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8 *Attorneys for Plaintiffs*

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF OREGON
12 PORTLAND DIVISION
13

14 NO MORE FREEWAYS, CHRISTOPHER
SMITH, ELIOT NEIGHBORHOOD
15 ASSOCIATION, NEIGHBORS FOR
CLEAN AIR, FAMILIES FOR SAFE
16 STREETS, ASSOCIATION OF OREGON
RAIL AND TRANSIT ADVOCATES, and
17 BIKELOUD,

18 Plaintiffs,

19 v.

20 UNITED STATES DEPARTMENT OF
TRANSPORTATION, UNITED STATES
FEDERAL HIGHWAY ADMINISTRATION,
21 and SHAILEN BHATT, Administrator of the
Federal Highway Administration,

22 Defendants.
23
24

Case No.:

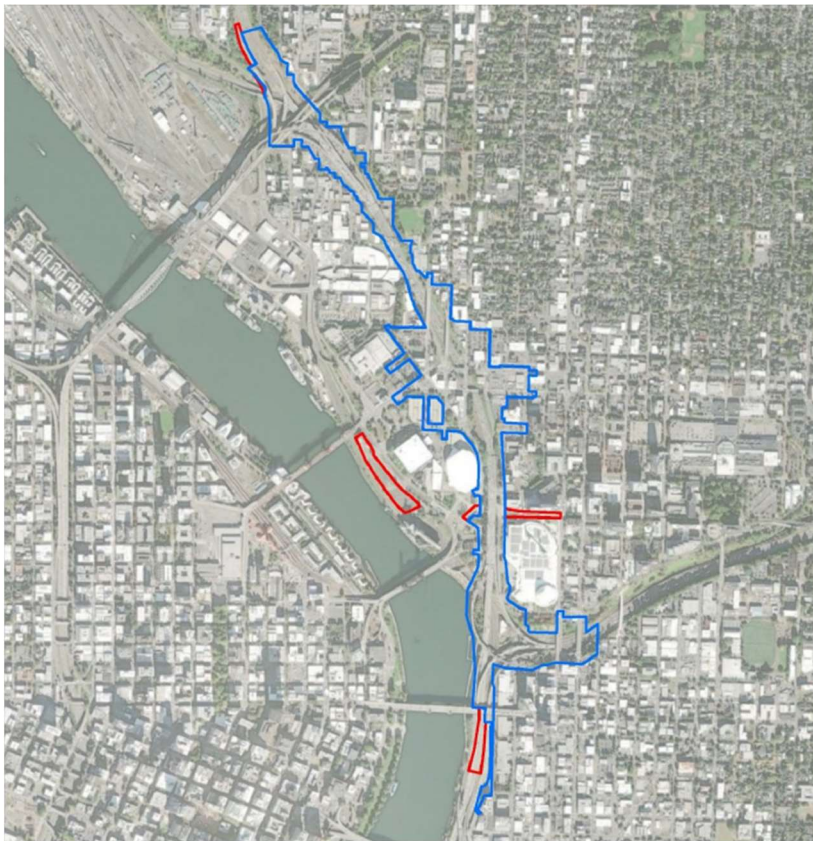
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

(National Environmental Policy Act, 42
U.S.C. §§ 4321 *et seq.*, Administrative
Procedure Act, 5 U.S.C. §§ 701 *et seq.*,
U.S. Department of Transportation Act,
49 U.S.C. § 303(c), Federal Highways
Act, 23 U.S.C. §§ 134 *et seq.*)

1 **STATEMENT OF THE CASE**

2 1.

