkable. WSDOT and the City then convened a 29-member stakeholder committee to provide feedback on new alternatives.² Members of that committee, including representatives of business, labor, and environmental groups, suggested the state "move forward with an Alaskan Way Viaduct Replacement Plan that includes improvements to I-5, transit, surface streets and potential for construction of a deep bore tunnel" and "a state-funded Supplemental Environmental Impact Statement should include review of an I-5/surface/transit hybrid."³

O-001-005

Just a month after this result from a year-long process, in January 2009, Governor Gregoire recommended that a deep-bored tunnel be the replacement for the Viaduct.⁴ Although this tunnel had not been studied in the extensive 2008 analysis, nor reviewed under

²App'x, Doc. 1.
³App'x, Doc. 2.
⁴App'x, Doc. 3.

O-001-003

See response to Comments O-001-016 through O-001-021.

O-001-004

A more complete description of the Partnership Process is provided in Chapter 2, Question 5 of the Final EIS and in the Project History Report provided as Appendix S of the 2010 Supplemental Draft EIS (available on the project website and also included on CD with the Final EIS).

O-001-005

Many public officials have made statements supporting and opposing alternatives and other aspects of this project. This is normal for a project of this magnitude and local and regional importance. These comments are outside of and have not influenced the NEPA review process.

O-001-005

NEPA or SEPA, the governor said that she was “confident that a bored tunnel replacement . . . is the best solution for Seattle, the region, and the state.”⁵ Since then, she and other state and WSDOT officials have repeatedly said that they have decided to choose this tunnel as the Viaduct replacement. WSDOT then changed the project’s statement of purpose and need in a supplemental EIS, without explanation, and ignored the committee members’ endorsement of an “I-5/ Surface/ Transit” alternative.

O-001-006

On February 28, 2011, the Seattle City Council adopted an ordinance that conditionally approved three agreements with WSDOT on the design and construction of the proposed deep-bored tunnel. Petitioner Protect Seattle Now (PSN), an association of Seattle citizens who are concerned about the environmental and fiscal effects of a deep-bored tunnel replacement for the Viaduct, then gathered 28,900 signatures in 30 days to place this ordinance to a referendum. The Seattle City Attorney brought suit in King County Superior Court to block the referendum. Upon PSN’s motion, the City Attorney was dismissed as party plaintiff for initiating the suit without the authority to do so. WSDOT then assumed the plaintiff’s chair voluntarily.⁶ PSN substantially prevailed on the merits, the Court ordered a referendum on the ballot,⁷ and the election is scheduled for August 16, 2011.

The Sierra Club Seattle Group (Sierra Club) is a coalition member of PSN and also a long standing environmental advocate. Its national organization represents hundreds of thousands of individuals, and the Seattle Group counts among its members thousands of city- and federal-tax-paying residents of Seattle. The Sierra Club submitted a letter commenting on the 2010 Supplemental DEIS and intervened in the referendum lawsuit on behalf of two of its volunteers who, as PSN officers, were named in the lawsuit.

IV. DISCUSSION

A. A 90-Day Comment Period Is Necessary

O-001-007

Three aspects of this project warrant an extended time period of 90 days for the public to review and comment on the FEIS. First, the FEIS is over seven thousand page long. The preferred alternative has been changed only recently, and there are new impacts to consider. Adequate and robust public participation is essential to the NEPA process. It allows an agency to obtain the information it needs to document and consider a project’s environmental impacts.⁸ The period between FEIS release and ROD release allows FHWA to conduct internal review and for the public and other agencies to consider and

⁵*Id.*

⁶App’x, Doc. 4 at 3:24-4:2.

⁷App’x, Doc. 5.

⁸See, e.g., *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)

O-001-006

The referendum does not materially bear on selection of the Bored Tunnel or the NEPA process.

O-001-007

As stated in a letter to this commenter dated August 8, 2011, FHWA has denied the commenter’s request for a 90-day comment period on the Final EIS. The NEPA regulations do not require a comment period on a Final EIS; they require only that there be a 30-day waiting period following publication of the Final EIS. While a comment period is not required, FHWA and WSDOT invited comments on the Final EIS to provide an additional opportunity for public input. FHWA has determined the 30-day period to be sufficient and appropriate. There have been extensive comment opportunities that have occurred throughout this process; the entire Final EIS, including appendices, was made available in electronic form; and much of the information in the Final EIS had previously been made available. Also, it should be noted that the 30-day comment period is measured from the publication of a notice in the Federal Register announcing the availability of the Final EIS. The Final EIS itself was made available on-line on July 7, 2011; the comment deadline ran through August 15, 2011. Therefore, the Final EIS was actually available for review and comment for a total of 39 days.

O-001-007

comment on the FEIS.⁹ Unless the FHWA grants significantly more than 30 days, an already flawed process will be rushed through its final stages without a meaningful opportunity for public comment.

O-001-008

Second, a cooperating agency, the City of Seattle, is holding a referendum related to the project on August 16, 2011. The referendum concerns the authority of the City Council to finally approve the construction phase of its agreements with WSDOT governing property, environmental remediation, design review, permitting, and construction aspects of the proposed deep-bored tunnel. Because the City's cooperation is essential to a successful implementation of the project, FHWA should give itself time to understand the effect on the project if voters reject the referendum.

