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Introduction

I am the managing attorney for the Pacific Environmental Advocacy Center (“PEAC”), which is the domestic environmental law clinic at the Lewis & Clark Law School. I offer this testimony on behalf of the Northwest Environmental Defense Center, Coalition for a Livable Future, Columbia Riverkeeper, Audubon Society of Portland, Organizing People-Activating Leaders, Community Health Partnership, Upstream Public Health, and the Association of Oregon Rail and Transit Advocates. Although they are not a formal client, I am also authorized to offer testimony on behalf of the Rosemere Neighborhood Association.

The focus of my involvement in the CRC project and PEAC’s representation of these groups regarding that project has been to advise them and to advocate for a proper and legal process and evaluation of the CRC project under the National Environmental Policy Act, 42 USC. Sec. 4321, et seq., NEPA’s implementing regulations, 40 CFR Sections 1500.1-1508.28 (2009), and other applicable regulations and rules.

Along with this testimony I am submitting a copy of our lengthy DEIS comments, and seven copies of the Executive Summary of those comments.

Avoiding NEPA as the CRC's "Raison de'etre"

In my opinion, the CRC's focus from the beginning has been to avoid NEPA's requirements or to do as little as possible to comply with them. I'll start with the most recent evidence in support of my opinion.

The CRC and its Project Sponsors' Council have recently been considering changes to the "Locally Preferred Alternative." Both CRC staff and members of that Council have repeatedly stated, both publicly and in meetings with other elected officials, that the primary factor influencing what changes they would consider is whether a particular change or changes would trigger the need to prepare a Supplemental Environmental Impact Statement under NEPA. Do we really want avoiding NEPA's public disclosure and public involvement requirements to be the primary factor determining what changes can be made to a \$ 4 billion project? Is this really how the CRC and the FHWA think that regional transportation planning should be conducted?

This entity is also evidence of that NEPA avoidance behavior. According to a June 7, 2010 letter to me from Chairman Warne, the IRP has been told to examine the CRC's "implementation plan, financial plan and post-construction performance measures." These are all subjects that could and probably should be evaluated in a comprehensive DEIS for a proposal of this size. And yet, the June 7th letter also told me that the IRP's "efforts are not part of the formal NEPA process." Why not?

So What Does NEPA Require and Why is the CRC Afraid of it?

NEPA of course is the statute that requires federal agencies to prepare Environmental Impact Statements. But what does not actually mean?

--NEPA requires federal agencies to explain the rationale for their proposed actions, and to provide an analysis of its impacts, including a comparison with a “wide range of reasonable alternatives”. 40 CFR Sections 1502.13-1502.16.

--NEPA requires that the agency set out their near-final explanation and analysis in a public document—the DEIS-- that is offered to the public for their consideration and comments well before the agency makes any actual or final decision regarding how to proceed. See 40 CFR Sections 1500.1,1500.2,1502.9, 1503.1.

--NEPA requires the agency to respond to the public’s comments in its FEIS when it makes its actual decision. 40 CFR Sec. 1503.4.

Because no one likes to be second-guessed or embarrassed about the actual consequences of what they are proposing to do, NEPA is not a favorite of federal agencies or the CRC, but it often fulfills its ultimate goal of “fostering excellent action.” See 40 CFR Sec. 1500.1(c).

Why a Supplemental DEIS is Both Legally Required and a Good Idea Generally.

NEPA’s regulations set out the standard for when a supplemental EIS is required. 40 CFR Sec. 1502.9(c). Generally substantial changes to the proposed action or significant new circumstances or information trigger the requirement. But it also applies when the purpose of NEPA would be served by preparing an SEIS.

Here a Supp. DEIS is necessary because the initial DEIS was wholly inadequate and failed to achieve the basic purpose under NEPA for a DEIS. In addition CRC has made substantial changes to the project and prepared significant new analysis and data regarding its impacts since

the DEIS was published. CRC may quibble about the first points, but the last point is really beyond dispute.