3 Defendants United States Department of Transportation (“DOT”) and the United
4 States Federal Highway Administration (“FHWA”) approved the Interstate 5 (“I-5”) Rose
5 Quarter Freeway Expansion & Improvement Project (“the Project”) by issuing a new
6 Finding of No Significant Impact (“FONSI”) and a Revised Supplemental Environmental
7 Assessment (“RSEA”) for the Project. These documents were prepared in conjunction
8 with the Oregon Department of Transportation (“ODOT”). The Project is located in
9 Portland, Oregon, on I-5 between Interstate 405 (I-405) and Interstate 84 (I-84). It
10 includes the Broadway/Weidler interchange, and changes to adjacent surface streets in
11 the vicinity of Broadway/Weidler interchange. An image showing the Project area
12 outlined in blue is provided:



1 As part of the Project's actions, Defendants (in conjunction with ODOT) plan to, in
2 part, expand the freeway and to construct new auxiliary lanes and shoulders
3 between I-84 to the south and I-405 to the north, in both southbound and northbound
4 directions. In addition, defendants/ODOT will re-stripe the I-5 mainline to provide the
5 I-5 southbound auxiliary lane between the I-84 off-ramp and the Morrison Bridge/SE
6 Portland/Oregon Museum of Science and Industry off-ramp. Removal, and in some
7 cases construction or reconstruction, of structures over I-5 would also occur.

8 2.

9 Urban freeways have significant impacts on the cities in which they exist, and the
10 Project will have a significant impact on the City of Portland and its residents – in part
11 because of the tremendous cost of the Project which is currently estimated at
12 approximately \$1.9 Billion. This is the newest, and largest, of the Project cost estimates.
13 Plaintiffs suspect that future estimates and actual costs will be higher. This Billion-dollar
14 expansion is proposed, despite the existence of much more fiscally conservative
15 alternatives that can satisfy the Project's purposes and needs.

16 3.

17 In approving the Project, Defendants have violated the National Environmental
18 Policy Act ("NEPA") and the regulations implementing NEPA which is a violation of the
19 Administrative Procedure Act ("APA"), section 4(f) of the U.S. Department of
20 Transportation Act ("Transportation Act") within the meaning of the APA, as well as the
21 Federal Highways Act and the regulations and policies implementing that statute, which
22 are also violations of the APA.

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4.

Plaintiffs seek relief declaring that Defendants' approval of the Project violates NEPA, the Transportation Act, the Federal Highways Act, and the APA, as well as an order vacating the FONSI and RSEA and remanding the matter with directions requiring Defendants to prepare an Environmental Impact Statement ("EIS"). Defendants should also be enjoined from implementing the Project pending further review of the Project and compliance with all applicable provisions of law.

JURISDICTION

5.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) (action for declaratory and injunctive relief arising under the Constitution and laws of the United States); 28 U.S.C. §§ 2201, 2202 (power to issue declaratory or injunctive relief in cases of actual controversy); and 5 U.S.C. §§ 702-706 (the APA), because (1) the action arises under the laws of the United States, (2) each Defendant is sued in its official capacity, and (3) there is a present, actual and justiciable controversy between the parties.

6.

Plaintiffs commented on the Revised Supplemental Environmental Assessment (RSEA), as well as engaged with the FHWA and ODOT at every opportunity afforded the public. In so doing, Plaintiffs have exhausted all administrative remedies available to them as required by the APA. The challenged agency action is final and subject to this Court's review pursuant to 5 U.S.C. §§ 702, 704, and 706. Some of Plaintiffs also submitted a letter requesting supplemental analysis under NEPA.

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1 **VENUE**

2 7.

3 Venue properly rests in the District of Oregon pursuant to 28 U.S.C. § 1391(e)
4 and 5 U.S.C. § 703 (APA) because all or a substantial part of the events or omissions
5 giving rise to the claims herein occurred within this judicial district and the agency
6 records in question are located in this district. This case is filed properly in Portland,
7 Oregon pursuant to Local Rule 3.2.

8 **PARTIES**

9 8.

10 Plaintiff NO MORE FREEWAYS (“NMF”) is an unincorporated association of
11 individuals and organizations in the State of Oregon dedicated to reducing the impact of
12 urban freeways on climate change, air quality and urban quality of life. NMFs’ members
13 make the community aware of adverse impacts of urban freeway expansions and
14 advocate for responsible alternatives. The organization’s membership includes many
15 individuals who live, work, go to school and recreate in the impact area of this project,
16 the I-5 corridor generally, and the Portland metropolitan regional freeway network.
17 NMFs’ members pursue, and have concrete plans to continue pursuing the
18 aforementioned activities, as well as a reduction of community impacts from urban
19 freeways and freeway expansions. These intersections of NMF and its members are
20 substantial and are adversely affected by Defendants’ failure to comply with NEPA. The
21 requested relief will redress the injuries of No More Freeways and its members.