O-001-009

Voter opposition to the referendum would also cast doubt on the project's desirability and viability. The campaigns for and against the referendum have centered their arguments on the merits of the tunnel.¹⁰ The outcome of the vote will very likely shift the politics and funding viability surrounding the project. If voters soundly reject the referendum, the FHWA and other decision makers will have a clear indication that the public does not want the tunnel. At the very least, a "reject" vote would show that the public does not have the appetite to approve the tax packages that will be necessary to pay for the project. The public's backing and willingness to pay for a project are essential considerations before rushing ahead with a multi-billion-dollar project.

O-001-010

The third reason for a longer comment-and-review period for the FEIS time is that the concerns laid out in this petition require substantive action on the part of FHWA. The FEIS review period is precisely the time for the FHWA to examine the process to date, understand the public's substantial and concerns about the process and the project, and decide whether to issue a ROD. Hasty approval of a flawed process would be inappropriate.

O-001-011

B. Procedural NEPA Violations

Although the FHWA may delegate the preparation of an EIS to a state agency such as WSDOT, the FHWA is ultimately responsible for ensuring the process complies with NEPA. Therefore, FHWA must ensure that "no action by an agency or an applicant concerning the proposal shall be taken which would . . . limit the choice of reasonable alternatives," until the ROD is issued.¹¹ This prohibition prevents a premature choice among alternatives.

An agency also must take a "hard look" at the environmental impacts of a project, "and it must be taken objectively and in good

⁹CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question #34b (Mar. 23, 1981), available at <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>.

¹⁰See, e.g., App'x, Docs. 6-7.

¹¹CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question #10a (Mar. 23, 1981).

O-001-008

The City of Seattle (specifically, the Seattle Department of Transportation) is a co-lead agency with FHWA and WSDOT, not a cooperating agency. The outcome of the August 16, 2011 referendum is not expected to materially affect implementation of this project.

O-001-009

While the outcome of the referendum may provide some indication of public opinion, it does not affect funding for the project, selection of the Bored Tunnel, or the NEPA process.

O-001-010

FHWA has been closely involved throughout the NEPA process and does not require any additional time before completing this Record of Decision.

O-001-011

Throughout the course of this project, extensive analysis has been completed on multiple alternatives with ample and appropriate public disclosure and discourse. FHWA is satisfied a thorough and complete "hard look" has been completed and documented as required and that all appropriate procedures have been followed. The NEPA process is described in Chapter 2 of the Final EIS.

O-001-011

faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.”¹² As the Ninth Circuit has observed, these principles bar an agency from taking any action to prejudice the outcome:

The whole point of NEPA is to study the impact of an action on the environment before the action is taken.

Where [i]nterim action prejudices the ultimate decision on the program[,] NEPA forbids it. Action prejudices the outcome when it tends to determine subsequent development or limit alternatives.¹³

WSDOT has violated these clear commands and the result has been impermissible prejudice poisoning the process. WSDOT’s actions require the FHWA to intervene.

1. WSDOT and state officials admit they have already made a final decision

During the last two years, WSDOT officials, the Governor, and the Transportation Committee chairs from both houses of the state legislature have all made numerous public statements saying that they have made a final choice to construct a deep-bored tunnel alternative:

- A year and half before the first EIS even considered a deep bore tunnel’s efficacy and impacts Gov. Gregoire declared “The time for debate is over.”¹⁴
- Rep. Judy Clibborn, House Transportation committee chair, said on August 11, 2009, “The state is building that tunnel, it’s a done deal.”¹⁵ And referring to Seattle’s concerns over the tunnel, “The only impact the city could have would be to slow it down and make it very expensive.”¹⁶
- Gov. Gregoire, on September 24, 2009, “It’s done. We’re moving forward.”¹⁷
- Sen. Mary Margaret Haugen, Senate Transportation Committee chair on June 29, 2010, “It’s time to quit arguing about whether it’s good or not; the time is now to build it,” adding that the tunnel was a “done deal.”¹⁸
- Gov. Gregoire, on October 28, 2010, “The debate must end. We are going to build a tunnel.”¹⁹

¹²*Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)

¹³*N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 847 (9th Cir. 2007) (internal citations omitted).

¹⁴App’x, Doc. 8.

¹⁵App’x, Doc. 9.

¹⁶App’x, Doc. 10.

¹⁷App’x, Doc. 11.

¹⁸App’x, Doc. 12.

¹⁹App’x, Doc. 13.

O-001-012

Many public officials have made statements supporting and opposing alternatives and other aspects of this project. This is normal for a project of this magnitude and local and regional importance. These comments are outside of and have not influenced the NEPA review process. FHWA is satisfied all appropriate NEPA procedures have been followed.

