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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

COALITION FOR A LIVABLE FUTURE,
an Oregon nonprofit corporation,

Case No.:

**NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,**
an Oregon nonprofit corporation, and

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

**NORTHEAST COALITION OF
NEIGHBORHOODS,**
an Oregon nonprofit corporation,

Violations of Administrative Procedure
Act, National Environmental Policy Act,
and Endangered Species Act

Plaintiffs,

v.

**FEDERAL HIGHWAY
ADMINISTRATION,** an agency of the
United States Department of Transportation;

DANIEL M. MATHIS, Washington Division
Administrator, Federal Highway
Administration, in his official capacity, and
PHILLIP DITZLER, Oregon Division
Administrator, Federal Highway
Administration, in his official capacity,

**FEDERAL TRANSIT
ADMINISTRATION**, an agency of the
United States Department of Transportation;
and **RICHARD F. KROCHALIS**, Regional
Administrator, Federal Transit Administration
Region 10, in his official capacity, and

**NATIONAL MARINE FISHERIES
SERVICE**, an agency of the United States
Department of Commerce; and **WILLIAM
W. STELLE, JR.**, Regional Administrator,
National Marine Fisheries Service, in his
official capacity,

Defendants.

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. The Coalition for a Livable Future, the Northwest Environmental Defense Center, and the Northeast Coalition of Neighborhoods challenge the Federal Highway Administration's ("FHWA") and Federal Transit Administration's ("FTA") decision to approve a highway expansion project that would demolish two existing, structurally sound interstate highway bridges over the Columbia River and replace them with much larger bridges and multiple, greatly expanded interchanges. Those agencies reached their decision without satisfying the requirements of the National Environmental Policy Act ("NEPA"). For example, although there were many alternative approaches to addressing traffic congestion problems generally, and on these interstate highway bridges in particular, the FHWA and FTA improperly only considered action alternatives that would address congestion

by significantly expanding traffic capacity and adding more traffic lanes. Moreover, when addressing traffic issues those agencies refused to update their analysis and include new data showing that they were significantly overestimating future traffic demand.

2. This action also seeks review of the Biological Opinion (“BiOp”) prepared by the National Marine Fisheries Service (“NMFS”) in consultation with FHWA and FTA under section 7 of the Endangered Species Act (“ESA”). That flawed BiOp and consultation were legally required because the Columbia River where the project would be implemented is critical habitat for multiple salmonid species protected by the ESA. This project is one of the largest in-water construction projects on the Columbia River since these salmonid species were listed under the ESA. The BiOp admits that the project would kill or “take” large numbers of salmon but nevertheless arbitrarily concludes that this project will not jeopardize the continued existence of any of those threatened species. However, the defendants in fact do not know and have never attempted to determine how many salmon are already cumulatively being taken by the hundreds of other projects that NMFS has already approved on the Columbia River and its tributaries.

3. In sum, Defendants’ NEPA and ESA decision-documents do not adequately consider and disclose the adverse impacts of this massive interstate highway expansion project and do not consider numerous reasonable alternatives that might substantially reduce those impacts.

4. The Columbia River originates in British Columbia, flows south into Washington, then turns east to form the majority of the border between Washington and Oregon as it proceeds to the Pacific Ocean. It flows some 1200 miles and drains a basin roughly the size of France (258,000 square miles). Importantly, the Columbia River provides passage and habitat for 13 species of anadromous salmonid fish listed either as threatened or endangered under the ESA.

Many of those fish must pass through the section of the Columbia River where this project would be constructed both when moving downstream as juveniles and later when swimming upstream as adults to spawn.

5. Only two vehicle bridges cross the Columbia River in the Portland-Vancouver region: the I-5 Bridge and the I-205 Bridge. The nearest bridge downstream is approximately 50 miles away, and the nearest bridge upstream is approximately 35 miles away. The current I-5 bridges serve as both interstate highway bridges and a local access bridge for Hayden Island. That dual function results in numerous closely spaced exit and entrance ramps that slow down traffic and contribute to traffic congestion. The highway project authorized by Defendants (hereinafter referred to as the “Columbia River Crossing” or “CRC” or “the project”), will replace these I-5 bridges with a massive 2 bridge, multi-lane, multimodal structure, which will include light rail transit lines and a mixed-use path set below the highway lanes on both bridges, and will also include greatly expanded highway infrastructure on both sides of the bridges. Those replacement bridges would continue to serve as both interstate highway bridges and local access bridges for Hayden Island. The CRC is forecast to cost upwards of 3.6 billion dollars and purports to rely upon state and federal appropriations and tolling to cover the cost.

6. The Record of Decision (“ROD”) for the CRC and its associated Final Environmental Impact Statement (“FEIS”) violate NEPA. As described below, FHWA and FTA failed to undertake the required environmental analysis under NEPA. At the same time, NMFS failed to satisfy the ESA in determining the current status of the listed species present in the Columbia River and the appropriate environmental baseline to judge the impacts of the CRC. NMFS also failed to provide a legally adequate analysis of the reasonably foreseeable cumulative effects from actions on and along the Columbia River in its BiOp. Moreover, the

FHWA and FTA failed to comply with their independent obligations under the ESA. Finally, all the defendants have failed, in violation of the Administrative Procedure Act (“APA”) and ESA, to reinstate ESA consultation even though NMFS designated new critical for an endangered species in the project area after the BiOp was completed.

7. Therefore, Plaintiffs seek an order: (1) declaring that FHWA and FTA’s ROD, NEPA process, and NEPA documents deprive the public of the opportunity for meaningful comment and participation, violate NEPA and its implementing regulations, violate applicable FHWA regulations, and are agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or are illegal agency inaction, under the Administrative Procedure Act, 5 U.S.C. § 706(1) and (2)(A); (2) vacating the illegal ROD and FEIS ; (3) requiring that the responsible federal agencies withdraw the ROD and CRC FEIS and issue a Supplemental Environmental Impact Statement (“SEIS”) that considers transportation options other than expanding highway capacity, and that fully and objectively evaluates all impacts to the environment, including impacts on threatened salmon, from the project; (4) enjoining defendants FHWA and FTA and their agents or contractors from proceeding with the CRC project until the Defendants can demonstrate compliance with NEPA and its implementing regulations; (5) declaring that NMFS’s BiOp and its failure to reinstate consultation violates the ESA and is agency action, or agency inaction, that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(1) and (2)(A); (6) vacating the BiOp; (7) requiring the responsible federal agencies to withdraw the ROD and CRC BiOp and reinstate consultation in order to prepare a biological opinion for the project and related actions that complies with the APA and ESA; (8) a declaring that FHWA and FTA’s decision approving the CRC project, adopting the BiOp and their failure to reinstate consultation violates the ESA;

(9) requiring that FHWA and FTA reinitiate consultation with NMFS to produce a biological opinion that is legally adequate under the ESA; and (10) enjoining Defendants and their agents or contractors from proceeding with the CRC project until the defendants can demonstrate compliance with the APA and ESA.

8. Plaintiffs also seek an award of costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and the ESA, 16 U.S.C. § 1540(g)(B)(4).

PARTIES

9. Plaintiff COALITION FOR A LIVABLE FUTURE is a nonprofit organization dedicated to promoting healthy and sustainable communities, both human and natural, in the Portland-Vancouver region. The organization maintains its headquarters in Portland. CLF conducts research, policy advocacy, and public education to create and preserve transportation options and affordable housing; to protect open space, clean air and water; and ensure that all people have access to the resources necessary for meeting their basic needs and advancing their health and well-being.

10. CLF and its members actively participate in governmental decision-making processes at city, county, regional and state levels to support transparent, inclusive decision-making processes that engage the community as full partners to shape the future of their communities, to better manage growth and as a result to improve the economic, social, and environmental health of the metropolitan region as a whole.

11. CLF's members, officers and staff regularly make use of the I-5 transportation corridor and the regional transportation infrastructure more broadly.

12. CLF's officers, staff and members, including Native American members, reside near and/or regularly visit the I-5 corridor. For example, CLF has members who can see the current I-5 bridge from their residence. These officers, staff and members derive recreational and

aesthetic benefit from their activities within the I-5 Corridor, including the area in and around the project area, and intend to continue to use and enjoy these areas on an ongoing basis in the future. For example, CLF has members who fish on the Columbia and Willamette Rivers and who have been involved in I-5 corridor transportation planning processes in the past.

13. The aesthetic, health, and recreational interests of CLF's members, officers and staff have been and, without the relief sought herein, will continue to be adversely affected and irreparably injured. For example, CLF has members that live near the I-5 corridor and suffer from respiratory problems that they reasonably believe may be worsened as a result of the CRC project; members who are reasonably concerned that the view from their residence of the current I-5 bridge will be negatively impacted by the CRC project; and members that reasonably believe their ability to fish in the Columbia and Willamette Rivers or recreate near the I-5 corridor will be reduced or negatively impacted by the CRC project. CLF also has members who participated in the CRC NEPA process and who do not believe the process has been adequately conducted. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA and the ESA. The injuries can be redressed by the relief sought.

14. CLF has participated extensively in administrative actions to protect its interests in regional transportation planning and in the I-5 corridor, including in the CRC NEPA process, in CRC decision-making at the local, regional and state level, in regional land use decision-making and through membership on the CRC Task Force.

15. Plaintiff NORTHWEST ENVIRONMENTAL DEFENSE CENTER is a nonprofit environmental advocacy organization dedicated to the protection of the environment and the natural resources of the Pacific Northwest. The organization maintains its headquarters in Portland, Oregon. NEDC and its members actively participate in governmental decision-making

processes and in litigation to address issues related to air and water quality, land use, and wildlife.

16. NEDC's members, officers and staff hike, camp, bird watch, view wildlife, photograph scenery and wildlife, and engage in other vocational, educational, scientific observation, and recreational activities along the Columbia River basin, including the area in and around the CRC project area and adjacent lands.

17. NEDC's members, officers, and staff reside near and/or regularly visit the CRC project area or otherwise use portions of the Columbia River and Columbia Slough inhabited by salmon and therefore are impacted by the CRC project. For example, NEDC has members who boat near and under the current I-5 bridges. NEDC's members, officers, and staff derive recreational, inspirational, religious, scientific, and aesthetic benefit from their activities along the Columbia River basin, including the area in and around the project area, and intend to continue to use and enjoy these areas on an ongoing basis in the future.

18. The aesthetic, health, and recreational interests of NEDC's members, officers and staff have been and, without the relief sought herein, will continue to be adversely affected and irreparably injured. For example, NEDC has members who boat near and under the current I-5 bridge and reasonably believe their boating activities and interactions with salmon will be negatively impacted by the CRC project. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA and the ESA. The injuries can be redressed by the relief sought.

19. NEDC participated extensively in administrative actions to protect its interests in regional transportation planning and in the I-5 corridor.

20. Plaintiff NORTHEAST COALITION OF NEIGHBORHOODS is a nonprofit organization comprised of twelve neighborhood associations all dedicated to livability issues. In total Portland has seven neighborhood coalitions, ninety-five neighborhood associations, and forty business associations that interact and collaborate to address livability. NECN and its members seek to improve economic and community development, transportation, sustainability, land use, and public safety.

21. NECN's officers, staff, and members regularly make use of the I-5 transportation corridor and the regional transportation infrastructure.

22. NECN's officers, staff and members reside near and/or regularly visit the I-5 corridor. These officers, staff, and members derive recreational and aesthetic benefit from their activities within the I-5 Corridor, including the area in and around the project area, and intend to continue to use and enjoy these areas on an ongoing basis in the future. For example, NECN has members who bike in their neighborhoods near the I-5 freeway.

