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7 **BEFORE THE HEARING EXAMINER**
8 **CITY OF SEATTLE**

9 In the Matter of the Appeals of
10 THE FOUR SEASONS HOTEL SEATTLE, et al.,
11 from a decision issued by the Director,
12 Department of Construction and Inspections,
13 regarding a Major Public Project Construction
Noise Variance

Hearing Examiner Files:
HC-18-001 through HC-18-007

Department Reference:
3029782

WSDOT'S AND CITY'S MOTION FOR
SUMMARY JUDGMENT REGARDING
SEPA COMPLIANCE

14 **I. RELIEF REQUESTED**

15 Applicant Washington State Department of Transportation (WSDOT) and the City of
16 Seattle (City) move for an order on summary judgment dismissing the claim raised by Andrew
17 Konstantaras that a State Environmental Policy Act (SEPA) threshold determination was
18 required to be made for the Major Public Project Construction Noise Variance (MPPCNV)
19 issued by the City.

20 SEPA compliance occurred when WSDOT and the City, acting as joint lead agencies,
21 prepared a National Environmental Policy Act (NEPA) Final Environmental Impact Statement
22 (FEIS) that included complying with MPPCNV requirements.

23 Mr. Konstantaras failed to challenge the adequacy of the FEIS and because of his failure,
24 WSDOT and the City are entitled to judgment as a matter of law that by complying with NEPA,
25 SEPA compliance occurred.
26

II. STATEMENT OF FACTS

WSDOT began planning for replacement of the earthquake-vulnerable Alaskan Way Viaduct (AWV or Viaduct) in 2001, after the Nisqually earthquake caused damage to the Viaduct. After years of study, WSDOT and the Federal Highway Administration (FHWA) selected the bored tunnel alternative to replace this segment of State Route (SR) 99. The two agencies issued a FEIS under NEPA. FHWA issued a Record of Decision (ROD) in August 2011. The decision to replace the Viaduct with the bored tunnel included the eventual demolition of the Viaduct. Both the FEIS and the ROD may be found at <http://www.wsdot.wa.gov/Projects/Viaduct/Library/Environmental>.

The FEIS notes that the demolition work will include the use of noisy construction equipment, and that it could be bothersome to neighbors. FEIS at 183.¹ The FEIS also discusses the measures that would mitigate the noise impacts, including the noise resulting from Viaduct demolition, and that will be incorporated into a Noise Management and Mitigation Plan as part of a MPPCNV. FEIS at 221.² The ROD then incorporates those noise mitigation measures as project commitments. ROD at 25.³

NEPA applies to federal agency decisions. FHWA is the federal lead agency for NEPA compliance, and WSDOT is a co-lead agency. Under NEPA, state agencies with state-wide jurisdiction may prepare environmental documents under federal supervision. 42 U.S.C. § 4332(2)(D). WSDOT prepared the FEIS, with FHWA approval, and both agencies' representatives signed the FEIS. FEIS at i.⁴

Environmental decisions for federally-approved transportation projects are subject to a 150-day appeal period during which appeals must be brought in United States District Court.

¹ http://data.wsdot.wa.gov/publications/viaduct/06_AWVFEIS_Chapter6_ConstructionEffects.pdf

² http://data.wsdot.wa.gov/publications/viaduct/08_AWVFEIS_Chapter8_Mitigation.pdf

³ http://data.wsdot.wa.gov/publications/viaduct/00_AWVFEIS_Summary.pdf

⁴ http://data.wsdot.wa.gov/publications/viaduct/00_AWVFEIS_CoverContents.pdf

1 23 U.S.C. § 139(k)(3)(1); 76 Fed. Reg. 53,706 (Aug. 29, 2011). No appeals of the August 2011
2 ROD were filed.

3 **III. ISSUE PRESENTED**

4 As a matter of law, SEPA compliance is not required when NEPA compliance occurred.
5 Mr. Konstantaras failed to challenge the adequacy of the FEIS or the ROD that includes
6 demolishing the Viaduct. Should the Hearing Examiner dismiss the SEPA compliance claim
7 when a NEPA FEIS was issued?

8 **IV. ARGUMENT**

9 **A. No SEPA EIS is Required if a NEPA EIS Has Been Prepared**

10 SEPA provides that if a NEPA EIS has been prepared, SEPA's EIS review requirement
11 does not apply:

12 The requirements of RCW 43.21C.030(2)(c) pertaining to the preparation of a
13 detailed statement by branches of government shall not apply when an adequate
14 detailed statement has been previously prepared pursuant to the national
15 environmental policy act of 1969, in which event said prepared statement may be
utilized in lieu of a separately prepared statement under RCW 43.21C.030(2)(c).

16 RCW 43.21C.150. *See also Boss v. Dep't of Transp.*, 113 Wn. App. 543, 54 P.3d 207 (2002)
17 (SEPA challenge dismissed when WSDOT had prepared NEPA EIS for Tacoma Narrows Bridge
18 project). The NEPA EIS and the ROD issued based on the EIS are federal agency documents.
19 FHWA is a necessary party in a case challenging the adequacy or validity of those documents.
20 FHWA is not a party in this matter, and as a federal agency it may not be brought into this forum.
21 The SEPA provisions quoted above recognizes that problem.