22 9.

23 Plaintiff CHRISTOPHER SMITH is a member of NMF, a resident of Portland,
24

1 Oregon, and is interested in seeking a better climate future, and preserving and
2 enhancing what's left of the neighborhoods near the I-5 corridor. He regularly utilizes
3 the Project Area, and would be harmed by the increased noise, traffic, and pollution that
4 comes with a roadway expansion.

5 10.

6 Plaintiff ELIOT NEIGHBORHOOD ASSOCIATION ("Eliot") is a neighborhood
7 association and nonprofit in the State of Oregon, dedicated to achieving a better
8 environment, better physical accommodations, and an improved quality of urban life for
9 their residents. Eliot's members participate by meeting to discuss private and public
10 projects affecting the neighborhood. The organization's membership includes all people
11 who live or work within their boundaries who consent to being members. Eliot's
12 members and board members pursue, and have concrete plans to continue pursuing,
13 reducing diesel pollution in the neighborhood, reducing vehicle miles traveled through
14 the neighborhood, encouraging the welfare of the neighborhood, encouraging
15 immediate development of underused properties in the area, encouraging transit use
16 through the area, encouraging bicycle transportation and other non-car uses, improving
17 public trust in government spending through fiscal responsibility, and improving public
18 urban design.

19 11.

20 Plaintiff NEIGHBORS FOR CLEAN AIR ("Neighbors") is an Oregon environmental
21 nonprofit which advocates for better air quality in Oregon with an emphasis on public
22 health, and empowering Oregonians with information and tools to ensure everyone can
23 breathe clean air. Plaintiff Neighbors has more than three thousand members, the
24

1 majority of whom live in the state of Oregon and many of whom participate in advocacy
2 for the improvement of local air quality. Some of these members live, work, and play in
3 the area affected by the expansion of the I-5 freeway, or teach or have children
4 attending Harriet Tubman Middle School, which is directly adjacent to the freeway.
5 Conducting extended construction and increasing traffic, without first conducting a
6 full environmental impact statement, affects their ability to protect
7 community health and provide information about risk to our members. These
8 intersections of Neighbors for Clean Air and its members are substantial and are
9 adversely affected by Defendants' failure to comply with NEPA. The requested relief will
10 redress the injuries of Neighbors for Clean Air and its members.

11 12.

12 Plaintiff FAMILIES FOR SAFE STREETS OF OREGON AND SOUTHWEST
13 WASHINGTON ("Families") supports individuals who have lost loved ones or been
14 injured in traffic crashes, and also advocates for life-saving changes to our
15 transportation networks. The investment choices for the Rose Quarter project will
16 impact street safety in the Project Area as well as in other areas NOT funded because
17 of the choice to invest in this roadway expansion.

18 13.

19 Plaintiff ASSOCIATION OF OREGON RAIL AND TRANSIT ADVOCATES
20 ("AORTA") is the assumed business name of "Oregon Association of Railway
21 Passengers," a public education 501(c)(3) nonprofit Oregon corporation, established in
22 1976 to promote safe, economical, environmentally responsible, and equitable
23 transportation. Mobility for people and materials are essential freedoms, and the Rose
24

1 Quarter Project represents a diversion of resources that could go toward better
2 alternatives that is also less harmful to AORTA's members.

3 14.

4 Plaintiff BIKELOUD PDX ("BikeLoud") is a membership organization dedicated to the
5 mission of ensuring Portland follows its own goal to make the city a place where one
6 quarter of all trips are done on bicycles. BikeLoud members daily bicycle through the
7 Rose Quarter Project Area and will be impacted by any investment and expansion
8 made in this project.

9 15.

10 Defendant United States Department of Transportation ("DOT") is a cabinet level
11 agency of the United States Government and its principal place of business is located at
12 1200 New Jersey Avenue, SE, Washington, DC 20590. DOT is the executive
13 department of the federal government responsible for approval of federally funded
14 highway projects.