23. The aesthetic, health, and recreational interests of NECN's members, officers and staff have been and, without the relief sought herein, will continue to be adversely affected and irreparably injured. For example, NECN has members that live near the I-5 corridor and are reasonably concerned that the CRC project will impact their health, and members that believe that the CRC project will reduce or otherwise negatively affect their ability to bike in their neighborhood because of increased traffic and air pollution. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NEPA and the ESA. The injuries can be redressed by the relief sought.

24. NECN has participated in administrative actions to protect its interests in regional transportation planning and in the I-5 corridor.

25. Defendant FEDERAL HIGHWAY ADMINISTRATION is one of two federal agencies that has executed the DEIS, FEIS, and ROD for the CRC project. The ROD also approved and adopted the BiOp.

26. Defendants DANIEL M. MATHIS, Washington Division Administrator, Federal Highway Administration, and PHILLIP DITZLER, Oregon Division Administrator, Federal Highway Administration, signed the ROD. The ROD was the Federal Highway Administration's final agency action regarding the CRC project. Defendants Mathis and Ditzler are sued only in their official capacities.

27. Defendant FEDERAL TRANSIT ADMINISTRATION is the second of two federal agencies that has executed the DEIS, FEIS, and ROD for the CRC project.

28. Defendant RICHARD F. KROCHALIS, Regional Administrator, Federal Transit Administration Region 10, signed the ROD. The ROD was the Federal Transit Administration's final agency action regarding the project. Defendant Krochalis is sued only in his official capacity. The defendant agencies and the officers responsible for the ROD. Defendants FHWA, FTA, Mathis, Ditzler, and Krochalis are hereafter referred to collectively as "FHWA and FTA."

29. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS") is the federal agency that has executed the BiOp for the CRC project, pursuant to the ESA.

30. Defendant WILLIAM W. STELLE is the Regional Administrator for the National Marine Fisheries Service. His office issued the Biological Opinion. That issuance was the National Marine Fisheries Service's final agency action regarding the project. Defendant Stelle is sued only in his official capacity as Regional Administrator. Defendants NMFS and Stelle are collectively referred to as "NMFS."

JURISDICTION AND VENUE

31. This action arises under, and alleges violations of, federal law, including the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370h, the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701–706.

32. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 and 704 (APA jurisdiction to review agency actions); and 16 U.S.C. § 1540(g) (ESA citizen suit jurisdiction). The requested relief is proper under 28 U.S.C. §§ 2201 (declaratory relief); 2202 (injunctive relief); and 2412 (costs and fees), and 16 U.S.C. § 1540(g)(4) (costs and fees).

33. FHWA and FTA took a final action reviewable under the APA when the agents named in the caption above signed the Record of Decision (“ROD”), authorizing the CRC project under NEPA and other applicable federal laws. FHWA and FTA also unlawfully withheld agency action by failing to prepare a supplemental EIS, which is also reviewable under the APA. Moreover, Plaintiffs submitted comments and information to FHWA and FTA during the public comment periods for both the Draft and Final Environmental Impact Statements and have repeatedly demanded that they prepare a supplemental EIS. Therefore, Plaintiffs have exhausted all administrative remedies and judicial review of the final actions and inaction of the FHWA and FTA is proper.

34. In issuing their December 7, 2011, ROD, FHWA and FTA failed to comply with the substantive and procedural requirements of section 7 of the ESA, 16 U.S.C. § 1536. On April 25, 2012, Plaintiffs sent the FHWA, FTA, NMFS and the Secretaries of Commerce and Transportation a letter explaining their intent to sue FHWA and FTA for violations of the ESA. Plaintiffs also sent copies of the letter to the National Oceanic & Atmospheric Administration,

the U.S. Department of Transportation, the U.S. Attorney General, the U.S. Army Corps of Engineers, and NMFS. Each of these recipients were served by hand with the letter on April 26, 2012 or the U.S. Postal Service confirmed that receipt occurred on or before April 27, 2012. More than sixty days have passed since the required parties were provided notice of Plaintiffs' intent to sue, as required by section 11(g)(2)(A) and (C) of the Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A) and (C). Thus Plaintiffs have satisfied all required prerequisites to file their ESA claims.

35. NMFS took final agency action reviewable under the APA when its agent named in the caption above signed and issued the BiOp. NMFS's failure to reinstate consultation under the ESA was agency action or agency action unlawfully withheld which is also reviewable under the APA.

36. Venue is properly vested in this Court under 28 U.S.C. §1391(e) because defendants are officers or employees of the United States, and a substantial part of the events or omissions giving rise to the claim occurred in Oregon, and members of the plaintiff organizations reside in this district and these members and organizations do business here. In addition, Defendants maintain offices in the district. Venue is also proper in this Court under 16 U.S.C. § 1540(c).

37. This case is properly filed in Portland, Oregon and properly before the Portland Division of this District pursuant to Civil Local Rules 3.2 and 3.3 because a substantial part of the events or omissions giving rise to the claim occurred in Portland. The CRC project will span the Columbia River between Portland, Oregon and Vancouver, Washington with impacts throughout Portland and the metropolitan region.

STATUTORY FRAMEWORK

Administrative Procedure Act (5 U.S.C. §§ 701–706)

38. The Administrative Procedure Act, 5 U.S.C. §§ 701–706, authorizes courts to review final agency actions and hold unlawful and set aside final agency actions, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The APA also authorizes a reviewing court to compel agency action that is unlawfully withheld. 5 U.S.C. § 706(1). The APA provides a cause of action to challenge any final agency action taken pursuant to any statute where the action is made reviewable by that statute, or where there is no other adequate remedy in a court. 5 U.S.C. § 704.

National Environmental Policy Act (42 U.S.C. § 4321–4370h)

39. The National Environmental Policy Act, 42 U.S.C. § 4321–4370h (NEPA), “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA’s primary purposes are to ensure fully informed decision-making and to provide for public participation in environmental analyses and decision-making. *Id.* §§ 1500.1(b), (c). The Council on Environmental Quality (“CEQ”) promulgated regulations implementing NEPA that are binding on all federal agencies. 40 C.F.R. § 1500–1518.4. Agency actions taken pursuant to NEPA are reviewable by this Court under the APA, 5 U.S.C. §§ 702, 704.

40. Under NEPA, an Environmental Impact Statement (EIS) must be prepared for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA requires that the decision-maker, as well as the public, be fully informed so that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

41. One of NEPA's fundamental goals is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. The scope of NEPA review is quite broad, including the consideration of all reasonable alternatives, 40 C.F.R. § 1502.14(a), and direct, indirect and cumulative effects on "ecological . . . aesthetic, historic, cultural, economic, social, or health" interests. 40 C.F.R. § 1508.8. NEPA requires adequate disclosure of all such impacts. The NEPA documentation must provide the decision-maker and the public with adequate information, evidence, and analyses to fully assess the potential impacts of the proposed actions. *Id.* § 1502.1.

42. The requirement to evaluate all reasonable alternatives is not simply procedural; the CEQ has stated that the alternatives analysis is "the heart" of the NEPA analysis. 40 C.F.R. § 1502.14; *see also* 42 U.S.C. § 4332(2)(E);, 40 C.F.R. § 1507.2(d). The federal agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"; "[d]evote substantial treatment to each alternative considered in detail including the proposed action"; and "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(a)–(c).

43. To satisfy NEPA's "hard look" requirement, a federal agency must present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decision maker and the public. 40 C.F.R. § 1502.14. Because the purpose and need statement required by 40 C.F.R. § 1502.13 defines the scope of reasonable alternatives, an agency may not narrowly construe the purpose and need so as to define away competing reasonable alternatives and foreclose consideration of a reasonable range of alternatives.

44. An adequate analysis of the environmental impacts of a project also must include a consideration of the direct, indirect, and cumulative impacts of the project resulting from all past, present and reasonably foreseeable future actions. 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c). Direct effects are “caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts are the impacts on the environment that result from incremental impacts of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. 40 C.F.R. §§ 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions.” 40 C.F.R. § 1508.7.

45. NEPA obligates the agency to make available to the public high-quality information, including accurate scientific analyses, expert agency comments and public comments, before decisions are made and actions are taken. 40 C.F.R. § 1500.1(b). NEPA also specifically requires a federal agency to discuss “[w]hether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10). A federal agency must disclose the federal permits that are required to complete the project, 40 C.F.R. § 1502.25(b), and how the alternatives will achieve the requirements of other environmental laws and policies. 40 C.F.R. § 1502.2(d).

46. When a federal agency determines that a proposed action will require an EIS because the action will have a significant effect on the environment, *see* 42 U.S.C. 4332(2)(C), the federal agency will begin by publicly defining the scope of the analysis they are to undertake in the EIS. 40 C.F.R. § 1501.7. After defining the scope, the federal agency prepares a Draft EIS for public comment which must “fulfill and satisfy to the fullest extent possible the requirements

established for [a Final EIS]” 40 C.F.R. § 1502.9(a). After receiving public comments on the Draft EIS, the federal agency will prepare a Final EIS, which responds to the public comments on the Draft EIS and discusses opposing views not discussed in the Draft EIS. 40 C.F.R. § 1502.9(b). The ability of the public to meaningfully comment on an agency’s NEPA analysis is an essential part of NEPA’s public participation mandate. *See* 40 C.F.R. §§ 1500.1(b), 1503.1, 1506.6.

47. As allowed by 40 C.F.R. § 1507.3(a), FHWA has enacted regulations to implement the requirements of CEQ’s NEPA regulations. 23 C.F.R. §§ 771.101–771.139. Those FHWA NEPA regulations only supplement and implement, and do not supersede, the CEQ regulations.

48. CEQ and FHWA regulations set out a standard for requiring an SEIS in light of changes and new information after a draft or final EIS is issued. 40 C.F.R. § 1502.9(c); 23 C.F.R. § 771.130. Those regulations require an SEIS when there are substantial changes to a project or new information that demonstrate significant impacts that were not considered in the Draft EIS or Final EIS.

Endangered Species Act (16 U.S.C. §§ 1531–1544)

49. The Endangered Species Act, 16 U.S.C. §§ 1531–1544, provides for judicial review of citizen suits alleging violations of section 7 of the ESA, 16 U.S.C. § 1536. 16 U.S.C. § 1540(g). In addition, federal agency action taken pursuant to the ESA, but not covered by the citizen suit provision, is reviewable by this court pursuant to the APA, 5 U.S.C. §§ 702, 704.

50. Section 7 of the ESA requires all federal agencies to ensure that their actions do not jeopardize the survival and recovery of a listed species, or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2).

51. To prevent agency actions that might violate section 7's prohibition, the ESA also establishes an interagency consultation process under which all federal agencies must consult with NMFS before undertaking any federal action that may affect any listed marine or anadromous species, including salmon. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.01(b). This is called a section 7 consultation. Under this process, an agency proposing an action (the "action agency") must prepare and provide to the appropriate expert agency, here NMFS, a biological assessment ("BA") of the effects of the proposed action. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.14(c). The action agency's BA must be complete and accurate in order to comply with the ESA and its implementing regulations.

52. For those actions that may adversely affect a species, NMFS must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a biological opinion from NMFS, also known as a BiOp. *Id.*; 16 U.S.C. § 1536(b)(3)(A).