- In December 2010, Ron Judd, WSDOT's outreach director for the project said, "The debate about whether or not we're going to do a tunnel is over."²⁰
- Responding to the citizen's referendum, Gov. Gregoire on March 31, 2011, "The fact of the matter is the decision for the deep-bored tunnel was made in 2009."²¹
- WSDOT's project manager, Ron Paananen, March 2011 said, state officials "are not interested in revisiting the decision."²²
- In May 2011, WSDOT Secretary Paula Hammond was asked "If construction begins at the end of August on the tunnel, is that the point at which there is no turning back in your view?" Hammond replied, "Actually, we've made the decision, the governor, the executive of King County, and the then Mayor of Seattle, in 2009, made the decision to construct the deep bore tunnel."²³

These top state officials have exploited the weight of their offices to make a de-facto final decision, when in fact NEPA says that there could not yet be a final decision. Their comments also created an aura of inevitability, chilling public participation. Their actions undermine NEPA's goals of informed decision-making and public participation.²⁴

WSDOT shut off public and agency consideration of alternatives long before all the environmental effects were ever known. NEPA does not allow such behavior. Even when the EIS process has been completed and a decision made, NEPA dictates that agencies remain open to unforeseen environmental effects, as the U.S. Supreme Court has explained:

The broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior

²⁰App'x, Doc. 14.

²¹App'x, Doc. 15.

²²App'x, Doc. 16.

²³Audiofile available at Ross Reynolds, *The Conversation*, KUOW (May 25 2011), <http://www.kuow.org/program.php?id=23515>.

²⁴*See, e.g., Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) ("A properly prepared EIS ensures that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences, and it provides the public with information on the environmental impact of a proposed action and encourages public participation in the development of that information.")

O-001-012

to the completion of agency action simply because the relevant proposal has received initial approval.²⁵ Yet WSDOT's director and its political superiors have insisted on putting the blinders over the eyes of themselves and the public *before* release of the FEIS and ROD.

The statements of WSDOT and state officials, apart from stifling public participation, prejudiced the decision-making and limited alternatives being studied. Again, "[a]ction prejudices the outcome when it tends to determine subsequent development or limit alternatives, according to the Ninth Circuit Court of Appeals, whose interpretation of NEPA is binding on the actions of WSDOT and NEPA in this case.²⁶ How could WSDOT and other state officials' predetermination of the final choice of alternatives *not* determine subsequent development of the EIS and limit alternatives? NEPA forbids such prejudicial action, and this situation merits the FHWA's inquiry and granting of relief.

2. A prejudiced WSDOT sues citizens who refuse to accept its premature decision

The upcoming referendum in Seattle is an opportunity for the public to weigh in on the final choice of alternatives by the City, a recognized cooperating agency. Instead of assuming a neutral role, however, WSDOT took the plaintiff's seat in a lawsuit aimed at stopping the referendum. The referendum is a power of the citizens enshrined in state law and the Seattle City Charter and is a significant part of the public-participation process in Washington.²⁷ And NEPA holds public participation as a guiding principle.²⁸ It is incongruous that WSDOT would simultaneously maintain the positions of plaintiff blocking citizen involvement and objective decision-maker carrying out the EIS process. WSDOT's challenge to the referendum ultimately failed, as Judge Laura Gene Middaugh of the King County Superior Court issued an order on May 20, 2011 allowing a referendum to proceed to the ballot this August.²⁹ We fail to see any scenario where WSDOT's failed attempt was appropriate before release of the FEIS and ROD. WSDOT's actions thus further indicate that its mind has long been closed to an objective review of the project.

O-001-013

²⁵*Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (internal citations omitted).

²⁶*N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 847 (9th Cir. 2007) (internal citations omitted).

²⁷ Wash. Const. Art. II Sec. 1(b); Seattle City Charter, art. IV, § 1.H

²⁸*See State of Cal. v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) ("NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action.")

²⁹*See App'x*, Doc. 5.

O-001-013

The referendum concerned the process by which the City Council would give its own notice to carry out the agreements entered into between WSDOT and the City once the environmental review process was complete. The referendum was passed on August 16, 2011. The approval of the referendum confirmed use of the process originally set out in the agreements by which the City would direct its agencies to go forward with their work under the agreements.

The litigation challenging Referendum 1 was filed by the City Attorney on behalf of the City of Seattle. WSDOT intervened in that litigation because, as the state agency responsible for the state highway system and specifically for the SR 99 project, it had a significant interest in the litigation. Under FHWA's oversight, WSDOT has been committed to fulfilling NEPA's public participation requirements over the last 10 years. However, NEPA's public participation process does not extend to local initiatives and referenda, and WSDOT's participation in the referendum litigation was unrelated to its NEPA obligations.

3. WSDOT violated NEPA rules regarding cooperative agencies

Before the lawsuit, WSDOT actively ignored Seattle Department of Transportation (SDOT) and even punished it. SDOT is a cooperating agency in the EIS because the proposed project will be built exclusively within the City of Seattle's geographic boundaries.³⁰ SDOT's role as cooperating agency is important as it requires WSDOT to use SDOT's environmental analysis and proposals and to meet with SDOT at their request.³¹ In December 2010, SDOT submitted a DEIS comment letter to WSDOT detailing its concerns with and comments on the October, 2010 DEIS.³² These comments requested additional study of reasonable alternatives be performed prior to the release of the FEIS.³³ In response to SDOT's comments, WSDOT cut SDOT out of the FEIS review in clear contravention to NEPA's requirements.³⁴

In a letter dated April 26, 2011, WSDOT AWV Administrator Ron Paananen stated that "while WSDOT and FHWA would typically provide SDOT with the internal review draft of the Final EIS for your review, policy comments from the City of Seattle's Mayor's office have led us to change the typical practice."³⁵ Later in the letter, Mr. Paananen explained, "The Mayor's Office, via SDOT, submitted comments [that] suggest the I5/Surface/Transit option be studied as a reasonable alternative." By blocking a cooperating agency from participation in the EIS, WSDOT violated NEPA. This action is further evidence of an agency that has lost objectivity, is refusing to take a hard look at viable alternatives, and is pursuing a predetermined outcome.