15 16.

16 United States Federal Highway Administration ("FHWA") is an operating
17 administration of DOT, and its principal place of business is located at 1200 New Jersey
18 Avenue, SE, Washington, DC 20590. FHWA is the administration primarily responsible
19 for highway planning and funding. FHWA, through its Oregon Division and in
20 conjunction with ODOT, prepared, reviewed and approved the all drafts of the
21 Environmental Assessment, including the current RSEA and the FONSI.

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1 17.

2 SHAILEN BHATT is the chief executive officer and administrator of the FHWA. He is
3 responsible for the administration, operations, and activities of FHWA and its various
4 divisions. Administrator Bhatt maintains his office at 1200 New Jersey Avenue, SE,
5 Washington, DC 20590. Administrator Bhatt is sued in his official capacity.

6 **PRIMARY GOVERNING LAW**

7 **The National Environmental Policy Act (NEPA)**

8 18.

9 NEPA is the so-called Magna Carta of American environmental law, and it embodies
10 our Nation’s environmental conscience. Congress issued a fundamental declaration of
11 values, including a call to action that focused on the protection of human health and the
12 environment in all federal agencies.

13 19.

14 NEPA has twin aims. First, NEPA requires federal agencies to consider every
15 significant aspect of the environmental impact of a proposed action. Second, NEPA
16 ensures that the agency will inform the public that it has indeed considered
17 environmental concerns in its decision-making process.

18 20.

19 According to 40 C.F.R. § 1502.1 (2016),¹ the primary purpose of a NEPA analysis is
20 to serve as an action-forcing device to ensure that the policies and goals defined in
21 NEPA are infused into the ongoing programs and actions of the Federal Government.

22 _____
23 ¹ As noted in the RSEA itself, “the CEQ regulations that were in effect on November 17,
24 2016, when the NEPA process for the I-5 Rose Quarter Improvement Project was
initiated, continue to apply to the I-5 Rose Quarter Improvement Project RSEA, as it is a

1 21.

2 NEPA procedures ensure that environmental information is available to public
3 officials and citizens before decisions are made and before actions are taken. Accurate
4 scientific analysis, expert agency comments, and public scrutiny are essential to
5 implementing NEPA, pursuant to 40 C.F.R. § 1500.1(b) (2016).

6 22.

7 NEPA and its implementing regulations promulgated by the Council on
8 Environmental Quality (“CEQ”) require federal agencies to prepare an environmental
9 impact statement (“EIS”) for every recommendation or report on proposals for legislation
10 and other major federal actions significantly affecting the quality of the human
11 environment, pursuant to 42 U.S.C. § 4332(2)(C). Moreover, for those major federal
12 actions, agencies must analyze and disclose the environmental impact of the proposed
13 action, any adverse environmental effects which cannot be avoided should the proposal
14 be implemented, alternatives to the proposed action, the relationship between local
15 short-term uses of the human environment and the maintenance and enhancement of
16 long-term productivity, and any irreversible and irretrievable commitments of resources
17 which would be involved in the proposed action should it be implemented. Pursuant to
18 42 U.S.C. § 4332(E), agencies must study, develop, and describe appropriate
19 alternatives to recommended course of action in any proposal which involves
20 unresolved conflicts concerning alternative uses of available resources. Pursuant to 40
21 C.F.R. § 1508.9 (2016), an environmental assessment (“EA”) shall include brief

22
23 _____
24 continuation of the ongoing NEPA process started under those regulations.” RSEA p.5
n.2.

1 discussions of the need for the proposal, of alternatives, and of the environmental
2 impacts of the proposed action and alternatives.

3 23.

4 NEPA requires federal agencies to analyze the direct, indirect, and cumulative
5 impacts of proposed actions, pursuant to 42 U.S.C. § 4332(2)(C)(i)-(ii), 40 C.F.R. §§
6 1508.7 (2016), 1508.8 (2016).

7 **The Administrative Procedure Act (APA)**

8 24.

9 The Court's review of plaintiffs' NEPA and other claims is governed by the APA.

10 25.