53. In formulating its BiOp, and determining whether an action will jeopardize a species or destroy or adversely modify its critical habitat, NMFS must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). Courts interpret the "best science" mandate to require that federal agencies consider all available information relevant to complying with section 7 of the ESA.

54. NMFS also must evaluate the "effects of the action" together with the "cumulative effects" on the listed species. This multi-step analysis requires NMFS to consider:

- the direct, indirect, interrelated and interdependent effects of the proposed action;

- the “environmental baseline” to which the proposed action will be added; and
- any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.”

50 C.F.R. § 402.02.

55. In short, the provisions of section 7 and its implementing regulations require NMFS to determine the current status of a species and its critical habitat – as affected by all previously authorized federal actions, all past and present non-federal activities, and future nonfederal actions “reasonably certain” to occur – in assessing whether a proposed federal action is likely to jeopardize listed species or destroy or adversely modify their critical habitat. 50 C.F.R. §§ 402.02, 402.14(g).

56. In evaluating the effects of the action, the direct and indirect effects of the action are added to the “environmental baseline.” 50 C.F.R. § 402.02. The “environmental baseline” includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area.” *Id.* Essentially, the environmental baseline is a “snapshot” of a species' health at a specified point in time.

57. If, based on an analysis of the requisite factors and in light of the current status of the species, NMFS concludes that the proposed action is likely to jeopardize a listed species or destroy or adversely modify its critical habitat, it must identify and describe any reasonably prudent alternative (“RPA”) to the proposed action that it believes would avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A). The effects of an RPA must be analyzed under the same section 7 framework (described above) as an action proposed by an action agency. If NMFS believes that there is no RPA to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

58. Consultation has the effect of halting the underlying action during the process. After an agency initiates consultation with NMFS, neither the agency, nor the applicant to the agency may make an “irreversible or irretrievable commitment of resources.” 16 U.S.C. § 1536(d). This halt prevents the agency or applicant from foreclosing the formulation or the implementation of an RPA. *Id.*

59. If NMFS reaches a no-jeopardy/no-adverse modification finding for either a proposed action or an RPA, it may also issue an incidental take statement (“ITS”) for any take of a listed species that is likely to occur as a consequence of the action. 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 402.14(i). Take of listed species that is consistent with an ITS is not subject to the prohibition against take in section 9 of the ESA. 16 U.S.C. § 1536(b)(4).

60. An ITS must state the impact that the take will have on the species, identify the “reasonable and prudent measures” (“RPMs”) considered necessary to minimize the expected impact, and establish “terms and conditions” necessary for implementation of the RPMs. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Importantly, an ITS must express the amount or extent of take in some form, either as a numeric value or as a surrogate ecological condition that has some connection to the taking of the species. This is because an ITS sets forth a trigger that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to reinitiate consultation.

61. In addition, even after the consultation process is complete and an action agency receives a BiOp, the action agency has a continuing and independent legal duty to avoid any action that would cause jeopardy to a listed species. 16 U.S.C. § 1536(a)(2). An action agency’s reliance on an inadequate, incomplete, or flawed BiOp to satisfy its duty to avoid jeopardy is arbitrary and capricious.

62. The action agency's substantive duty to avoid jeopardy to listed species and/or adverse modification of their critical habitat remains in effect at all times, regardless of the status of the consultation.

63. The designation of critical habitat for a listed species triggers a non-discretionary duty to re-initiate consultation. This requirement exists so that the expert agencies may properly consider the impacts of a project on the newly designated critical habitat. NMFS' regulations implementing the ESA state that re-initiation of consultation is required whenever "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(d).

64. Separately, section 7(a)(1) of the ESA requires federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the *conservation* of endangered species and threatened species listed" under the Act. 16 U.S.C. § 1536(a)(1) (emphasis added). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NMFS. *Id.* A program of "conservation" is one that brings the species to the point of recovery and delisting. 16 U.S.C. § 1532(3).

FACTS GIVING RISE TO PLAINTIFFS' CAUSES OF ACTION

65. Problems arise with transportation infrastructure over time for several reasons, including: changes in travel patterns or travel demand and related congestion; structural deterioration or obsolescence; outdated amenities for pedestrians and cyclists; and seismic vulnerability. Moreover, the solutions available to address transportation issues and how those solutions are implemented also are constantly evolving. For example transportation experts now understand that adding additional capacity to highways usually results in more long term congestion and sprawl. Similarly tolling highways and bridges is now viewed as a way to possibly control congestion rather than just a method for financing new construction. When the

federal government takes actions to address these transportation problems through investments in transportation infrastructure or the application of new methods to control congestion, compliance with NEPA and the ESA is required. NEPA and the ESA require that federal agencies choose their course of action based on careful analysis and full disclosure of the basis for agencies' decisions and that those decisions avoid jeopardy to protected species and adverse impacts to their critical habitat. These laws provide the public with opportunities to participate in agency decision-making, and ensure that any adversely affected persons can seek review of agency decisions by the courts.

Administrative Process Procedural History

66. The FHWA and FTA published a notice of intent to prepare an EIS for the CRC project in the Federal Register on September 27, 2005. 70 Fed. Reg. 56,523 (Sept. 27, 2005).

67. Almost three years later, on May 2, 2008, those federal agencies published a Draft Environmental Impact Statement ("DEIS") for the CRC project. Although the document was hundreds of pages long and included numerous "technical reports," that DEIS in fact lacked substantial detail regarding, among other things, impacts to air and water resources and impacts to endangered species. For example, contrary to CEQ regulations, the Ecosystems Technical Report included almost no footnotes or specific references to scientific studies or technical publications to support its supposed "technical analysis." Moreover, contrary to guidance in NEPA and the ESA, the DEIS was prepared and issued for publication and public comment long before the FHWA and FTA initiated ESA consultations.

68. The DEIS examined and compared five alternatives, including the required "no action" alternative. Two "supplemental bridge" alternatives would have retained the existing bridges, and, on a third new bridge, added two additional traffic lanes and a light rail line or high speed bus service. Two "replacement bridge" alternatives would entirely replace the existing

bridges with new bridges providing twice as many traffic lanes and adding additional lanes for either light rail or high speed bus service. Thus the DEIS's "range of alternatives" included only action alternatives that added additional vehicle lanes, only action alternatives that continued to use the I-5 bridges as both interstate highway bridges and local access bridges for Hayden Island, and only action alternatives that used essentially the same bridge design for any new bridges.

69. Although FHWA and FTA had taken several years to draft the DEIS, they allowed the public only 60 days to comment on the lengthy document. Plaintiffs CLF and NEDC requested in writing that the FHWA and FTA exercise their discretion and extend the comment period, but they refused to do so. That refusal prejudiced Plaintiffs' ability to fully comment on the DEIS.

70. During the short public comment period, the FHWA and FTA, or their agents, insisted that local and regional governments and transportation agencies choose a Locally Preferred Alternative ("LPA") from among the narrow range of alternatives presented in the DEIS. Thus the LPA was identified by these governmental entities before any of them had seen or reviewed the public's comments on the DEIS. When choosing the LPA several of those governmental entities and several CRC advisory panelists complained about missing or insufficient analysis in the DEIS.

71. On or about July 1, 2008, CLF, NEDC and many other groups submitted timely and lengthy comments on the DEIS, including supporting exhibits and documents. Those comments, among other things, asked for the FHWA and FTA to consider a far greater range of alternatives and complained about the lack of detail in the DEIS regarding many likely impacts. They also objected to the process that identified the LPA before they and the rest of the public had submitted comments on the DEIS.

72. Despite the FHWA and FTA's rush to identify the LPA and complete the public comment process, they did not publish their FEIS until September 23, 2011, more than three years later. That FEIS included the same basic "range of alternatives," although much more detail regarding the LPA—replacement bridges with light rail—was provided and all of the action alternatives were now based on a new bridge design that had not been disclosed in the DEIS. The FEIS also included, for the first time, the analysis and results from the ESA consultation regarding salmonids and other species. The FEIS included significant changes to the LPA's bicycle and pedestrian facilities, including moving those facilities to the bridges' lower level, below the multiple, new traffic lanes. Finally the FEIS included the required, but inadequate, written responses to the public's DEIS comments.

73. Despite the many significant changes and added detail, the FHWA and FTA allowed the public only 30 days to review their responses to the public's DEIS comments and to comment on the FEIS. Plaintiffs once again requested more time to comment, and FHWA and FTA once again rejected that request. Defendants' refusal to extend the FEIS comment period prejudiced Plaintiffs' ability to comment on the FEIS.

74. On or about October 24, 2011, Plaintiffs and other groups submitted lengthy comments on the FEIS, including many documents and exhibits supporting those comments. Plaintiffs' comments once again noted, for example, the inadequate range of alternatives and asked for a supplemental DEIS because of the many changes and additions to the analysis in the DEIS. In violation of CEQ regulations, defendants had issued a cursory DEIS for public comment in 2008 and then spent the next three years doing at least some of the detailed analysis that is required for an EIS. But despite the added detail and analysis regarding some issues, much important information was still missing from the FEIS. For example, the FEIS still fails to

disclose how Defendants intend to treat the substantial additional stormwater run-off that will be generated by the new, much larger bridges and highway interchanges. In terms of impacts to salmon, the FEIS and attached BiOp still fail to consider and account for the cumulative impacts of all of the existing “take” that NMFS has authorized and simply conclude, incorrectly and arbitrarily, that the substantial, additional impacts on salmon caused by the CRC project will not be significant.

75. FHWA and FTA are the lead federal action agencies responsible for ensuring that the proposed CRC project complies with the ESA. Accordingly, on June 25, 2010, FHWA and FTA initiated formal ESA consultation with NMFS regarding the effects of the CRC on ESA-listed salmonids by submitting a Biological Assessment (“BA”) to NMFS. On January 19, 2011, NMFS issued a Biological Opinion (“BiOp”) for the CRC project, making a determination of no jeopardy to listed salmonid species and no adverse modification of their critical habitat.

76. The BiOp, for the first time, disclosed that the standard in-water work window designed to protect salmon will likely be suspended for much of the time the new proposed bridge is under construction. The DEIS did not disclose or discuss the impacts on salmon of that suspension. As noted above, the BiOp was attached to the FEIS when FHWA and FTA published it several months later.

77. On October 20, 2011, before the ROD was issued, NMFS designated new critical habitat for the southern Distinct Population Segment of the Pacific eulachon. 76 Fed. Reg. 65,324 (Oct. 20, 2011). These small, anadromous fish, commonly called smelt, rely on a combination of freshwater creeks and rivers and their associated estuaries including segments of the Columbia River. The designation recognizes that dredging has had a major impact on the species. *See* Nat’l Marine Fisheries Serv., Status Review of Eulachon (*Thaleichthys Pacificus*) in

Washington, Oregon, and California 137–39 (2010), available at

http://www.nwfsc.noaa.gov/assets/25/7092_06162010_142619_EulachonTM105WebFinal.pdf.

78. FHWA and FTA have not reinitiated consultation with NMFS since the BiOp was issued in January 19, 2011. FHWA and FTA proceeded to issue the ROD on December 7, 2011, despite the fact that the ESA and the October 2011 Federal Register Notice regarding eulachon clearly required them to reinitiate ESA consultation before making any irretrievable commitment of resources. That ROD approves the FEIS and BiOp and selects the LPA in the FEIS as the actual CRC project that FHWA and FTA intend to implement.

