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6 **OFFICE OF THE HEARING EXAMINER**  
7 **FOR THE CITY OF SEATTLE**

8 In the Matter of the Appeal of

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

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10 FOUR SEASONS HOTEL, SEATTLE, et al.,  
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12 from a decision issued by the Director,  
13 DEPARTMENT OF CONSTRUCTION  
14 AND INSPECTIONS

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

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16 **I. INTRODUCTION**

17 Applicant Washington State Department of Transportation ('WSDOT') and the City of  
18 Seattle ('City') have moved for an order of summary judgment on the State Environmental  
19 Policy Act ('SEPA') raised in the appeal of Andrew Konstantaras ('Konstantaras' or  
20 'Appellant') of the decision by the Director of the Seattle Department of Construction and  
21 Inspections ('SDCI') granting WSDOT a Major Public Project Construction noise variance  
22 ('MPPC Variance'). This motion for partial summary judgment should be denied because the  
23 argument that SEPA compliance occurred when WSDOT and the City prepared a National  
24 Environmental Policy Act ('NEPA') Final Environmental Impact Statement ('FEIS') that  
25 included complying with MPPC Variance is flawed because even though the FEIS did reference  
26 compliance with the MPPC Variance, the issue before the Hearing Examiner includes the  
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argument that WSDOT failed to comply with these requirements and such compliance is a disputed issue before the Hearing Examiner and therefore is not ripe for summary judgment.

Furthermore, implicit in Appellant's SEPA argument is the fact that the underlying FEIS issued in 2011 does not cover the granting an MPPC Variance that allows demolition work on the Alaskan Way Viaduct ('AWV') to occur every hour of the day for every day for one year in neighborhoods zoned as residential and other neighborhoods with significant residential units. Such an extreme scope was not addressed in the FEIS and therefore should have triggered additional SEPA review.

Finally, dismissing a potentially significant issue on the basis of a technicality is inappropriate at this time as the Hearing Examiner forum is designed for average citizens to raise their concerns and while a decision to grant partial summary judgment might be appropriate in a court where all parties are generally required to be represented by trained legal counsel, it should not prevent the Hearing Examiner from considering an issue for which it has jurisdiction.

## **II. STATEMENT OF FACTS**

WSDOT improperly relies on the FEIS for the AWV Replacement Project ('AWV FEIS'), issued in July 2011 and the Record of Decision ('ROD') issued in August 2011 to satisfy its SEPA obligations. First, the main purpose of the AWV FEIS was to examine the various options to replace the AWV, namely the Bored Tunnel Alternative, the Cut-and-Cover Alternative and the Elevated Structure Alternative. AWV FEIS, p. 1. Each alternative assumed the AWV would be demolished and so the exploration into alternatives in the demolition of AWV were never considered. Even though the FEIS contemplated that construction and demolition work could occur through the night, it never examined the environmental impact of such work or considered any alternatives to 24x7 demolition in residential neighborhoods. The FEIS is inconsistent when it comes to whether 24x7 work will be required as in some places it says that WSDOT might apply for noise variances ("Construction could occur up to 24 hours a day, 7 days a week depending on the construction activity and will be determined during the

final design.” AWV FEIS, p. 183) and in other places it seems to assume that such work will occur when it discusses noise mitigation activities that WSDOT will implement.

Both the AWV FEIS and the ROD reference a MPPC Variance and both rely require that WSDOT have a Noise Mitigation and Management Plan (‘NMMP’) as required by SMC 28.05.580.D. AWV FEIS, p. 220-221 and ROD, p. 25. WSDOT’s MPPC Variance application fails to meet the requirements of an NMMP as it sets forth a handful of noise mitigation measures and then provides a list of measures it “could also use.” WSDOT Application, p. 34.

WSDOT’s application does not contain a plan, but rather a framework with options that WSDOT may select to use. While many of these options in the list of measures that WSDOT “could” use are those referenced in the AWV FEIS and ROD, it also includes the option to “provide earplugs and white noise machines to residents.” WSDOT Application, p.35.

### III. ARGUMENT

#### A. SEPA Compliance Cannot Be Met Without Fulfilling the Obligations Set Forth in a NEPA FEIS.

WSDOT argument that the AWV FEIS fulfilled its SEPA obligation cannot be grounds for summary judgment because WSDOT’s compliance with the a potential MPPC Variance, this appeal argues that WSDOT failed to fulfill the requirements of the MPPC Variance and since WSDOT did not move for summary judgment on that issue, it remains a disputed fact. If a reference to complying law was enough to fulfill SEPA compliance regardless of whether a party met the obligations of the law, then applicants could circumvent SEPA by making a promise that they had no intention of fulfilling.