11 Pursuant to 5 U.S.C. § 702, the APA mandates that a person suffering legal wrong
12 because of an agency action, or adversely affected or aggrieved by agency action
13 within the meaning of a relevant statute, is entitled to judicial review thereof.

14 26.

15 Pursuant to 5 U.S.C. §§ 706(2)(A) and (D), the reviewing court shall hold unlawful
16 and set aside agency actions, findings, and conclusions found to be arbitrary,
17 capricious, or an abuse of discretion or otherwise not in accordance with law, or which
18 have been taken without observance of procedure required by law.

19 **PROCEDURAL BACKGROUND**

20 27.

21 On November 28, 2018, some of Plaintiffs requested an extension of the public
22 comment period, and the Defendants or their agents denied that request on January 11,
23 2019.

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28.

On February 15, 2019, the Defendants issued a Draft Environmental Assessment (“DEA”).

29.

On March 4, 2019, some of Plaintiffs requested that the agencies provide key data that was not included in the DEA and its appendices. The agencies did not make this requested information (roughly 632 pages) available until March 13, 2019.

30.

On March 18, 2019, some of Plaintiffs requested an extension to submit comments on the DEA given that the agencies did not provide the public with access to all relevant information for the DEA until well after the DEA was published. The agencies denied the request for an extension of time to comment on the DEA.

31.

On March 23, 2019, through a public records request, ODOT released roughly 33GB of electronic files containing engineering diagrams and drawings of the Project.

32.

On March 25, 2019 ODOT disclosed traffic modeling assumptions for the Project.

33.

On April 1, 2019, Plaintiffs and thousands of others submitted comments on the DEA.

34.

On September 12, 2020, some of plaintiffs sent a letter to the agencies requesting supplemental NEPA analysis based on significant new information.

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35.

On October 15, 2020, FHWA issued a response to the request to prepare supplemental NEPA analysis, indicating that the agencies would respond to the letter within the Revised Environmental Assessment (“REA”).

36.

On October 30, 2020, the agencies issued the FONSI and REA for the Project.

37.

On November 6, 2020, the Federal Register published the Notice of Final Federal Agency Actions on I-5 Rose Quarter Improvement Project in the City of Portland, Multnomah County, Oregon.

38.

On April 2, 2021, some of the Plaintiffs filed a complaint contesting the validity of the FONSI and REA for strikingly similar reasonings as this present complaint. Claims were brought under NEPA, the APA, and the Department of Transportation Act.

39.

On January 18, 2022, the agencies withdrew the FONSI and REA.

40.

In November 15, 2022 FHWA and ODOT released a Supplemental Environmental Assessment (SEA) for comment to the public.

41.

On January 4, 2023, Plaintiff NMF submitted a comment letter to the agencies addressing concerns over the validity of the SEA.

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42.

On March 12, 2024, the agencies issued the present FONSI and RSEA for the Project.

43.

On March 20, 2023, Plaintiff NMF submitted a letter to FHWA addressing the lack of reasonably available funding given the current budgeting situation in the State of Oregon.

FIRST CLAIM FOR RELIEF
Violation of NEPA and the APA
Count I
Failure to Prepare an Environmental Impact Statement

44.

Plaintiffs incorporate by reference ¶¶ 1-43.

45.

NEPA, specifically 42 U.S.C. § 4332(2)(C), requires agencies to prepare an EIS for all major federal actions significantly affecting the quality of the human environment.

46.

Defendants prepared an EA for the Project. Pursuant to 40 C.F.R. § 1508.9(a)(1) (2016), to instead prepare an EA, it must contain sufficient evidence and analysis for determining whether to prepare an Environmental Impact Statement or a Finding of No Significant Impact.

47.

Under 40 C.F.R. § 1508.27 (2016), which lists the regulatory factors used to determine significance, the environmental impacts of the project are significant.

1 Defendants' authorization of the Project without preparing an EIS violates NEPA
2 because the Project is a major federal action significantly affecting the quality of the
3 human environment.

4 48.