WSDOT later retreated from this hardline position, allowing some of SDOT's comments and data to be incorporated into the FEIS, and SDOT has since signed the FEIS. However, not all of SDOT's comments were addressed, as evidenced by a statement submitted by SDOT Director Peter Hahn at the time of signing.

Overall, I believe the EIS document has been crafted primarily to support and defend the selection of the Deep Bored Tunnel as the preferred alternative, rather than to provide an

³⁰See 40 C.F.R. § 1508.5 ("Cooperating Agency means any Federal agency other than a lead agency which has jurisdiction by law A State or local agency of similar qualifications . . . may by agreement with the lead agency become a cooperating agency.").

³¹See 40 C.F.R. § 1501.6(a) ("The lead agency shall: (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time. (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency. (3) Meet with a cooperating agency at the latter's request.").

³²See App'x, Doc. 17.

³³See App'x, Doc. 18.

³⁴See 40 C.F.R. § 1502.9 ("The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter").

³⁵See App'x, Doc. 19.

O-001-014

The City of Seattle (specifically, the Seattle Department of Transportation) is a co-lead agency with FHWA and WSDOT, not a cooperating agency. City of Seattle staff from multiple departments have been extensively involved in planning this project and in reviewing discipline reports as appropriate for their expertise and jurisdiction. City of Seattle staff reviewed and commented on a preliminary draft of the Final EIS and their comments were incorporated in the final published document. FHWA is satisfied the City's involvement is appropriate for a co-lead agency and that the Final EIS accurately and objectively evaluates all reasonable alternatives.

O-001-014

unbiased account of the impacts of the tolled deep bore tunnel compared to other reasonable alternatives.³⁶
The EIS process requires the FHWA, or its designee, take a hard look at all reasonable alternatives. WSDOT failed to meet that duty by ignoring a cooperating agency's study and comments. WSDOT also violated the duty owed to cooperating agencies. Under 40 C.F.R. § 1501.6(a),

The lead agency shall: (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time. (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency. (3) Meet with a cooperating agency at the latter's request.

Rather than use SDOT's environmental analysis and proposals, WSDOT rebuked SDOT and cut it out of the process. WSDOT violated NEPA and its implementing regulations.

4. An arbitrary change to the statement of purpose and need

Many groups commented on the 2010 Supplemental Draft EIS (SDEIS) and expressed strong reservations about the change in the project's statement of purpose and need. This point, however, deserves additional emphasis as the FHWA prepares to choose between the alternatives developed in the FEIS. Not only has WSDOT set up the FHWA to commit a NEPA violation, but it is also fair to presume that WSDOT's arbitrary change to the statement of purpose and need is born from its prejudice towards the tunnel. It is one consequence, petitioners believe, of WSDOT's decision to bend the EIS process towards its predetermination to select the tunnel.

In the 2006 Alaskan Way Viaduct & Seawall Replacement Project Supplemental Draft Environmental Impact Statement ("2006 SDEIS"), the purpose-and-need statement was as follows:

The main purpose of the proposed action is to provide a transportation facility and seawall with improved earthquake resistance. The project will maintain or improve mobility, accessibility, and traffic safety for people and goods along the existing Alaskan Way Viaduct Corridor as well as improve access to and from SR 99 from the Battery Street Tunnel north to Roy Street.³⁷

³⁶See *id.*

³⁷WSDOT et. al, Alaskan Way Viaduct and Seawall Replacement Supplemental Draft Environmental Impact Statement 122 (July 2006), available at <http://www.wsdot.wa.gov/Projects/Viaduct/library-environmental.htm#sdeis>.

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This comment portrays changes to the purpose and need statement as being done entirely by WSDOT. This is not the case. All three lead agencies (FHWA, WSDOT, and SDOT) jointly evaluated public comments and information developed during the Partnership Process and concluded the project's purpose and need statement should be revised. The changes to the statement were made with full participation by FHWA, WSDOT, and SDOT and were completed in July 2009. The changes are grounded on careful analysis and public comment. The change highlighted by this comment is simply clarifying how the "people and goods" referred to in the 2006 purpose and need statement move. This clarification does not constitute a new purpose as the comment contends.

The statement that WSDOT recommended a surface and transit alternative is factually incorrect. The document referenced in this comment is a fact sheet describing the scenarios developed during the Partnership Process and is not a statement of preference or recommendation by WSDOT or any other agency.

Contrary to the assertion in this comment, the changes to the purpose and need statement were described in the 2010 Supplemental Draft EIS (Chapter 3, Question 6) and in the Final EIS (Chapter 2, Question 6).

Notably, the project goal was a broad statement favoring the movement of people and goods; capacity for vehicles was not an end to itself, although obviously it could be one means of achieving that goal.