Furthermore, WSDOT’s Application fails to provide an acceptable Noise Mitigation and Management Plan (‘NMMP’) and instead provides a framework that both the City and WSDOT expect to be finalized at a later date. While the NMMP does not need to be finalized at the application stage, it should provide enough commitment that both the City and the public can rely upon. There is no reason that WSDOT could not have proposed more detail in the

1 application NMMP and allowed a later contract to revise the plan with an alternative that was as  
2 good or better than that in the Application. Instead, WSDOT includes a list of actions, one of  
3 which is both woefully inadequate (i.e., providing residents with ear plug and a white noise  
4 machine) and a clear outlier in efficacy from the other measure that WSDOT “could” implement.

5 **B. APPELLANT’S SEPA ARGUMENT IMPLICITLY CHALLENGES THE**  
6 **UNDERLYING FEIS.**

7 Appellant argued that WSDOT and the City failed to meet the requirements of SEPA  
8 because they failed to make a threshold determination as required by SEPA. SEPA provides a  
9 simple mechanism for over-regulating activities such as the AWV Project. It is clear that  
10 WSDOT and the City spent significant time and resources on the AWV FEIS and it examined  
11 many issues. It did not, however, assume that the demolition of the AWV would require a year-  
12 long noise variance with the expectation that demolition activity would occur in a residential  
13 neighborhood for at least three months. This decision is not required by the plan contemplated  
14 by the AWV FEIS. There are obviously many alternatives to 24x7 demolition that WSDOT  
15 could have chosen. It is undisputed that extended exposure to loud noises is harmful to people.  
16 Therefore, WSDOT’s decision to adopt a plan that exposes residents to extreme loud noises on a  
17 continuous basis for at least three months should have trigger an inquiry as to the impact of this  
18 exposure on the environment. Furthermore, continuous demolition work will keep the air  
19 saturated with particulate matter that could have significant health impacts on residents. Plans  
20 that allow residents to sleep and such particulates to settle, would obviously have less health  
21 impacts. WSDOT could have addressed this concern by creating a SEPA checklist and having  
22 the City make a threshold determination as to whether this change to the plan set forth in the  
23 AWV FEIS requires any further SEPA analysis. WSDOT should not be allowed to avoid SEPA  
24 requirements by refusing to even acknowledge the potential impact of something as egregious as  
25 exposing a residential neighborhood to a barrage of loud demolition noise for at least three  
26 months.

27 **C. Summary Judgment on a technical issue is not appropriate in this forum.**  
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1 As stated above, Appellant's attack on the AWW FEIS is implicit in its SEPA argument.  
2 Even if that is not enough, the Hearing Examiner should not allow that technicality to preclude it  
3 from considering a valid and substantive issue raised by a citizen. The Hearing Examiner  
4 regularly listens to non-attorney arguments that are made regarding City decisions and actions.  
5 This does not mean that non-attorney parties should be allowed to ignore the requirements of the  
6 law, but rather some latitude should be granted. The failure to explicitly state that there is a  
7 problem with an underlying FEIS should not result in the dismissal of a challenge to the SEPA  
8 claim made by appellant. There was a change to a plan that could result in a significant impact  
9 on the environment and so challenging how the City made its SEPA obligations is exactly the  
10 type of issue that should be addressable by the Hearing Examiner. If Appellant had merely  
11 argued, "I don't like it" then summary judgment would probably be appropriate. However, a  
12 specific SEPA obligation was mentioned and it seems reasonable that WSDOT should explain  
13 itself and its rationale for saying that this most extreme environment that it is planning on  
14 creating will not have a detrimental effect on the environment in a residential neighborhood.

#### 15 IV. CONCLUSION

16 The SEPA claim made by the Appellant should not be dismissed pursuant to WSDOT's motion  
17 for summary judgment.

18 DATED this 11<sup>th</sup> day of May 2018

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**BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Konstantaras Response to WSDOT'S and City's Motion for Summary Judgment Regarding SEPA Compliance** to each person listed below, or on the attached mailing list, in the matter of **Four Seasons Hotel Seattle et al.**, Hearing Examiner Files: **HC-18-001 through HC-18-007** in the manner indicated.

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Dated this 11<sup>th</sup> day of May 2018



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