79. On or about March 13, 2012, plaintiffs NEDC and CLF wrote to the FHWA because the ROD violates FHWA policy and applicable federal law and regulations. *See* 2011 FHWA Supplement, 23 U.S.C. § 134(j)(3)(D), 23 U.S.C. § 135(g)(4)(E), 23 C.F.R. § 450.324(h)-(i). Specifically the ROD does not and could not find that funding for the CRC project is “reasonably available” as defined by those rules. Moreover, several post-ROD developments had made such funding even less “reasonably available.” The FHWA however refused to withdraw its ROD or correct this error.

80. On or about June 25, 2012, plaintiffs requested again, in writing, that the FHWA and FTA issue a supplemental EIS because of the many new issues identified in plaintiffs’ FEIS comments, because of the financial issues identified in plaintiffs’ March 2012 letter, and because of substantial new information regarding the height of the proposed new bridges and the impacts of that height. As of July 2, 2012, FHWA and FTA had not responded to that letter.

81. On January 5, 2012 the FHWA published a notice in the Federal Register notifying the public that it had taken final environmental actions in the ROD and that pursuant to

23 U.S.C. § 139(l) any claim for judicial review of those final actions had be filed on or before July 3, 2012. 77 Fed. Reg. 531 (Jan. 5, 2012). Plaintiffs filed this action on July 2, 2012.

Defendants' NEPA Documents

82. In the ROD, Defendants FHWA and FTA decided to construct much larger replacement bridges over the Columbia River, along with expansions to seven interchanges and to the local street network. The ROD identifies this proposed project as the “Locally Preferred Alternative” (“LPA”). The FEIS describes the LPA and purports to disclose and analyze the impacts of the LPA as proposed. The proposed LPA will use a two-bridge design of a composite deck truss type. One bridge will feature northbound traffic lanes over a pedestrian and bicycle path, and the second bridge will have southbound traffic lanes over light rail transit lines. There are at least ten traffic lanes on the bridge portion of the LPA. The LPA will be coupled with alterations to interchanges and street networks in Portland and Vancouver, and on Hayden Island. These alterations include additional light rail lines and transit stations extending light rail transit into Vancouver, bicycle and pedestrian paths connecting to the LPA, and modifications to seven highway interchanges.

83. The DEIS, FEIS and ROD identify the project purpose as addressing travel demand and mobility needs in the Bridge Influence Area (“BIA”). The BIA is a span of 5 miles along the I-5 corridor from Columbia Boulevard in the south to SR 500 in the north. The LPA will implement design changes to the current highway and connecting road networks and add light rail infrastructure in the BIA. According to these NEPA documents, the LPA will impact the Gresham area surrounding TriMet’s Ruby Junction Maintenance Facility, areas of North Portland—bisecting Hayden Island, and will extend north through Vancouver directly impacting at least 15 neighborhoods. In fact a key omission from the DEIS and FEIS is that the CRC

Project's impacts will extend far beyond the BIA and both of those NEPA documents fail to analyze many of those extended impacts.

84. The final NEPA documents prepared and acted upon by FHWA and FTA are legally flawed in many respects, including, but not limited to: FHWA and FTA's reliance on incorrect and outdated traffic data; failure to consider a reasonable range of alternatives; false assumptions and poor modeling regarding induced growth and failure to analyze the indirect impacts of such induced growth; failure to properly analyze direct impacts on visual resources, air quality, climate change, public health, water quality, and species; failure to properly analyze cumulative impacts; and failure to properly respond to public comment. Defendants' ROD and FEIS also fail to address their decision's compliance with applicable FHWA regulations, *see e.g.*, 23 C.F.R. § 771.129(a), and other agencies' permitting requirements. Plaintiffs allegations in this complaint offer examples and not an exhaustive list of every error and omission in defendants' NEPA and ESA analysis and decision documents

85. Plaintiffs have submitted numerous Freedom of Information Act ("FOIA") requests to defendants and other agencies regarding their NEPA and ESA process and analysis. In 2011 FHWA refused to produce hundreds of documents in response to plaintiff's FOIA request. Plaintiffs appealed that request, and although the FHWA has promised to produce additional documents in response to that appeal, as of July 2, 2012, it has produced no such documents. Defendants and other federal agencies also have delayed their responses to more recent FOIA requests. These delays have prejudiced plaintiffs' ability to identify additional mistakes and omissions in Defendants' NEPA and ESA documents. Plaintiffs reserve the right to raise any error or omission supported by the administrative record that defendants will eventually produce for this Court's review.

86. The traffic estimates used by the FEIS, which form the basis of the CRC project's projected need, are the same as those used by the DEIS in 2008 and based on data collected in 2005. According to the FEIS, reported traffic was 134,000 per day in 2005, whereas data from the Oregon Department of Transportation ("ODOT") puts traffic at 132,600 per day. Data estimating the amount of traffic crossings along the I-5 estimated traversals at approximately 143,400 per day in 2010. Data from ODOT shows actual traversals in 2010 at 126,400 per day. The predictions used in the FEIS evolved from a 1994 transportation survey and do not account for the steep rise in gas prices, specifically, and the decrease in reliance on cars, generally. These assumptions lead the CRC to predict that the consistent rate of increase in vehicle demand would double over the rate from the previous decade. CRC attributes the decline in vehicle traffic to the recession beginning in 2007, but the level of traffic on the I-5 bridges showed a smaller increase in 1999–2004 from levels in 1994–1999, and showed an actual decline in traffic in 2004–2009. The FEIS does not explain why these traffic predictions remain valid given this data, and how growth in the future will make up for this decline. Two consultants hired by Oregon found the DEIS traffic projections, which were unchanged in the FEIS, to be significantly overstated. Moreover, the models used to estimate traffic for input in the DEIS and FEIS are not designed to analyze tolled facilities.

87. Incorrect traffic projections influence almost all other analyses of environmental impacts in the FEIS—e.g. over-estimating adverse impacts from the no action alternative and also the benefits from proposed action alternatives. FHWA and FTA spent millions of dollars to add or update other deficient analyses in the DEIS, but failed to address incorrect and outdated traffic projections.

88. Each action alternative considered in the DEIS and FEIS includes adding highway capacity without adequate explanation as to why only these alternatives would satisfy the project's purpose and needs. The analysis of why only these alternatives satisfied the narrow purpose and needs statement of the project consisted of a series of six questions and a chart listing whether each proposed component "passed" or "failed" to satisfy the question. Those components which passed the six question gauntlet were then mixed together in either supplemental or replacement bridge form to provide the 12 alternatives initially considered before the DEIS. Many commenters suggested alternative bridge designs with fewer piers in the water and narrower footprints. Others suggested alternatives that addressed the purpose and need without adding additional traffic capacity and/or without demolishing the existing structurally sound bridges. All were rejected with similarly minimal explanations as to why these alternatives would not satisfy all of the project's purpose and needs.

89. Plaintiffs' DEIS and FEIS comments noted both specific reasonable alternatives and, more generally, types of reasonable alternatives that the FHWA and FTA had failed to examine and compare in the DEIS and FEIS. For example, several commenters suggested a phased alternative that used a combination of methods, including tolling the existing bridges, construction of a separate arterial bridge for local Hayden Island traffic, and navigation channel improvements. A well-known bridge architect suggested a replacement bridge with a much different design, a much smaller footprint, and likely lower impacts overall. Generally, Plaintiffs' comments requested, for example, an alternative that actually reduced greenhouse gas emissions. All of Defendants' alternatives only purported to reduce the increase in such emissions in comparison to the no action alternative.

90. The width of the proposed replacement bridges and the number of available, additional traffic lanes on those proposed bridges was the topic of considerable public discussion and comment. The DEIS explicitly included width information for all alternatives, but the FEIS omitted this information for the LPA. Plaintiffs allege on information and belief that this omission masks the true additions to highway capacity that will actually occur as a result of the approved CRC project and therefore the scope of impacts the project may have. This omission from the FEIS also deprived the public of highly relevant information regarding the LPA's actual impacts.

91. The DEIS insisted, contrary to much published research, that the enlarged bridges and interchanges it was considering would not cause induced growth. As a result, the DEIS improperly did not consider the indirect impacts of any such induced growth. The FEIS supplemented the DEIS's induced growth analysis by adding the 2010 Metroscope econometric model. Contrary to most of the available research and technical literature, this model also incorrectly and arbitrarily concluded that additional highway capacity would not induce growth in Clark County, and thus the FEIS also did not address the environmental impacts of the induced growth that usually occurs when highway capacity is expanded.

92. Neither the DEIS nor the FEIS analyze a scenario where the project shifts traffic congestion south into downtown Portland, north beyond Vancouver, east to I-205 and onto arterial streets. The project only widens I-5 for a short distance and connects to existing highway infrastructure outside of the BIA with far fewer traffic lanes. Many commenters reasonably questioned whether such "improvements" would simply move congestion to the areas north, south, and around the CRC project area.

93. The FEIS's disclosure and analysis of direct impacts on the human environment from construction and operation of the CRC project are legally flawed with regard to at least six types of impacts: visual resources; air quality; climate change; public health; water quality; and biodiversity.

94. First, the FEIS understates the project's visual impacts. For example, the visual impact technical report contains only a handful of computer-simulated images of the bridge, all of which are taken from distant points floating in the air instead of on the ground, from where people will most often view the bridge.

95. Second, the FEIS largely ignores short-term and temporary impacts on air quality while predicting a long-term net benefit for air quality from implementation of the CRC project. The FEIS fails to consider impacts from Mobile Source Air Toxics or other air toxics that will be emitted in the construction and operation of the CRC project.

96. The FEIS claims no air quality impacts will occur as a result of the CRC project. This claim is based on improper reliance on the Metro 2035 Regional Transportation Plan ("RTP"). The RTP indicates that there will be fewer trips that cross the Columbia River, and congestion would be lowered if the LPA is built. The FEIS' reliance on the RTP is misplaced because it ignores the shift in congestion that the CRC project will cause: increasing congestion north and south of the project area, and driving traffic into the neighborhoods surrounding the project area. The CRC project also likely would enable a massive increase in car, light truck, and heavy truck traffic. Moreover, construction of the CRC project likely would increase air emissions. Therefore, FHWA and FTA were required to disclose and analyze the impacts on public health, safety, and the environment from such likely and foreseeable increased air emissions associated with the construction and operation of the CRC project.

97. The FEIS claims no air quality impacts will occur because the FEIS only analyzed air emissions associated with the new bridges in 2030. The FEIS relies on new regulations for fuel formulations and emissions from heavy-duty diesel on-road and off-road vehicles to support this claim. The FEIS does not describe relevant pollutants, the range of expected concentrations over time, or the health and environmental impacts of those concentrations.

98. The FEIS's analysis of air quality impacts is conclusory and inadequately analyzes potential emissions. The FEIS has relied on air quality projections for 2030 while ignoring the earlier impacts that the project will have over more than a decade. These projections for 2030 are optimistic, and the FEIS does not provide an analysis of its modeling technique. The FEIS's analysis of air quality impacts also improperly relies on compliance with national ambient air quality standards ("NAAQS") as a demonstration of "no effects" for NEPA purposes, does not analyze the effect of mobile source air toxics ("MSATs"), and relies on one study to extrapolate the effects on sensitive populations to the entire project area. Moreover, the FEIS does not describe the temporary air pollution increases that will result from the construction project, relying on a single vague mitigation measure and incomparable studies to minimize the air quality effect as a result of construction. Finally, the FEIS claims that the project will not increase greenhouse gas ("GHG") emissions, but relies on inappropriate assumptions about traffic patterns and conditions in the area and a non-efficient speed design to make such a claim. This analysis is both misleading and inadequate to describe the actual impacts the public may experience as a result of the CRC project. The ROD and FEIS often equate a lower increase in GHG emissions (in comparison to the no action alternative) with an actual reduction in GHG emissions.