In 2008, WSDOT convened a Stakeholder Advisory Committee and worked together with the city and county transportation departments (“Partnership Process”) to develop alternatives for replacing the Viaduct after Seattle voters, in an advisory vote, rejected both prior alternatives, a four-lane tunnel and an elevated highway. These three agencies established Guiding Principles for the Partnership Process and the Committee’s work, and the second such principle echoed the 2006 statement of purpose and needs:

Provide efficient movement of people and goods now and in the future. Any solution to the Alaskan Way Viaduct must optimize the ability to move people and goods today and in the future in and through Seattle in an efficient manner, including access to businesses, port and rail facilities during and after construction.³⁸

After the governor made her decision in early 2009, however, the 2010 SDEIS subtly changed these prior two statements of the project’s goals, as follows:

The purpose of the proposed action is to provide a replacement transportation facility that will:

- Reduce the risk of catastrophic failure in an earthquake by providing a facility that meets current seismic safety standards.
- Improve traffic safety.
- Provide capacity for automobiles, freight, and transit to efficiently move people and goods to and through downtown Seattle.
- Provide linkages to the regional transportation system and to and from downtown Seattle and the local street system.³⁹

Perhaps a transportation department is justified in stating that a highway-replacement project needs to supply capacity for vehicles. But WSDOT, and by extension the FHWA, did not start there initially. It was new for WSDOT to say the project needs to create “capacity” for “automobiles” and “freight.”

The reasons for this change have not been explained by WSDOT. The federal Administrative Procedure Act requires the FHWA to articulate a reason for this change in policy course.⁴⁰ As the U.S. Supreme Court has stated, a federal agency may not “depart from a prior policy *sub silentio*.”⁴¹ Rather, “the agency must show that

³⁸See App’x, Doc. 20.

³⁹WSDOT, FHWA, Alaskan Way Viaduct Replacement Project Supplemental Draft Environmental Impact Statement 4 (Oct. 2010) (emphasis added).

⁴⁰See, e.g., *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 42 (1983)

⁴¹*FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

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there are *good reasons* for the new policy.”⁴² We doubt that such good reasons appear in the agency record, nor can we conceive any facts or community needs that changed between 2006 and 2010 to justify the change. The change appears arbitrary and capricious, especially in light of WSDOT adopting guiding principles for the project in 2008 that did not include bare “capacity” for vehicles.

WSDOT’s action, and by implication the FHWA’s, also appears contrived to exclude consideration of the “I5/ Surface/ Transit” alternatives that rely more significantly on transit and had been recommended by WSDOT in December 2008.⁴³ It potentially excludes alternatives that rely on transit, demand management, and system-wide mobility improvements to the flow of people and goods.

Because the FHWA owns this change as much as WSDOT does, the FHWA risks an adverse outcome in any court challenge to the FEIS. To avoid that scenario, and to demonstrate that the FHWA is acting fair-mindedly and reasonably, the FHWA should take all steps necessary to change back the statement of purpose and need.

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C. Inadequate Funding Plan

The current preferred alternative is a tolled bored tunnel. An alternative may be unreasonable if it is economically unfeasible. As the FHWA’s general counsel wrote in a 2004 memo providing guidance on environmental review of toll roads, “the economic feasibility of a particular alternative, especially when considered in conjunction with other factors, might provide the basis for eliminating that alternative as unreasonable.”⁴⁴ The Council on Environmental Quality (CEQ)’s guidance also describes “reasonable alternatives” as “those that are practical or feasible from the technical and economic standpoint and using common sense.”⁴⁵ The Ninth Circuit upheld an agency’s decision to exclude an alternative as unreasonable where evidence showed that “it would be significantly more costly and more environmentally destructive than the proposed route.”⁴⁶ And the Eighth Circuit has stated that, at the selection stage, “under NEPA, if the stated purpose will not be achieved by the proposed action or if the indirect costs or consequences are so great that a decision by the agency to proceed with the proposed action can only be said to be arbitrary and capricious, then a court may nullify the decision.”⁴⁷ A body of agency guidance and court decisions, therefore, dictate that the FHWA carefully review the tolled-tunnel alternative’s cost, its funding plan, and its reasonableness in light of these and other fac-

⁴²*Id.* (emphasis added).

⁴³See App’x, Doc. 21.

⁴⁴See Gribbin, D.J., FHWA, NEPA Analysis of Toll Roads (Oct. 15, 2004), available at http://www.environment.fhwa.dot.gov/guidebook/NEPA_tollroads.asp.

⁴⁵CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, Question #2a (March 23, 1981).

⁴⁶*Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

⁴⁷*Jackson County, Mo. v. Jones*, 571 F.2d 1004, 1013 (8th Cir. 1978).

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The Washington State Legislature passed into law RCW 47.01.402, which commits the state to providing funding up to \$2.8 billion to replace the SR 99 Alaskan Way Viaduct, with tolling to provide up to \$400 million of that commitment.

The state funds programmed by the State Legislature include gas tax revenue from the Motor Vehicle Fund through the Nickel and Transportation Partnership Act (TPA) taxing authorities, and federal funding. The funds are used across Washington State for highway-related projects and are bonded with General Obligations bonds backed by the good faith and credit of the state (RCW 47.10.864). Bonds issued under the authority of RCW 47.10.861-866 are a general obligation of the State of Washington and pledge the full faith and credit of the state to the payment of principal, interest and contain an unconditional promise to pay such principal and interest when the bonds become due. Bond proceeds for toll revenue may include General Obligation bonds, Toll Revenue bonds, or a combination of both, as determined by the Washington State Treasurer and the State Finance Committee. In addition, on February 9, 2010, the Port of Seattle Commission, by a 5 to 0 vote, moved to affirm the Port’s support and financial commitment to the Bored Tunnel Alternative.

