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Oregon House Transportation and Economic Committee

VIA E-MAIL

Re: HJM 22/ Columbia River Crossing

Dear Members of the Oregon House Transportation and Economic Development Committee:

I am the managing attorney for the Pacific Environmental Advocacy Center ('PEAC'), the domestic environmental law clinic at the Lewis & Clark School of Law in Portland. For the past three years I have been representing a coalition of environmental and public health groups who are concerned about the proposal to construct a new, much larger I-5 freeway, including the bridge over the Columbia River. This project is commonly referred to as the Columbia Crossing Project ("CRC"). Specifically I have been advising those groups regarding the CRC's compliance with the National Environmental Policy Act ("NEPA"), the federal law that requires federal agencies to prepare an environmental impact statement ("EIS") before approving a large project like the CRC.<sup>1</sup> My clients include Coalition for a Livable Future, Upstream Public Health, and the Rosemere Neighborhood Association. They have asked me to contact you while you are considering HJM 22 and to share my concerns about the legality of the CRC's NEPA analysis to date.

### National Environmental Policy Act

After reviewing of the Draft EIS ("DEIS) and subsequent decisions, and examining relevant case law, my legal assessment is that: (1) the NEPA process undertaken by the CRC to date has been deeply flawed, (2) recent developments have made that process even more problematic, and (3) if the CRC stays on its current course of approving a bridge proposal in a Final EIS later this year, federal court litigation regarding any such approval is almost certain and will have a good chance of succeeding.

I have already stated my criticisms of the CRC's April 2008 Draft EIS in official comments on that NEPA document and in less formal comments during multiple public hearings.

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<sup>1</sup> NEPA applies to the CRC because several federal agencies, including the Federal Highway Administration and Federal Transit Administration, are funding and must approve certain aspects of the CRC.

Rather than repeat those criticisms here, I am attaching an executive summary of my DEIS comments and a copy of my July 2010 testimony before the Governors' CRC Review Panel. These comments address a range of issues including the legal insufficiency in the number and range of alternatives that were a false choice between two extremes, and the failure to conduct the required analysis regarding several key aspects of this project's environmental impacts.

Recent developments in 2011 have transformed an already compromised NEPA process into one that is almost impossible to defend under existing applicable statutes, regulations and case law. We now know that the replacement bridge design presented in the DEIS (the open-web box girder design), and vigorously defended by CRC staff for the past three years, is not acceptable due to numerous technical and engineering problems. But that same DEIS did not evaluate or consider any alternative designs, including any of the three different designs that the CRC is now currently evaluating.

NEPA's most central, mandatory legal requirement is that a DEIS must consider and thoroughly evaluate a wide range of reasonable alternatives. 40 C.F.R. § 1502.14 and 1502.9(a). The CRC cannot cure the omission of an alternative design by simply dumping its ongoing analysis into a Final EIS. When there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact" an agency must prepare a Supplemental Draft EIS. 40 C.F.R. § 1502.9(c). The CRC cannot seriously dispute that the rejection of its only DEIS replacement bridge design, and its belated consideration of three new alternative designs, are exactly the type of "significant new circumstances" that trigger the legal requirement for a Supplemental DEIS.

It is my understanding that CRC staff are nevertheless insisting that the new bridge design recommended by the Departments of Transportation will have little impact on any replacement bridge's environmental impacts and that the 2008 DEIS sufficiently addressed those generic impacts. Such an argument however is easily refuted simply by focusing on one very large impact from the construction of any replacement bridge in and over the Columbia River—the impact on threatened salmon species.

### Endangered Species Act, NEPA, and Harm to Endangered Salmon

Recently the National Marine Fisheries Service issued a Biological Opinion regarding the CRC. One purpose of the Biological Opinion was to determine whether, under the Endangered Species Act ('ESA'), the CRC would cause "jeopardy" (i.e. extinction) for any threatened salmon species. The Biological Opinion, based on the open-web box girder design, found no jeopardy. But in order to reach that conclusion the Biological Opinion also had to evaluate CRC's proposal to significantly extend the "in water work window" for the Columbia River.