99. The FEIS statement that no air quality impacts will occur is also based on estimates that the project area would continue to attain current NAAQS for criteria pollutants. Criteria pollutants under the Clean Air Act are pollutants that EPA has determined “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a)(1)(A). To date, EPA has made “endangerment findings” for six pollutants: particulate matter (PM, PM₁₀, and PM_{2.5}), ground-level ozone (O₃), sulfur dioxide (SO₂), nitrogen oxides (NO_x), lead (Pb), and carbon monoxide (CO). Once EPA makes an endangerment finding, EPA must then develop “air quality criteria” for that pollutant. *Id.* § 7408(a)(2). The criteria are intended to accurately reflect the latest scientific knowledge about effects on public health and welfare that can be expected from various levels of that pollutant in the ambient air. *Id.* Once the criteria are established, EPA must set NAAQS to protect human health and welfare. 42 U.S.C. § 7409.

100. Currently, the project area is a maintenance area for ozone precursors and carbon monoxide, and an attainment area for all other criteria pollutants. But the standards for criteria pollutants can and do change. EPA is in the process of promulgating a new standard for ozone at a level between 0.070 ppm and 0.060 ppm, and EPA has also announced a new proposed standard for PM_{2.5} on June 14, 2012, between 12 and 13 µg/m³ on a weighted annual mean basis. The final standard has not yet been determined, and designations under the new ozone and PM_{2.5} standards have not yet been made, but the Portland-Vancouver-Beaverton area may no longer be in attainment for ozone or PM_{2.5} before the CRC has finished its estimated 6-year construction process. The FEIS also states additional monitoring will be needed to evaluate the full extent of roadway NO₂ impacts. Thus, the FEIS fails to demonstrate that the project area is, in fact, attaining the existing NAAQS, or will attain the new NAAQS proposed by EPA.

101. For purposes of NEPA, compliance with NAAQS is not the same as “no adverse impacts,” as criteria pollutants often pose significant health threats even when ambient concentrations are at or below the national standard for three reasons. First, EPA does not comply with its duty to review the criteria and NAAQS every five years. Second, EPA has on at least two occasions rejected the NAAQS levels that its own Science Advisory Council has recommended as requisite to protect public health and welfare. Third, for some criteria pollutants, there is no level under which the population will experience “no impacts.” Simply put, the more pollution present in the ambient air, the more death and disease associated with the exposure, even if the NAAQS are satisfied.

102. For example, when reviewing the NAAQS for PM_{2.5}, EPA found that there is no level of particulate matter pollution at which no human health effects occur. According to EPA, fine particulate matter pollution causes a variety of adverse health effects, including premature death, heart attacks, strokes, birth defects, and asthma attacks. 71 Fed. Reg. 2620, 2627–36 (Jan. 17, 2006). In reviewing the fine particulate matter health-based ambient air quality standard, EPA was unable to discern a threshold level of pollution under which the death and disease associated with fine particulate matter would not occur. Even low levels of PM can cause low birth weights, damage lung function, and increase risks of heart attack and premature death. Studies reviewed by EPA revealed a linear or almost linear relationship between diseases like cancer and the amount of fine particulate matter in the ambient air. *Id.* at 2635–36. Consequently, compliance with NAAQS does not equal protection of human health from adverse impacts of PM_{2.5} pollution because the NAAQS thresholds for particulate matter allow for some particulate matter contamination, and any particulate matter contamination has adverse health effects. *Id.*

103. The Carbon Monoxide (CO) NAAQS similarly does not reduce health impacts of CO concentrations to “no impact.” Since EPA published its criteria document for CO in 2000, significant new information about CO’s impacts on fetuses has been published. For example, in 2000 EPA claimed a non-conclusive “suggestion” that exposure to ambient CO may be associated with low birth weight. Since then, at least three studies have confirmed that suggestion.

104. Low birth weight in children has a number of serious effects over the lifetime of the individual. Low birth weight has been associated with disruptive behavioral problems, reduced IQ and an increased susceptibility to depression. Several epidemiologic studies have shown associations between low birth weight and a number of other problems as adults, including obesity, insulin resistance, type 2 diabetes mellitus, and cardiovascular disease. Obesity and diabetes are major public health problems facing the nation.

105. Other criteria pollutants also cause adverse health and environmental impacts.

106. Nitrogen oxides (“NO_x”) are highly reactive gases emitted primarily from the combustion of fossil fuels in mobile and stationary sources. NO_x can cause respiratory problems such as asthma attacks, respiratory tract symptoms, bronchitis, and decreased lung function. NO_x emissions result in nitrogen deposition, which may cause “significant adverse changes” in terrestrial ecosystems such as soil acidification, increases in soil and plant susceptibility to natural stresses, and alteration of natural plant species balances. Nitrogen deposition can also adversely affect aquatic ecosystems through acidification or eutrophication, both of which cause a reduction of water quality, and can leave the waterbody unfit for many aquatic organisms and/or human consumption. In addition, NO_x emissions contribute to visibility impairment,

global warming, acid rain, formation of ground-level ozone and formation of toxic chemicals.

NO_x is also a precursor chemical to fine particulate matter.

107. The Columbia River Gorge National Scenic Area is particularly impaired by NO_x and SO_x pollution (discussed below). The Columbia River Gorge National Scenic Area ranked 6th in the country for poorest visibility for Scenic Areas. Gorge air quality has been monitored for the last seventeen years. The Forest Service has documented that visibility impairment occurs on at least 95% of the days that have been monitored. Metals, sulfur and nitrogen concentrations in lichen tissue found in the Gorge are comparable to that found in lichen tissue sampled in urban areas. The Gorge now stands among the most polluted places in the country, including Pittsburgh and Los Angeles. Nitrogen deposition rates in the Gorge are comparable to the most polluted areas in the U.S.

108. Compliance with the NO_x NAAQS does not demonstrate that there will be no significant adverse health or environmental impacts. First, the NAAQS of 0.053 ppm as an annual arithmetic mean does not protect the public from acute effects of short-term exposures to dangerous levels of NO_x. Some communities that are in compliance with the NO₂ NAAQS nonetheless may experience short-term NO₂ levels in excess of 0.25 ppm. For example, in 2007 and 2008, Anacortes, Washington recorded one-hour peak NO₂ concentrations above 0.25 ppm (0.265 and 0.374 ppm respectively). Other areas have experienced similar peak concentrations. Despite these high readings, these areas meet the current NO₂ NAAQS.

109. Since the last NAAQS review, extensive scientific evidence has emerged concerning the health and welfare effects of NO_x. This recent evidence indicates that NO₂ is causing adverse effects to human health and welfare at levels allowed by the current NO₂ NAAQS. For example, research completed since the last NO₂ NAAQS update has established

that there is a correlation between elevated levels of NO₂ and incidence of Sudden Infant Death Syndrome (“SIDS”). Other recent studies have expanded the base of knowledge on the links between NO₂ and asthma attacks, respiratory tract symptoms, bronchitis, and decreased lung function.

110. Since the last review of the air quality criteria for NO_x and NAAQS for NO₂, research into the public welfare impacts of NO₂ emissions has solidified the link between NO₂ emissions and the harmful effects of nitrogen deposition. 70 Fed. Reg. 8880, 8892 (Feb. 23, 2005). Recent studies have also raised awareness of the role of nitrogen deposition in the eutrophication of water bodies. The increasing evidence regarding the adverse effects of NO₂ pollution has prompted the state of California to enact ambient NO₂ limitations stricter than the federal NAAQS. The annual California standard is 0.03 ppm, as compared with the Federal NAAQS of 0.053 ppm. California regulations also provide for a one-hour NO₂ concentration limit of 0.18 ppm. Cal. Code. Regs. tit. 17, § 70200.

111. Sulfur Oxides (“SO_x”) such as SO₂ are a group of gases formed primarily from the combustion of fuel containing sulfur, such as gasoline and diesel. SO_x emissions have a variety of negative effects on both human health and the environment. SO_x pollution contributes to respiratory problems, particularly for children and the elderly, and aggravates existing heart and lung diseases. High levels of SO_x emitted over a short period can be harmful to asthmatics. SO_x also contribute to the formation of acid rain, which damages trees, crops, historic buildings, and monuments and alters the acidity of both soils and water bodies. In addition, because SO_x emissions may be transmitted long distances, they contribute to visibility impairment problems in many scenic areas, including Mount Hood, the Wallowa-Whitman and Eagle Cap Wilderness,

the Columbia River Gorge National Scenic Area, and other federally-protected parks and Wilderness Areas in Oregon and Washington.

112. Research has shown for decades that SO₂ has adverse impacts on vegetation, including important agricultural crops at levels below the current SO₂ NAAQS.

113. Automobile pollutants including NO_x, SO_x, and PM react in the atmosphere to cause regional haze, scattering light and decreasing visibility.

114. The FEIS does not analyze MSATs emission in relation to Oregon's ambient benchmark concentrations ("ABCs") set for the six MSATs that EPA has identified as the most dangerous. The FEIS's description of the effects of MSAT emissions based on the Portland Air Toxics solution ("PATs") model does not communicate the results of the PATs analysis and the predicted impacts that MSAT emissions will have on the public health. In addition, the FEIS relies on the Harriet Tubman Middle School Monitoring Initiative to determine that there will be no impact to sensitive populations from the project. The study only monitored one small area the project will affect, compared the samples to a sample screening level and not to Oregon's ABCs, did not sample diesel particulate matter, and only sampled 10 days within a 60-day period. Thus, the FEIS fails to demonstrate that the project will not contribute to impacts related to MSATs.

115. In addition, the FEIS acknowledges, but does not disclose the short-term increase in air pollution emissions that construction will cause, and relies on promises of mitigation plans to find there will be "no effect" from air pollution increases due to construction.

116. With regard to climate change, the FEIS claims that the CRC will "reduce" GHG emissions due to the decrease in traffic congestion afforded by the CRC's higher design speed and traffic predictions for 2030. This "reduction" is only a reduction in relation to the no-build alternative. GHG emissions from the LPA will actually have increased over current levels.

Claiming that the LPA will result in a “reduction” is misleading to the public. The design speed for the CRC is 70 MPH, which is above the speed where vehicles travel most efficiently. The FEIS also bases this claim on the national weighted fleet mix, not a study of the regional or local fleet mix, and a “typical” operating condition based on a July weekday with high visibility and less congestion due to school closures. Thus, the FEIS’s claims regarding climate change are based on the best possible scenario and do not disclose the likely impacts of the CRC on climate.

117. With regard to public health and safety, the FEIS does not contain an adequate analysis of the impact of the CRC project on public health. The FEIS does not include a systematic analysis of the health impacts of the CRC both during and after construction. The impacts of the CRC on the health of the neighboring communities due to noise and vibration, air quality, obesity, increased injuries and fatalities resulting from more traffic moving at higher design speeds, and construction-related impacts are not fully disclosed in the FEIS. The FEIS discusses the predicted effects from noise and vibration, air quality, and construction caused by the project in its various sections and technical reports, but does not analyze the impacts these effects would have on human health and safety. Yet, the FEIS somehow estimates that there will be a net benefit to public health.