Finally, WSDOT has submitted a federally required finance plan to FHWA, entitled *Initial 2011 Financial Plan SR 99 Alaskan Way Viaduct Replacement Project*, which is currently under review. FHWA expects to complete its review and approve the finance plan following FHWA’s authorization of this Record of Decision.

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tors. In our view, the conclusion that the FHWA must reach is that the tolled-tunnel is unreasonable and, even if reasonable, undesirable due to its broken funding plan, which relies on highly risky assumptions.

WSDOT has released the following funding plan for the State's budgeted \$3.1014 billion for the tolled-tunnel alternative, \$468.4 million of which is assumed to come through your agency.

State Funding	
2009 Gas Tax (Partnership Funding)	\$1,597
2003 Gas Tax (WVSA Funding)	\$216
Other State Funds	\$210.4
Federal Funds	\$468.3
Local Funding	\$0
toll Funding	\$400.0*
Port of Seattle Funding	\$300.0**
Total Source of Funds	\$3,101.4

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Already, at least \$700 million of this funding (\$300 million from the Port of Seattle and \$400 million from tolling) is in doubt and quite possibly will never materialize. This \$700 million is critical, because the Washington state legislature imposed a hard cap on the state's funding contribution to the project; no more than \$2.4 billion is permitted from state gas-tax revenues and federal dollars funneled through the state.⁴⁹ Thus, without the \$700 million, a tunnel is not economically viable.

1. The Port of Seattle's questionable \$300 million

As WSDOT's project director Ron Paananen stated in a court declaration on November 24, 2009, the tolled-tunnel alternative is not viable without the Port of Seattle's contribution of \$300 million.⁵⁰ Yet WSDOT seeks the FHWA's approval for this alternative without a binding commitment from the Port of Seattle. WSDOT and the Port entered an interlocal agreement in April 2010, but the agreement requires the Port to contribute funds only "[t]o the extent feasible and authorized by the Port Commission."⁵¹ The agreement assumes that the Port will contribute to the project over three years, 2016-2018.⁵² However, there is not a single document anywhere, let alone a proper

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⁴⁹WSDOT, *Alaskan Way Viaduct & Sewall Replacement Program - Understanding the Program's Cost and Funding*, (May 2011), available at http://www.wsdot.wa.gov/NR/rdonlyres/A0086739-79D7-4ABD-A01B-DA59AA32D710/0/2011_0516_BoredTunnel_CostFunding_folio_web.pdf.

⁵⁰See Wash. Rev. Code § 47.01.402.

⁵¹App'x, Doc. 22 at 4 ¶¶ 10-11.

⁵²See App'x, Doc. 23 at 4 § III.B.

⁵³*Id.* at § III.B.5.

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The Port of Seattle affirmed its participation in the project by approving Memorandum of Agreement (MOA) No. GCA 6444 on February 9, 2011. This MOA agrees to provide \$300 million in funding for the project.

Contrary to the assertions made in this comment, the Port of Seattle has consistently affirmed its commitment to provide the \$300 million in funding for the project. In their discussion supporting the agreement, the Port of Seattle Commissioners cited their support for the Bored Tunnel Alternative, its advantages over other alternatives, the importance of SR 99 to the regional economy, and the importance of funding projects that support freight movement.

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authorization by the Port Commission, indicating that such funding is feasible and forthcoming.

Many indicators show that the Port of Seattle will not be able, or willing, to contribute such a significant sum to a project that will not directly benefit the Port or serve its mission. The Port's annual operating budget is only about \$500 million; its annual capital budget is approximately \$400 million.⁵³ Thus a \$300 million contribution, even spread out over three years, is obviously unrealistic without selling off assets or issuing bonds. But state law caps the indebtedness levels of the Port without a public vote.⁵⁴ In this uncertain economic environment, the Port is cutting it very close. As of December 31, 2010, the Port had room to issue only \$487 million in general-obligation bond debt without a vote.⁵⁵ These debt-limit issues aside, it is not clear whether the Port would have sufficient revenues to service the debt without an additional vote. The Port's property-tax levy may increase by a rate of no more than 1% per year unless the voters approve.⁵⁶ And now at least one Port commissioner is already on record questioning whether it is desirable for the Port to allocate \$300 million to the tolled-tunnel project.⁵⁷

In light of these circumstances, the FHWA must carefully inquire into the feasibility of the Port's contribution and the real possibility that the Port Commission or the voters will never authorize \$300 million in bonds. If the Port's contribution does not materialize, the FHWA should demand WSDOT to prove that the tolled-tunnel alternative is economically reasonable and desirable. The FHWA should not throw good money after bad.