The in-water work window is a mitigation measure developed by state agencies in Oregon and Washington that protects salmon by significantly restricting when many activities can occur in the Columbia and Willamette rivers. The Biological Opinion authorizes the CRC to conduct in-water work far beyond the standard four month in-water work window for the Columbia River. The Biological Opinion's analysis and conclusions regarding jeopardy and the in-water work window (and other issues) are seriously flawed and violate the ESA and Administrative Procedure Act. But my focus here is the CRC's failure to comply with NEPA and the Biological Opinion underscores several such NEPA violations.

Although the DEIS acknowledged the standard in-water work window, it did not clearly disclose that extending that window would be an important aspect of the project and the DEIS did not even attempt to address the environmental impacts of such an extension. The federal case law regarding NEPA is very clear that a DEIS or Final EIS cannot simply incorporate or rely on

an ESA Biological Opinion to satisfy NEPA, which requires a much broader and comprehensive analysis of environmental impacts. Thus the January 2011 Biological Opinion cannot and does not “cure” the complete omission from the DEIS of the impacts caused by any significant extension of the in-water work window, and this issue also triggers the need for a Supplemental DEIS.

#### Failure To Study Lower Impact Alternatives

But there is even more. The Biological Opinion’s analysis, like the analysis in the DEIS, was based solely on impacts from the now-rejected open-web box girder design. However, we now know, thanks to the February 2011 CRC Bridge Review Panel Final Report, that there are at least two alternative designs, the cable stay and arch design, that were not even disclosed in the DEIS much less discussed, that could have significantly lower impacts on threatened salmon. Both of those designs would have fewer in-water piers and would not have piers in shallow water. Of course, it is impossible to be sure that such lesser impacts would actually occur absent a complete, public NEPA analysis regarding these alternative designs. But the mere fact that viable designs exist, that could have lower impacts on salmon, and those alternative designs were not analyzed in the DEIS, is a rather clear violation of NEPA, unless the CRC prepares a Supplemental DEIS.

Apparently the CRC chose not to pursue these alternative designs because of concerns about impacts on nearby Pearson Field. But as the 2011 Bridge Review Panel Final Report noted, “It is not apparent that an airspace design exception for Pearson Field has been pursued with the FAA.” Report at 24. In other words, the CRC chose Cessnas over salmon without even determining that such a choice was even necessary. This kind of arbitrary decision-making would not be easy to defend in federal court NEPA litigation.

#### Inaccurate Traffic Forecasts

Finally, I want to address one more “recent development” that has gotten far too little attention. The CRC’s traffic forecasts in the DEIS were criticized at the time the DEIS was issued in 2008. Such forecasts are critical because they provide both the justification for the sizing of the project (number of lanes and size of interchanges), and because they underpin the financing of the project through toll backed bonds. Since 2008, actual data shows that the critics were right. The CRC forecast that traffic over I-5 would grow 1.3 percent per year from 2005 to 2030, from 135,000 vehicles per day to 184,000 vehicles per day. In fact, since 2005, traffic on the I-5 bridges has declined.

Even when gas prices were between \$1.00 and \$2.00 per gallon, the rate of traffic increase on the current bridges was only 0.6 percent (1999 to 2004). Traffic levels in the nearly five years since CRC forecasts were completed have actually declined: traffic volumes on the I-5 bridges have declined by about 7,000 vehicles per day, rather than increasing by about 7,000 vehicles per day as forecast by the CRC. The CRC forecasts assumed—without any reasonable basis—that traffic growth on the I-5 crossing would accelerate, when in fact the traffic growth rate has been decelerating systematically over the past 15 years.

The inaccuracy of these forecasts casts serious doubt on the findings contained in the environmental impact analysis (as these forecast traffic levels are used as the baseline for calculating the net environmental impacts of build alternatives) and also on the financial analysis. If the bridge has less traffic than forecast, toll bonds will not produce the projected levels of revenue, and the project will experience significant revenue shortfalls, that could

produce bond defaults or require additional state subsidies.

### Conclusion

The CRC staff, and the state and federal agencies supporting this project, have already made a serious error regarding the bridge design. My letter highlights their multiple serious legal errors regarding compliance with NEPA. It would be an equally serious error, and a waste of even more taxpayer money, for this committee to simply rubberstamp the CRC's mistakes by passing HJM 22 and thereby endorsing this project before those mistakes have been fully corrected.

Sincerely,

/s/Tom Buchele

Tom Buchele

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cc: Co-Speaker Hanna  
Co-Speaker Roblan  
House Republican Leader Cameron  
House Democratic Leader Hunt