118. For example, in terms of public health and safety impacts, while the FEIS predicts that the frequency of vehicle crashes will decrease, it fails to consider whether the severity of crashes may increase because of higher projected speeds. The FEIS does not address bicycle and pedestrian access to the LPA from local neighborhoods on both sides of the river. The LPA increases incentives and capacity for single occupancy vehicles, and research shows that increases in such use have a direct relationship with increased obesity. Increases in noise are associated with increases in hypertension and cardiovascular disease and interferes with

children's cognitive development. The FEIS further fails to consider how health effects from air quality might disproportionately affect low income, minority, or vulnerable populations.

119. The FEIS does not disclose the impacts on water quality that will result from this project. Instead FHWA and FTA focus on compliance with water quality standards ("WQS") as a means of demonstrating there are no impacts. But, compliance with WQS is not demonstrated in the FEIS, which does not discuss all of the possible pollutant additions as a result of the project. The addition of treated pollutants can still result in an impact compared to a no build alternative, and the FEIS does not disclose these impacts or the likelihood of increases in pollutant loads resulting from the project. CRC's analysis also only focuses on the project area, rather than the cumulative impacts on the watershed as a whole.

120. With regard to water quality, the FEIS significantly misstates or improperly analyzes the impacts of the CRC project on stormwater runoff, wetlands, and groundwater. First, the FEIS does not disclose what pollutants are currently being discharged by runoff on the I-5, nor the volume of such discharges, yet concludes that there will be an improvement in water quality as a result of the CRC. The FEIS assumes that there will be stormwater treatment facilities that will reduce the acreage of impervious surfaces that produce untreated stormwater runoff from 219 to zero. However, the plans for the stormwater treatment facilities are not included in the DEIS or FEIS and thus those documents provide no support for these promises and assumptions. It is impossible to comment on a void, and the public has been denied an opportunity to evaluate and comment on the mitigation plans for the increase in impervious surfaces and stormwater runoff.

121. The FEIS also concludes that staging facilities will comply with water quality standards, but it does not discuss or include these staging sites in its analysis of runoff from

impervious surfaces. The FEIS further relies on conclusions that the CRC will not violate water quality standards to determine that there will be no effect on the environment and does not disclose what impacts the CRC will have on water quality. The FEIS does not analyze the impacts on water quality or total maximum daily load (“TMDL”) allocations associated with the Columbia River from construction, or whether construction will cause a violation of water quality standards.

122. The FEIS updated the water quality analysis in the DEIS only for the no-build and LPA alternatives. However, the FEIS only added analysis concluding that best management practices will serve to mitigate the undisclosed impacts to water quality. The FEIS also removed analysis of impacts from the discharge of phosphorous when both the Columbia Slough and Fairview Creek have TMDLs established for eutrophication, which includes phosphorus.

123. The FEIS concludes that there is no impact to wetlands without analyzing impacts related to wetland buffers. Mitigation of impacts to wetlands are also not adequately addressed in the FEIS. The FEIS concludes that new impervious surfaces would not discharge untreated stormwater runoff into the wetlands, and the wildlife activities that may be impacted are already negatively affected by the urbanized environment, but it does not explain or support this conclusion.

124. The FEIS’s analysis of groundwater impacts relies solely on the Troutdale Sole Source Aquifer Technical Report. CRC had access to newer and more detailed information about the area’s groundwater, but has not used this information in its analysis. The analysis of groundwater impacts also does not take into account the changes in design, specifically regarding stormwater treatment, and makes no mention of what effect pile driving will have on liquefaction.

125. With regard to impacts to biodiversity, the FEIS ignores many impacts to species of plants and animals that are not listed as protected or endangered under the ESA. For protected or endangered species, the FEIS relies on the ESA documents, the Biological Assessment and Biological Opinion, which are legally flawed.

126. The FEIS also fails to properly disclose and analyze cumulative impacts. The FEIS focuses on impacts in the immediate project area and does not analyze the cumulative effects of all projects in the watershed. The FEIS discloses the CRC's cumulative effect on the ecosystem by simply acknowledging that the CRC will "disturb" native vegetation, trees, and wetlands, and that the aquatic habitat will be "affected."

127. The FEIS does not include an analysis of the impacts that the projects listed as adding to the cumulative effect would actually have. Instead of analysis, the FEIS asserts that there are no cumulative impacts from other projects, remains unclear as to the area considered in its cumulative impacts analysis, and does not analyze the impacts to aquatic species from construction activities.

128. The Cumulative Effects Technical Report's section describing past and future actions does not describe any specific actions that may have an impact on the project area, and states that compliance with law and regulation would minimize or mitigate impacts from future projects. The cumulative impacts analysis admits that it has not explicitly identified and analyzed ongoing and future federal projects such as the Federal Columbia River Power System and salmon recovery efforts, only that these projects are taken into account. The report also does not describe the impacts these actions would have on non-protected species of fish and salmon, focusing only on impacts to listed species of fish.

129. FHWA and FTA also utterly failed to properly respond to public comments in issuing the FEIS. Indeed, FHWA and FTA responded to many of Plaintiffs' DEIS comments about the lack of analysis of alternatives and impacts by baldly assuring Plaintiffs that they had done "extensive analysis."

130. Because of potential funding issues the FEIS does note that certain parts of the project may be delayed or implemented in phases. However, this disclosure does not adequately address the likely impacts of such phasing. For example, although the FEIS acknowledges that certain water treatment facilities may not be completed until after the new bridges are constructed, the FEIS does not analyze the impacts of operating those bridges without completed water treatment facilities.

131. One reason offered by Defendants for replacing the existing bridges is the fact that those bridges use a lift span to allow tall vessels (up to 175 feet) to pass underneath and the occasional lifts cause traffic delays. The LPA is projected to have only between 75 and 95 feet of navigational clearance depending on water level. A vertical clearance of 95 feet would in fact impede both current and prospective navigation on the Columbia River. However, the FEIS erroneously minimizes this impact and incorrectly suggests that the U.S. Coast Guard had agreed that the LPA's current navigational clearance would not create a new problem. In fact the U.S. Coast Guard's FEIS comments noted that the analysis of this issue in the FEIS was inadequate, several businesses upstream from the proposed LPA also have objected to the LPA's low navigational clearance, and the U.S. Army Corps' current river dredging barge also would not be able to pass under the LPA. The FEIS also does not address applicable U.S. Coast Guard permitting requirements related to this bridge height issue. *See* 33 U.S.C. § 401; 33 C.F.R. § 332.1.

132. The FHWA and FTA have always insisted that building a higher bridge or using a bridge design with higher towers could interfere with aviation operations at nearby airports or violate Federal Aviation Administration rules or regulations. However, on information and belief, Plaintiffs allege that the Defendants have not investigated or considered whether the FAA would waive or modify those height restrictions. Moreover they have not determined that any height restrictions are in fact an insurmountable obstacle to at least considering alternative designs with higher clearance or towers.

Defendants' Actions Regarding Species Protected by the ESA

133. Steelhead and salmon are anadromous fish. They are born and rear in freshwater tributaries of the Columbia River, migrate downstream through the Columbia River to the Pacific Ocean, where they grow and live as adults, and return to their natal streams and lakes to spawn and die. The Columbia River, its tributaries, and estuary historically provided habitat for chinook, sockeye, chum and coho salmon, as well as steelhead. A century ago, between 10 and 30 million salmon returned to the Columbia each year.

134. The remarkable historic productivity, abundance and diversity of these fish has now collapsed. For example, a recent analysis of the status of the Upper Columbia spring Chinook ESU, performed by the Interior Columbia Basin Technical Recovery Team ("ICTRT"), notes that for each of the three populations in this ESU that still exist:

The ... population is not currently meeting viability criteria. Of particular concern is the high risk rating with respect to abundance and productivity. The population cannot achieve any level of viability without improving its status ... for both abundance and productivity. Spatial structure and diversity is also rated as high risk.

See http://www.nwfsc.noaa.gov/trt/col/trt_upper_columbia_chinook_mpg.cfm.

135. As of 1991, 67 stocks of Columbia River salmonids were extinct and 76 stocks were at risk of extinction.

136. A “species” that may be listed for protection under the ESA “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). When deciding whether to list populations of Pacific salmon for protection as a “distinct population segment” under this definition, NMFS employs the concept of “evolutionarily significant unit” (“ESU”). *See* 64 Fed. Reg. 14,308, 14,310 (Mar. 24, 1999). In 2006, NMFS issued revised listings for all west coast steelhead populations applying the joint Distinct Population Segment (“DPS”) policy developed by NMFS and the U.S. Fish and Wildlife Service in 1996. *See* 71 Fed. Reg. 834 (Jan. 5, 2006). Eight salmon ESUs and five steelhead trout DPSs listed as endangered or threatened are present in the project area. Many other ESUs and DPSs are already extinct. Recent status reviews of all ESUs and DPSs confirm that each of them remains at significant risk, and no ESU or DPS has been proposed for delisting. In fact, populations of salmon and steelhead in the Columbia River have largely continued to decline since listing.

137. During the course of their juvenile and adult lives, the few remaining Columbia River basin salmon and steelhead face numerous artificial obstacles to successful migration, reproduction, and rearing including, but not limited to: habitat loss and degradation due to human activities such as development, logging, grazing, farming and mining; disease and adverse effects to the genetic pool of wild fish caused by hatchery fish, as well as competition from hatchery fish for food and shelter; commercial and recreational harvest for human consumption; and the presence and operation of the four federal mainstream Columbia River hydroelectric dams, and the four Lower Snake River hydropower projects.

138. The new crossing over the Columbia River is among the largest new in-water projects to be proposed for the Columbia River Basin since multiple species of imperiled

salmonid fish were placed on the ESA's "threatened" or "endangered" species lists. The construction and operation of the LPA would impose a new, very large obstacle for these species both when they migrate downstream as juveniles and upstream as adults. The project will severely and adversely affect ESA-listed salmon and steelhead in a variety of ways, including, but not limited to the following: (1) increased sedimentation and pollution from stormwater; (2) significantly increasing the shaded areas over the Columbia River and North Harbor, thus increasing predation on juvenile salmonids; (3) increased in-water structures; and (4) impact pile driving. Taken together, these impacts result in increased injury, death and reduced reproductive success of the listed ESUs and DPSs. According to the BiOp, for several high risk ESUs just the in-water construction work for the CRC would take up to 1% of each annual run during the CRC's multi-year construction period.

139. The BiOp defines the action area as (1) the area where underwater noise caused by pile driving will exceed background levels; (2) the lower Columbia River where dissolved and suspended pollutants caused by stormwater runoff from the CRC project is redistributed to the Pacific Ocean; and (3) the eastern Pacific Ocean where southern resident killer whales overlap with Chinook salmon from the Columbia basin. This action area does not include upland areas impacted by the CRC that will significantly affect the salmonid species. This action area does not include several existing adverse impacts in the environmental baseline, such as urbanization along the river, specifically from the Bonneville Dam to the mouth of the Columbia River. The restrictive definition of the action area in the BiOp masked many of the CRC's impacts to the listed species that would occur because of activities on areas upland from the river. Without an analysis of these impacts, the BiOp is unable to accurately describe the environmental baseline of the species and the additive impacts that will occur as a result of the

CRC. Further, ignoring these upland activities also prevents the BiOp from addressing the cumulative effects of all future activities on the listed species.