22 Nor may a federal project be "defederalized" to avoid application of NEPA. *Ross v. Fed.*
23 *Highway Admin.*, 162 F.3d 1046, 1051 (10th Cir. 1998) ("[t]he relevant inquiry on appeal is
24 whether [23 U.S.C.] § 145 authorized state and local officials, with FHWA approval, to
25 'defederalize' a segment of a 'major federal action' by foregoing federal funding in order to
26 avoid compliance with NEPA. On the unique facts of this case, the answer is no."); *Scottsdale*

1 *Mall v. State of Indiana*, 549 F.2d 484, 488 (7th Cir. 1977) (“We do not view 23 U.S.C. § 145
2 as granting to a state the prerogative to avoid compliance with NEPA.”). Regardless of whether
3 there is federal highway money in this phase of the project, it is still the subject of a federal
4 environmental review.

5 Mr. Konstantaras’ argument that a SEPA threshold determination was required fails as a
6 matter of law. Compliance with SEPA is not required when WSDOT and the City complied
7 with NEPA. RCW 43.21C.150. *See also Boss v. Dep’t of Transp.*, 113 Wn. App. 543,
8 54 P.3d 207 (2002).

9 **B. Because the AWW Environmental Review Was Conducted in Association with a**
10 **Federal Agency Under NEPA, Review is Available Only in Federal Court**

11 FHWA’s NEPA regulations require consultation with FHWA when there are changes to
12 a project. 23 C.F.R. § 771.129(3). The regulations also require preparation of a supplemental
13 EIS when there are changes to a project that “would result in significant environmental impacts
14 that were not evaluated in the EIS.” 23 C.F.R. § 771.130(a)(1). An allegation that such
15 supplemental environmental review is needed is necessarily an attack on the continued validity
16 of the federal FEIS and ROD.

17 Any challenge to a final federal action such as the ROD, including any challenge that
18 alleges that the ROD is no longer valid, must be brought in federal court, and must join the
19 federal agency that issued the decision. While some federal statutes allow for concurrent state
20 and federal court jurisdiction, NEPA does not.

21 Congress . . . may confine jurisdiction to the federal courts either explicitly or
22 implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an
23 explicit statutory directive, by unmistakable implication from legislative, history,
or by a clear incompatibility between state-court jurisdiction and federal interests.

24 *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, 101 S. Ct. 2870, 69 L. Ed. 2d 784
25 (1981).
26

1 Congress has implicitly confined jurisdiction of NEPA compliance issues to the federal
2 courts. NEPA does not contain its own appeal provisions; rather, federal agency NEPA
3 decisions are reviewable as final federal agency actions under the Administrative Procedure Act,
4 5 U.S.C. § 551. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005).
5 There cannot be concurrent jurisdiction when a necessary and indispensable party to a federal
6 law claim has sovereign immunity and cannot be sued in state court. *In re Quantification*
7 *Settlement Agreement Cases*, 201 Cal. App. 4th 758, 831, 134 Cal. Rptr. 3d 274 (2011). Because
8 Appellant's environmental review claim involves a challenge to a federal agency action, it must
9 be brought in federal court.

10 **C. An Argument That a Compliance With NEPA—and Consequently SEPA—Has Not**
11 **Occurred Must Be Made To the Federal Court**

12 Appellant contends that SEPA analysis is needed to address nighttime work allowed by
13 the MPPCNV. As argued above, SEPA compliance is not required when a NEPA FEIS was
14 issued by WSDOT and the City. The contention that the NEPA FEIS did not adequately analyze
15 nighttime noise impacts is still an attack on the continued validity of the NEPA FEIS and ROD.
16 The FEIS and ROD remain valid until the FHWA or a federal court determines that a
17 supplemental EIS is needed. *See North Idaho Community Action Network v. U.S. Dep't of*
18 *Transp.*, 545 F.3d 1147, 1157 (9th Cir. 2008). 23 C.F.R. § 771.129(c).

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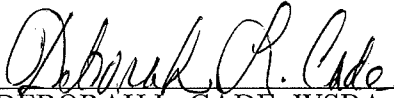
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V. CONCLUSION

The SEPA compliance claim raised by Mr. Konstantaras should be dismissed.

DATED this 4th day of May, 2018.

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CERTIFICATE OF SERVICE

14 I, Melissa Calahan, an employee of the Transportation and Public Construction
15 Division of the Office of the Attorney General of Washington, certify that on this day true
16 copies of WSDOT'S and City's Motion for Summary Judgment Regarding SEPA Compliance
17 and this Certificate of Service were served on the following parties as indicated below:

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16 I certify under penalty of perjury under the laws of the state of Washington that the
17 foregoing is true and correct.

18 DATED this 9 day of May, 2018, at Olympia, Washington.

20 
21 MELISSA CALAHAN
22 Legal Assistant
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