The Initial DEIS—A failed and misleading effort if judged by the Standards of a high school research paper.

This entity's existence is evidence that the initial DEIS and, indeed even CRC/FHWA's post-DEIS public education efforts, have failed to achieve one of NEPA's basic purposes—to offer a complete analysis of its proposal and its likely impacts in one comprehensive document that is accessible to the public and subject to meaningful public comment. That has not happened and legally cannot happen in an FEIS.

Rosemere Neighborhood Association has offered one of the best, bottom-line criticisms of the DEIS—the DEIS, despite its length, simply does not contain baseline data sufficient enough to analyze environmental impacts. For example, the DEIS contains no hydrological study to analyze groundwater impacts such as impacts to the Troutdale sole source aquifer.

The DEIS also offers entire sections of its “analysis” and even entire “technical reports” that are wholly unsupported by citations to scientific studies. The DEIS's Ecosystems Analysis and Technical Report, which is intended to include impacts to listed salmon species, is perhaps the best example of this. As we noted in our DEIS comments (DEIS comments at 3-4, 91-98) , this “Technical Report” is completely devoid of footnotes, even though NEPA specifically requires them. 40 CFR Sec. 1502.24. How can the public evaluate a non-existent and unsupported “analysis?” This is a serious issue, and I have yet to hear any explanation from the CRC for why

they would put out a DEIS when they were obviously not prepared to offer a serious analysis and specific evaluation of the impacts of their proposal on threatened salmon. Failing to include this in the DEIS and intending to dump it into the FEIS is flatly inconsistent with many of NEPA's basic purposes.

The DEIS is apparently also premised on a flawed assumption by the CRC. Richard Brandman of the CRC, when defending and explaining the DEIS's "gold plated" replacement bridge alternative, was quoted in the July 22, 2009 *Oregonian* as saying that the CRC was required to evaluate a proposal in the DEIS "that responds to its purpose and need without regard to cost....That's actually the regulations." I asked him, via e-mail, if that quote was accurate and if it was, to please cite the regulations. His response did not deny the quote's accuracy, did not provide a citation, and instead tried to change the subject. The quote actually explains a lot of what is wrong with the DEIS.

The DEIS itself and the CRC's defense of it have been undermined by repeated, misleading assertions. For example—

The replacement bridge alternative would "reduce greenhouse gas emissions". That is simply not true, especially when considered in the context of state policies in Oregon and Washington that seek actual overall reductions in greenhouse gas emissions. The evaluated alternative in the DEIS would only cause lower increases than the no action alternative. This assertion misleads the public.

The CRC has engaged in repeated obfuscations regarding the actual size of their proposal-- the number of traffic lanes—using misleading labels and ultimately distinguishing between how many lanes will "be stripped" and how many lanes are actually built. From the very beginning

the CRC's one non-negotiable goal and purpose was to build a bridge that added as much additional traffic lane capacity as possible. This led to a flawed purpose and need statement in the DEIS, and a flawed alternatives analysis.

Subsequent Changes and Analysis—When was the information you have been shown compiled and prepared?

What is the current "Locally Preferred Alternative?"

How much of the analysis and data that you have been shown was created or compiled after April of 2008? I have no doubt that the vast majority of what the CRC has shown you fits that description and therefore was not and could not have been included in the DEIS. Why did they issue a DEIS before compiling this information and before conducting this analysis?

The CRC in fact intends to dump all or most of this new analysis and information into an FEIS – which is too late for meaningful public participation under NEPA.

Under NEPA the public is entitled to review and comment on that relevant information in one EIS and to be given the opportunity to comment on that analysis in a meaningful way—before a decision has been made and with a legally required response from the decision-maker. This will not happen unless there is a Supplemental DEIS.

On behalf of my clients, I therefore repeat our request for a truly comprehensive Supplemental DEIS. That SDEIS, as intended by NEPA, should give the public an opportunity to evaluate and comment on the actual proposal, reasonable alternatives and the complete and scientifically supported analysis of the environmental consequences.