140. In addition, the provided environmental baseline did not analyze several important studies and reviews related to Lower Columbia River salmon species available at the time the BiOp was released. Thus, the BiOp does not consider the best available science to determine that the CRC is not likely to jeopardize the listed species. For example, the BiOp fails to analyze the success of the “reasonably prudent alternative” from the 2008 Willamette Project Biological Opinion in avoiding jeopardy, nor does it consider NMFS’s own 2010 status update of listed species in the area and the additive impacts from past incidental take statements. In fact, NMFS is currently unable to track the effect that past incidental take statements have actually had on the listed species and thus cannot adequately evaluate the current status of the listed species.

141. Since about 2005 NMFS has prepared hundreds of Biological Opinions regarding federal agency actions with potentially adverse impacts on listed salmonids. Most of those Biological Opinions authorize some level of “incidental take.” NMFS, the FHWA and FTA completely fail to consider or analyze the cumulative authorized take for each listed species and how the CRC’s additional impacts would add to that existing take and harm to each listed salmonid. Plaintiffs’ FEIS comments and ESA 60-Day Notice included all of these Biological Opinions and charts suggesting how these substantial, cumulative impacts on listed salmonids could have been, but were not, considered and evaluated by defendants.

142. The BiOp’s actual analysis of impacts to the listed species does not address the direct and indirect impacts that the CRC will have on the listed species. The BiOp expresses approval of an expanded in-water work window (“IWW”) from September 15 to April 15.

This window is longer than Oregon's normal IWWW—developed by the Oregon Department of Fish and Wildlife's regional biologists—that runs from November 1 through February 28. This variance in the IWWW was not in the DEIS, and neither the BiOp nor the FEIS specifically address the impacts on wildlife that might arise from this variance in the IWWW.

143. In fact, the BiOp ignores the extension of the IWWW and the effect that will have on listed species, even while only considering the lethal effects of underwater pile-driving which can only occur during in-water work.

144. The BiOp also improperly relies on unspecified stormwater treatment best management practices to conclude that the CRC will not jeopardize the species. The BiOp also fails to meaningfully discuss impacts, other than stormwater discharge, that the CRC will continue to have on species during the ongoing operation of the CRC. The cumulative effects analysis does not provide meaningful analysis of future activities, only listing population growth as having a potential consequence.

145. The deficiency in the analysis of the impacts of the CRC prevents NMFS and the other defendants from evaluating the level of take that will occur as a result of the CRC. The ITS does not provide a level of take expressed in actual death or injury to listed species; instead the ITS repeats the predicted impacts of the CRC. This eliminates any monitoring value of the ITS and compounds the monitoring problems NMFS will experience when attempting to establish the current status of species in future Biological Opinions.

146. The FEIS erroneously relies primarily on the BiOp and related BA, both ESA documents, to determine the CRC project's supposed impacts on salmonids. However, NEPA requires agencies to conduct a far broader analysis of impacts, including all impacts to salmonids

and not just those that could cause jeopardy. The FEIS thus omits or understates many impacts from the CRC on salmonids and their critical habitat.

147. The FEIS also disclosed for the first time that there were alternative bridge designs available with potentially far fewer adverse impacts on aquatic life. The FHWA and FTA however refused to consider and evaluate those alternative designs as part of their required range of alternatives analysis. That refusal violated their NEPA obligations and their conservation obligations under the ESA.

148. All of these foregoing errors in and omissions from the analysis and discussion in the DEIS and FEIS and BiOp, and many other errors and omissions, deprived the public and the FHWA and FTA decision-makers of relevant and material information regarding the CRC project's likely environmental impacts in violation of NEPA.

CLAIMS FOR RELIEF

Plaintiffs' First Claim for Relief

(Violation of the National Environmental Policy Act and 5 U.S.C. § 706(2)(A))

FHWA and FTA's Purpose and Need Statement and Resulting Unduly Narrow Consideration of Alternatives Violates NEPA and is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

149. Plaintiffs reallege all preceding paragraphs.

150. Under NEPA, FHWA and FTA must prepare an EIS that rigorously explores and objectively evaluates a range of reasonable alternatives that meet the basic purpose of the project, including alternatives not within the jurisdiction of FHWA and FTA, and that, for the alternatives eliminated from study, briefly discuss the reasons for elimination. 40 C.F.R. § 1502.14; 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1507.2(d).

151. Defendants' alternatives analysis failed to comply with NEPA because Defendants used an impermissibly narrow statement of purpose and need to frame the

alternatives analysis and that improper purpose and need statement led to their consideration of an unduly narrow range of alternatives.

152. FHWA and FTA violated NEPA by framing the FEIS with a biased and outcome-driven statement of the project's underlying purpose that resulted in a failure to seriously consider a range of reasonable alternatives to the LPA, including, but not limited to: any alternatives that did not include increased highway capacity; alternatives that tolled the existing bridges and added new infrastructure, such as bike, pedestrian and transit crossings, to the existing bridges; phased or combined alternatives that included tolling, a separate arterial bridge for Hayden Island traffic and light rail, and navigation channel improvements; or other reasonable alternatives in the record before FHWA and FTA.

153. The Defendants' analysis assumed that growing travel demand and congestion could only be met by alternatives that added significant additional highway capacity thereby illegally constraining the analysis of project alternatives and converted the LPA into an inescapable conclusion, in violation of NEPA.

154. Furthermore, because Defendants relied on outdated and flawed data that overstated future traffic needs, FHWA and FTA violated NEPA by only considering a narrow range of alternatives that all increase highway capacity by means of adding additional traffic lanes. Plaintiffs and many other commenters suggested numerous reasonable alternatives that Defendants arbitrarily refused to consider in detail in the DEIS or FEIS.

155. Defendants' failure to objectively evaluate all reasonable alternatives to the proposed CRC project violates NEPA and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

Plaintiffs' Second Claim for Relief

(Violation of the National Environmental Policy Act and 5 U.S.C. § 706(2)(A))

FHWA and FTA Violated NEPA and FHWA Regulations Because they Failed to Disclose and Analyze All the Impacts to the Human Environment of the CRC Project, Including Direct, Indirect and Cumulative Impacts.

156. Plaintiffs reallege all preceding paragraphs.

157. An adequate analysis of the environmental impacts of a project must thoroughly examine and disclose the project's direct, indirect, and cumulative environmental and social impacts, including compliance with applicable laws and regulations. 40 C.F.R. §§ 1508.7, 1508.8, 1508.27(b)(10), 1502.25(b), and 1502.2(d). The analysis must be based on reliable and up-to-date data to provide a rational basis upon which to compare alternatives. The CRC project FEIS fails to satisfy those requirements. The FEIS and ROD also fail to address compliance with certain FHWA regulations and other permitting requirements, including, for example, compliance with 23 C.F.R. § 771.129(a) or U.S. Coast Guard permitting requirements.

158. For example, FHWA and FTA's FEIS fails to adequately evaluate the impacts from the project and relies on flawed data, assumptions and analysis to present a false scenario in which the CRC project facilitates no additional traffic, congestion, growth or development in the area. Therefore, the FEIS erroneously concludes there will be no significant adverse impacts to or significant reductions in adverse impacts to, for example, visual resources, air or water quality, climate change, public health, or biodiversity.

159. Defendants' failure to take a hard look at the social and environmental impacts of the LPA and to disclose this information in the FEIS violates NEPA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

Plaintiffs Third Claim for Relief

(Violation of NEPA and 5 U.S.C. §706(2)(A))

FHWA and FTA's Illegal Imposition of a Public Process that Substantially Hindered Rather than Facilitated Public Comment and Involvement Violates NEPA and is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

160. Plaintiffs reallege all preceding paragraphs.

161. Allowing for meaningful public involvement and commenting on an agency's proposal and NEPA analysis is one of NEPA's fundamental purposes.

162. The FHWA and FTA's public involvement process focused on justifying decisions they had already made rather than allowing the public to comment before those decisions were made and to thereby have the opportunity to influence those decisions and the analysis of their environmental impacts. For example, the DEIS lacked sufficient detail regarding many potential impacts to allow for meaningful public comment and refused to allow sufficient time for public comment. Defendants then identified an LPA before the DEIS public comment process was complete. Defendants included many highly relevant "details" and analysis only in the FEIS and then allowed only 30 days for public comment on that new analysis. The FEIS also failed to adequately respond to many DEIS comments.

163. This flawed NEPA public involvement process violated both NEPA's specific provisions and regulations and NEPA's overall purpose and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A).

Plaintiffs' Fourth Claim for Relief

(Violation of NEPA and 5 U.S.C. § 706(2)(A))

FHWA and FTA's Failure to Prepare a New or Supplemental Environmental Impact Statement Violates NEPA and is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

164. Plaintiffs reallege all preceding paragraphs.

165. NEPA requires an agency to prepare a supplemental NEPA analysis when “[t]he agency 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 actions or its impacts.” 40 C.F.R. § 1502.9(c)(1)(i)–(ii); *see also* 23 C.F.R. § 771.130.

166. The DEIS delayed much of the impact analysis until the FEIS. The public was allowed 30 days to review and comment upon the FEIS and the new information and analysis contained therein. FHWA and FTA did not have to consider or respond to public comments on the FEIS. Therefore, the public has not had a meaningful opportunity to evaluate and comment on these events and information. A new draft analysis is required where “a draft [EIS] is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.” 40 C.F.R. § 1502.9(a).

167. The FEIS included new information not found in the DEIS. This new information includes, but is not limited to: more detailed tolling, financial, and air quality information; a completely new and lengthy Metroscope 2010 modeling report; a sustainability strategy; and numerous changes to the DEIS alternatives.

168. Moreover, since issuing the DEIS, FHWA and FTA prepared a BA regarding impacts on species and fisheries protected by the Magnuson-Stevens Act and the Endangered Species Act. In turn, FHWA and FTA added more detail to the FEIS and its appendices regarding impacts to species like salmon. FHWA and FTA consulted with NMFS on the BA, and NMFS issued a BiOp. This new information, for the first time, discloses that the standard in-water work window designed to protect salmon will be suspended for much of the time the new proposed bridge is under construction.

169. Since the DEIS was issued, new traffic data from ODOT for the I-5 bridge crossings shows that actual traffic is much lower than the traffic forecasts used by FHWA and FTA.

170. Since the DEIS was issued, many in the state, regional and local government have proposed a phased construction plan for the CRC project. The FEIS contains no information about the scope and timing of phased construction, and does not disclose or analyze any impacts to the human environment unique to phased construction.

171. FHWA and FTA's failure to prepare a new or supplemental EIS for the CRC project in light of this new information is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of NEPA. 40 C.F.R. § 1502.9; 23 C.F.R. § 771.130; 5 U.S.C § 706(2)(A).

Plaintiffs' (Alternative) Fifth Claim for Relief

(Violation of the NEPA and 5 U.S.C. § 706(1))

FHWA and FTA's Failure to Prepare a New or Supplemental Environmental Impact Statement Violates NEPA and is Agency Action Unlawfully Withheld or Unreasonably Delayed.

172. Plaintiffs reallege all preceding paragraphs.

173. NEPA requires an agency to prepare a supplemental NEPA analysis when "[t]he agency 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 actions or its impacts." 40 C.F.R. § 1502.9(c)(1)(i)–(ii); *see also* 23 C.F.R. § 771.130.

174. The DEIS delayed much of the impact analysis until the FEIS. The public was allowed 30 days to review and comment upon the FEIS and the new information and analysis contained therein. FHWA and FTA did not have to consider or respond to public comments on

the FEIS. Therefore, the public has not had a meaningful opportunity to evaluate and comment on these events and information. A new draft analysis is required where “a draft [EIS] is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.” 40 C.F.R. § 1502.9(a).