2. The uncertain \$400 million from tolling

Even more troubling, WSDOT may not be able to finance \$400 million in bonds through tolling. The problem stems primarily from state law's new limitations on tolling. In 2009, the state legislature authorized up to \$400 million in financing from tolls.⁵⁸ Since then, however, the voters of Washington approved Initiative 1053,⁵⁹ which requires legislative approval before a fee, such as a toll, is actually imposed or increased in any fiscal year. The state Attorney General issued an opinion last year stating that legislative authorization prior to I-1053's enactment is not enough; the legislature must pass a new law authorizing WSDOT to impose tolls.⁶⁰ Because any increase in toll rates would also require subsequent legislative ap-

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The funds used across Washington State for highway related projects are bonded with General Obligations bonds backed by the good faith and credit of the state (RCW 47.10.864). Bonds issued under the authority of RCW 47.10.861-866 are a general obligation of the state of Washington and pledge the full faith and credit of the state to the payment of principal, interest and contain an unconditional promise to pay such principal and interest when the bonds become due. Revenues from tolls are important but not the only source available to the state.

Bond proceeds for toll revenue may include General Obligation bonds, Toll Revenue bonds or a combination of both as determined by the Washington State Treasurer and the State Finance Committee. Finally, WSDOT has submitted a federally required finance plan to FHWA, entitled *Initial 2011 Financial Plan SR 99 Alaskan Way Viaduct Replacement Project*, which is currently under review. FHWA expects to complete its review and approve the finance plan following FHWA's authorization of this Record of Decision.

⁵³See App'x, Doc. 24.

⁵⁴See Wash. Rev. Code § 53.36.030.

⁵⁵See App'x, Doc. 25, at XI-3.

⁵⁶See Wash. Rev. Code §§ 84.55.010, .050(1), .101.

⁵⁷See App'x, Doc. 26.

⁵⁸See Wash. Rev. Code § 47.01.402(b)(6).

⁵⁹Codified at Wash. Rev. Code § 43.135.055 and in other statutory sections.

⁶⁰See App'x, Doc. 27.

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proval, serious doubts must arise about WSDOT's ability to adjust toll rates as necessary to raise enough money for bond payments.

Further clouding this picture, over 327,000 signatures were gathered to submit Initiative 1125 to Washington state voters this fall. If approved, it would expressly prohibit variable tolling.⁶¹ Variable tolling is necessary, according to WSDOT, to finance \$400 million in bonds while minimizing traffic diversion from the tunnel during off-peak times.⁶² Mr. Paananen, the WSDOT project director, recently admitted that passage of I-1125 would doom the project financially under the current plan's assumptions: "A flat toll rate would not achieve our objective as far as financing the project. . . . We would have to work with legislators and the governor's office, as far as handling that difference."⁶³

Thus, \$400 million in financing hinges on a very uncertain future. We believe FHWA should demand that WSDOT produce a viable plan for making up this \$400 million shortfall if and when it materializes, or clarify to the public and decision makers what WSDOT will cut from the project scope.

3. The tolling levels necessary to collect funding make the tolled-tunnel alternative unreasonable

Economic infeasibility is not the only problem with tolling. Indeed, the FHWA must carefully review the FEIS, before issuing the ROD, to determine whether WSDOT's analysis of tolling impacts includes necessary changes from the 2010 SDEIS. As the Nelson-Nygaard Report indicates, the 2010 SDEIS defined the project to exclude a critical new connection within the city street grid (the "Elliott/Western connector") that will be built if a bored tunnel is selected. This omission results in an overestimate of the number of vehicles using the tunnel, and an underestimate of the tolling diversion:

The State did model a 2015 "program" alternative (including the connector) with Toll Scenario C, but the results are not reflected in the SDEIS. In this model, 38,000 daily trips were forecasted to use the tunnel, compared to 86,000 without a toll. The State's analysis suggests that with the planned Elliott/Western connector tolling diversion from the tunnel could be as high as 55% of daily traffic.⁶⁴

The diversionary effects of a toll make it impossible for the tolled-tunnel alternative to be cost effective or to meet the project's purpose and need. To raise \$400 million in tolls, each one-way peak hour trip

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An analysis of the Nelson-Nygaard document is provided in Appendix V of the Final EIS. Contrary to statements in the Nelson-Nygaard document, the analysis of the Bored Tunnel program with tolls does include the Elliott-Western Connector. This is provided in the Final EIS Chapter 7 and Chapter 8 of Appendix C, Transportation Discipline Report.

⁶¹See App'x, Doc. 28.

⁶²See App'x, Doc. 29 at 15, 29.

⁶³See App'x, Doc. 30.

⁶⁴Nelson / Nygaard Consulting Associates, Inc., Additional Review of the Impacts of Deep Bored Tunnel Tolling Diversion on City Streets; Identification of Mitigation Draft Executive Summary (April 2011) (Nelson-Nygaard Report), to be available in Final Environmental Impact Statement.

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would cost up to \$5.00 for the 2-mile stretch of tunnel.⁶⁵ Because there are ample free parallel routes, diversion is so high that only 38,000 vehicles are expected to use the tunnel each day.⁶⁶ This is only 1/3 of the current viaduct traffic; other users would divert to city streets.⁶⁷ This calls into question the very utility of the project. Why spend this much for a facility that is expected to be unaffordable and undesirable for so many potential users?

Before issuing the ROD, the FHWA must ensure that it is reasonable to spend federal-aid highway dollars on a project that delivers so little utility, and only to drivers who are financially able to pay the high cost of tolls.