175. The FEIS included new information not found in the DEIS. This new information includes, but is not limited to: more detailed tolling information, more detailed financial information, more detailed air quality information; a completely new and lengthy Metroscope 2010 modeling report; a sustainability strategy; and numerous changes to the DEIS alternatives.

176. Moreover, since issuing the DEIS, FHWA and FTA prepared a Biological Assessment (“BA”) regarding impacts on species and fisheries protected by the Magnuson-Stevens Act and the Endangered Species Act. In turn, FHWA and FTA added more detail to the FEIS and its appendices regarding impacts on species like salmon. FHWA and FTA consulted with NMFS on the BA, and NMFS issued a BiOp. This new information, for the first time, discloses that the standard in-water work window designed to protect salmon will be suspended for much of the time the new proposed bridge is under construction.

177. Since the DEIS was issued, new traffic data from ODOT for the I-5 bridge crossings shows that actual traffic is much lower than the traffic forecasts used by FHWA and FTA.

178. Since the DEIS was issued, many in the state, regional and local government have proposed a phased construction plan for the CRC project. The FEIS contains no information about the scope and timing of phased construction, and does not disclose or analyze many impacts to the human environment unique to phased construction.

179. In the Alternative to Plaintiffs' Fourth Claim for Relief, FHWA and FTA's failure to prepare a new or supplemental EIS for the CRC project in light of this new information is agency action unlawfully withheld or unreasonably delayed in violation of 40 C.F.R. § 1502.9, 23 C.F.R. § 771.130, and 5 U.S.C § 706(1).

Plaintiffs' Sixth Claim for Relief

(Violation of the ESA and 5 U.S.C. § 706(2)(A))

NMFS Violated the ESA by Issuing a Biological Opinion that Fails to Support No Jeopardy Determination and is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law, and By Unlawfully Failing to Reinitiate Consultation.

180. Plaintiffs reallege all preceding paragraphs.

181. NMFS has failed to follow, and has violated, the requirements of ESA section 7 and its implementing regulations, and has arbitrarily, capriciously, without any rational basis, and in disregard of the best available scientific information, concluded in the BiOp that the proposed actions of FHWA and FTA are not likely to jeopardize any listed species or destroy or adversely modify their critical habitat.

182. To properly determine whether a proposed federal action is likely to jeopardize listed species or destroy or adversely modify critical habitat, NMFS must evaluate the "effects of the action and cumulative effects" — including direct and indirect effects of the action — on listed species or critical habitat, and add them to the "environmental baseline." 50 C.F.R. §§ 402.02, 402.14(g)(3). The "environmental baseline" is the current status of a species and its critical habitat — as affected by all previously authorized federal actions, all past and present non-federal activities, and future non-federal actions "reasonably certain" to occur. *Id.* § 402.02. The "best science" mandate requires that federal agencies consider all available information relevant to complying with section 7 of the ESA. 16 U.S.C. § 1536(a)(2). A proposed action that will

have adverse effects on listed ESUs and critical habitat may proceed only if it will not tip the species into jeopardy or adversely modify its critical habitat. *See* 16 U.S.C. § 1531(a)–(b).

183. NMFS based its BiOp on a definition of the action area that is far too restrictive. This resulted in the BiOp masking many of the CRC project's impacts to the listed species that would occur because of activities on areas upland from the river. This constricted action area specifically masks the effect that urbanization along the Columbia River has had on the listed species. Without an analysis of these effects, the BiOp is unable to accurately describe the environmental baseline of the species and the additive impacts that will occur as a result of the CRC project. Further, ignoring these upland activities also prevents the BiOp from addressing the cumulative effects of all future activities on the listed species.

184. Moreover, NMFS failed to consider the best available science to determine that the CRC project is not likely to jeopardize the listed species. The BiOp does not consider NMFS's own 2010 status update of listed species in the area, nor does it consider the additive impacts from past incidental take statements. NMFS is currently unable to track the effect that past incidental take statements have actually had on the listed species and thus, cannot adequately evaluate the current status of the listed species.

185. NMFS's analysis of impacts to the listed species fails to address the direct and indirect impacts that the CRC project will have on the listed species. For example, NMFS first improperly limits its consideration of in-water impacts only to the lethal effects of underwater pile-driving, ignoring the direct and indirect impacts of the extension of the in-water work window on listed species. Second, NMFS fails to assess the impacts of stormwater discharge, because it relies on unspecified stormwater treatment best management practices for complete mitigation of stormwater impacts. Third, NMFS fails to meaningfully discuss impacts, other than

stormwater discharge, that the CRC project will continue to have on species during its ongoing operation. Fourth, the cumulative effects analysis only lists population growth as a potential future impact, ignoring any meaningful analysis of specific future activities.

186. The action agency and NMFS are also required to reinitiate consultation when NMFS designates new critical habitat that may be affected by the action. 50 C.F.R. § 402.16(d). NMFS designated new critical habitat in the action area for the eulachon after the BiOp was issued. 76 Fed. Reg. 65,324 (Oct. 20, 2011). To date, NMFS has not reinitiated consultation with the FHWA and FTA. This newly designated habitat may be affected by the construction of the CRC project, as NMFS itself has recognized that dredging impacts the species, and construction of the CRC project includes activities very similar to dredging.

187. NMFS' actions and omissions, including, but not limited to those examples set forth above, violate the ESA and are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A).

Plaintiffs' (Alternative) Seventh claim for Relief

(Violation of the ESA and 5 U.S.C. § 706(1))

NMFS Violated the ESA and APA by Failing to Reinitiate Consultation

188. Plaintiffs reallege all preceding paragraphs.

189. The ESA imposes a mandatory duty to reinitiate consultation when NMFS designates new critical habitat that may be affected by the action. 50 C.F.R. § 402.16(d).

190. NMFS failed to reinitiate consultation with the FHWA and FTA after it designated new critical habitat for the eulachon in the CRC project area.

191. In the alternative to the part of Plaintiffs' Sixth Claim for relief regarding NMFS' failure to reinitiate consultation, that failure was agency action unlawfully withheld or unreasonably delayed in violation of the ESA and 5 U.S.C. § 706(1).

Plaintiffs' Eighth Claim for Relief

(Violation of the ESA and 5 U.S.C. § 706(2)(A))

NMFS Violated the ESA by Failing to Quantify Take in the Incidental Take Statement

192. Plaintiffs reallege all preceding paragraphs.

193. The ESA requires NMFS to issue an incidental take statement whenever an agency action will harm members of a threatened or endangered species but will not jeopardize the continued existence of that species. 16 U.S.C. § 1536(b)(4).

194. NMFS must express the amount or extent of take in some form, either as a numeric value or as a surrogate ecological condition that has some connection to the taking of the species.

195. The deficiency in the analysis of the impacts of the CRC project prevents NMFS from correctly evaluating the level of take that will occur as a result of the CRC project.

196. The incidental take statement does not provide a level of take expressed in actual death or injury to listed species; instead the incidental take statement repeats the predicted impacts of the CRC project from the BiOp. This eliminates any monitoring value from the incidental take statement and compounds the monitoring problems NMFS will experience when attempting to establish the current status of species in future Biological Opinions.

197. Thus, NMFS violated the ESA by issuing an incidental take statement that fails to adequately quantify take, or explain why a numerical value could not practicably be obtained.

198. NMFS's actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

Plaintiffs' Ninth Claim for Relief

(Violation of the ESA)

The FHWA and FTA's Reliance on the Incomplete and Flawed BiOp Violates the ESA.

199. Plaintiffs reallege all preceding paragraphs.

200. FHWA and FTA have an independent and continuing legal duty to comply with the substantive requirements of ESA section 7(a)(2) to avoid jeopardy and adverse modification of critical habitat without regard to whether they have received a Biological Opinion regarding their actions. 16 U.S.C. § 1536(a)(2). FHWA and FTA's reliance on and adoption of NMFS's badly flawed BiOp and their submission of an inadequate and flawed BA violate the ESA.

201. The FHWA's and FTA's reliance on the flawed BiOp in their ROD is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and in violation of the ESA and is reviewable under 16 U.S.C. § 1540(g)(1).

Plaintiffs' Tenth Claim for Relief

(Violation of the Endangered Species Act)

FHWA and FTA's Failure to Reinitiate Consultation with NMFS After the Designation of Eulachon Critical Habitat Violates the ESA.

202. Plaintiffs reallege all preceding paragraphs.

203. An action agency is required to reinitiate consultation with NMFS when NMFS designates new critical habitat that may be affected by the action. 50 C.F.R. § 402.16(d).

204. NMFS designated new critical habitat for the eulachon after the BiOp was issued. 76 Fed. Reg. 65,324 (Oct. 20, 2011). Defendants have not reinitiated consultation with NMFS. This newly designated habitat may be affected by the construction of the CRC project, as NMFS has recognized that dredging impacts the species, and construction of the CRC project includes activities very similar to dredging.

205. The FHWA and FTA's issuance of the ROD before completing consultation regarding this newly designated habitat also violates section 7(d) of the ESA. 16 U.S.C. § 1536(d).

206. The FHWA's and FTA's failure to reinitiate consultation and their failure to complete that consultation before issuing the ROD was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law in violation of the ESA and is reviewable under 16 U.S.C. § 1540(g)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Adjudge and declare that FHWA and FTA violated NEPA and applicable NEPA and FHWA regulations by preparing an inadequate ROD, DEIS and FEIS that failed to consider a reasonable range of alternatives, failed to analyze and disclose the environmental impacts of the proposed project, failed to provide reliable information, and deprived the public of the opportunity for meaningful public comment, and those agency actions are arbitrary, capricious, an abuse of discretion, and not in accordance with law under 5 U.S.C. § 706 (2)(A);

B. Adjudge and declare that FHWA and FTA violated NEPA by failing to prepare a supplemental EIS and that action was arbitrary, capricious, an abuse of discretion, and not in accordance with law under 5 U.S.C. § 706(2)(A), or is illegal agency inaction under 5 U.S.C. §706(1);

C. Vacate and set aside the FEIS and Record of Decision for the CRC project;

D. Enter appropriate preliminary and permanent injunctive relief to ensure that FHWA and FTA comply with NEPA, and specifically to ensure that Defendants and their agents take no further actions toward proceeding with the challenged CRC project until they have complied with NEPA;

E. Adjudge and declare that NMFS's Biological Opinion violates the ESA and is agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law under 5 U.S.C. § 706 (2)(A);

F. Adjudge and declare that NMFS's failure to reinstate consultation violated the ESA and is agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law under 5 U.S.C. § 706(2)(A), or is illegal agency inaction under 5 U.S.C. § 706(1);

G. Vacate and set aside the BiOp and the accompanying incidental take statement, and enjoin NMFS to notify the Action Agencies of these actions, and reinstate consultation with the Action Agencies in order to prepare a Biological Opinion for the project and related actions that complies with the requirements of the ESA;

H. Adjudge and declare that FHWA and FTA have violated the ESA by failing to reinstate consultation and by failing to avoid jeopardy by relying on NMFS's flawed BiOp, in violation of the requirements of ESA section 7, 16 U.S.C. § 1536;

I. Enter appropriate preliminary and permanent injunctive relief to ensure that Defendants comply with the ESA, and specifically to ensure that Defendants and their agents take no further actions toward proceeding with the challenged CRC project until they have complied with ESA;

J. Award Plaintiffs the costs of this action including expenses, expert witness fees, and reasonable attorney fees; and

K. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 2nd day of July, 2012.

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