4. Without adequate funding, the mitigation measures are illusory

O-001-020

The FHWA must consider mitigation of a project's environmental impacts and must "identify and include in the action all relevant and reasonable mitigation measures that could improve the action."⁶⁸ The importance of mitigation is highlighted in CEQ's new guidance on mitigation under NEPA. This CEQ guidance urges agencies to adopt procedures that make "relevant funding, permitting, or other agency approvals . . . conditional on performance of mitigation commitments."⁶⁹

Necessary mitigation has not yet been identified for the preferred alternative, and costs are still not known. Very little funding has been set aside in the project budget for mitigation; it may be grossly inadequate. Because WSDOT's funding plan rests on a shaky foundation, the first project components likely to be cut are mitigations of the tunnel's environmental impacts. The FHWA should require WSDOT to demonstrate, and make binding commitments, that it will adequately fund the measures identified in the FEIS as necessary to mitigate the tolled-tunnel alternative's environmental impacts.

5. Both the State and the City refuse to guarantee the project's funding

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The State and the City of Seattle have both expressly disavowed any responsibility for costs in excess of budget. The State legis-

⁶⁵See App'x, Doc. 29 at 8.

⁶⁶See Nelson-Nygaard Report at ES-4.

⁶⁷See *id.*

⁶⁸FHWA, NEPA and Transportation Decisionmaking, <http://environment.fhwa.dot.gov/projdev/tdmmitig2.asp>.

⁶⁹CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (Jan. 14, 2011), available at http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

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Cost estimates for the Bored Tunnel include mitigation commitments and contingency planning based on current best practices. FHWA is satisfied that all mitigation commitments can be met.

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WSDOT has submitted a federally required finance plan to FHWA, entitled *Initial 2011 Financial Plan SR 99 Alaskan Way Viaduct Replacement Project*, which is currently under review. FHWA expects to complete its review and approve the finance plan following FHWA's authorization of this Record of Decision.

lature enacted a law stating that it would appropriate not a dime more than \$2.4 billion, and assigning liability for cost overruns to "property owners in the Seattle area who benefit from replacement of the existing viaduct with the deep bore tunnel."⁷⁰ The City, however, insisted in its recent agreements with WSDOT that "the City and/or its citizens and property owners cannot be held responsible for any or all cost overruns related to the portions of the project for which the State is responsible."⁷¹ The project therefore lacks a financial guarantor. This is a major problem given the small margin for error. If any portion of the project were to go wrong, such as with tunnel boring, construction of the north tunnel portal, removal of the Viaduct, or reconnection of the surface streets, the project will be stalled pending further negotiations between the State and the City on additional funding. The FHWA should take the only reasonable step: withhold its approval of the project until the State and the City reach an accord regarding cost overruns, with at least some government entity financially guaranteeing the project.

V. CONCLUSION

WSDOT created a fatally flawed NEPA process by predetermining the outcome, failing to analyze all reasonable alternatives, and falling short of the objectivity and good-faith required by NEPA. Before finalizing the EIS, WSDOT and state officials made a de-facto final decision when they declared the bored tunnel alternative is a "done deal." WSDOT assumed an adversarial stance toward anyone who questioned their de-facto final decision, suing a citizen group to stop a valid referendum and punishing a cooperating agency for submitting comments regarding further study of an alternative. These actions are not those of an agency performing an objective and good-faith review of the project; they are the actions of an agency sacrificing an objective process in favor of ensuring their predetermined outcome is realized.

The FHWA should grant an extension of the FEIS review period in order to address the many significant technical and financial problems will surely be day-lighted by the release of the FEIS. The change to the preferred alternative will shed new light on the costs and benefits of this project. This is the last opportunity for decision-makers and the public to weigh the merits of a tolled tunnel and to negotiate solutions to unresolved problems with the project. Is usage by only 1/3 of present viaduct users enough to justify the project? How will the \$700 million funding gap be covered, and what will be cut if it is not? However, WSDOT has misled the public into believing it is too late to ask questions, too late to solve problems, and there are

⁷⁰See Wash. Rev. Code § 47.01.402(6)(b).

⁷¹Seattle Ordinance No. 123542, Ex. A, MOA NO. GCA 6486 § 10.2.

no other alternatives. The FHWA must take action now to avoid ratifying WSDOT's missteps by issuing a ROD with these problems unaddressed.

The FHWA should exercise its discretion and extend the comment and review period for the FEIS to 90 days. This will allow for the necessary scrutiny of the FEIS in light of WSDOT's prejudice. If FHWA determines additional environmental study is required to cure the flawed FEIS this must be performed free of the bias already exhibited by WSDOT and be included in the ROD. The FHWA should conduct an investigation into WSDOT's violation of the regulations governing cooperating agency involvement and propose remedies. The ROD should be withheld until WSDOT produces a viable and cost-effective funding plan to complete the proposed tunnel project and actually implement adequate mitigation measures. Finally, FHWA should hold an informal hearing to take more evidence on WSDOT's prejudice and the lack of adequate funding for this project.

We hope this petition has informed you of the situation as it has developed in recent months and has made clear the serious concerns which our organizations share. We encourage the FHWA to correct the deficiencies created by WSDOT under your delegated authority, and ensure compliance with NEPA and its standards for informed decision-making and high-integrity participation with local jurisdictions. Please contact us if you have any questions regarding the matters raised.

Respectfully submitted,



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