5 The Project is significant under 40 C.F.R. § 1508.27(b)(1) (2016) because the
6 project may result in significant adverse environmental impacts, including increased
7 congestion and increase vehicular miles driven in the Project Area, resulting in
8 increased air pollution and greenhouse gases, and decreased safety along the freeway
9 and on city streets.

10 49.

11 The Project is significant under 40 C.F.R. § 1508.27(b)(2) (2016) because the
12 Project will increase the adverse environmental impacts associated with public health
13 and safety. While the project proposes to increase safety, the Project will widen the
14 highway immediately adjacent to Harriet Tubman Middle School, providing for, at the
15 very least, a 5 to 14 percent increase in vehicle trips in that area.² This will jeopardize
16 the safety of children and staff at the Harriet Tubman middle school by increasing the
17 capacity of the highway to accommodate greater traffic loads. That traffic will, in turn,
18 increase air pollution in the area of the middle school, as well as decrease safety along
19 the freeway and on City streets in the area. Furthermore, the Project's increased
20 capacity will, as noted in the RSEA, also increase greenhouse gases.³ The Project will
21 also create a roadway capable of accommodating even more additional lanes of traffic
22

23 ² RSEA, 3.13.2.4, p. 112.

24 ³ RSEA, 3.16.2, p. 123.

1 beyond what is proposed for the Project, and the adverse impacts of that increase in
2 capacity was not analyzed or disclosed in the RSEA.

3 50.

4 The Project is significant under 40 C.F.R. § 1508.27(b)(3) (2016) because the
5 project will significantly affect unique characteristics of the geographic area. Not only is
6 Harriet Tubman middle school located immediately adjacent to the Project Area but the
7 project will increase the proximity of the highway to the middle school.

8 51.

9 The Project Area and its vicinity are also home to a number of notable Black-owned
10 businesses and civic organizations. Bill Webb Elks Lodge, a property associated with
11 Black history in NE Portland, is located within the Project Area and is included on the
12 National Register of Historic Places. The Urban League of Portland, one of the Portland
13 Black community's principal advocacy and service organizations, is also located in the
14 area. All of these unique characteristics of the area will now be subject to worsening air
15 quality and increased vehicular use in the areas adjacent to these city features.

16 52.

17 The Project is significant under 40 C.F.R. § 1508.27(b)(4) (2016) because the
18 effects to the Project are highly controversial. The agencies' analysis of air quality,
19 transportation impacts, noise impacts, climate emissions, and so forth are contingent
20 upon the transportation modeling, much of which has been kept from the public's
21 scrutiny. For the modeling that has been disclosed, the agencies misused the modeling
22 data by, including adopting a modeling strategy and assumptions that are at odds with
23 the best available science on the effects of induced demand. The agencies also

1 erroneously relied upon assumptions related to vehicle fleet composition and turnover,
2 amongst others assumptions, to artificially reduce emissions. Furthermore, the agencies
3 analysis of the project is misleading and/or inaccurate concerning the size, nature,
4 and/or effect on future traffic demand as a result of the highway expansion. Finally, in
5 setting a baseline, the project relied upon a number of infrastructure projects, such as a
6 12-lane freeway bridge across the Columbia River, which have not yet even been
7 authorized, much less begun to be constructed. This was done despite repeated public
8 requests to at least fully explain how the erroneous or misused assumptions fit into the
9 agencies' decision-making process.

10 53.

11 The Project is significant under 40 C.F.R. § 1508.27(b)(5) (2016) because the
12 effects on the human environment are highly uncertain. The agencies' analysis of air
13 quality, transportation impacts, noise impacts, climate emissions, and so forth are
14 contingent upon the transportation modeling, much of which has been kept from the
15 public's scrutiny. For the modeling that has been disclosed, the agencies misused the
16 modeling data by, including but not limited to, adopting a modeling strategy and
17 assumptions that are at odds with the best available science on the effects of induced
18 demand. The agencies also erroneously relied upon assumptions related to vehicle fleet
19 composition and turnover, amongst others assumptions, to artificially reduce emissions.
20 The agencies also relied upon a number of infrastructure projects which have not yet
21 even been authorized, much less begun to be constructed, all with uncertain effects on
22 the Project Area.

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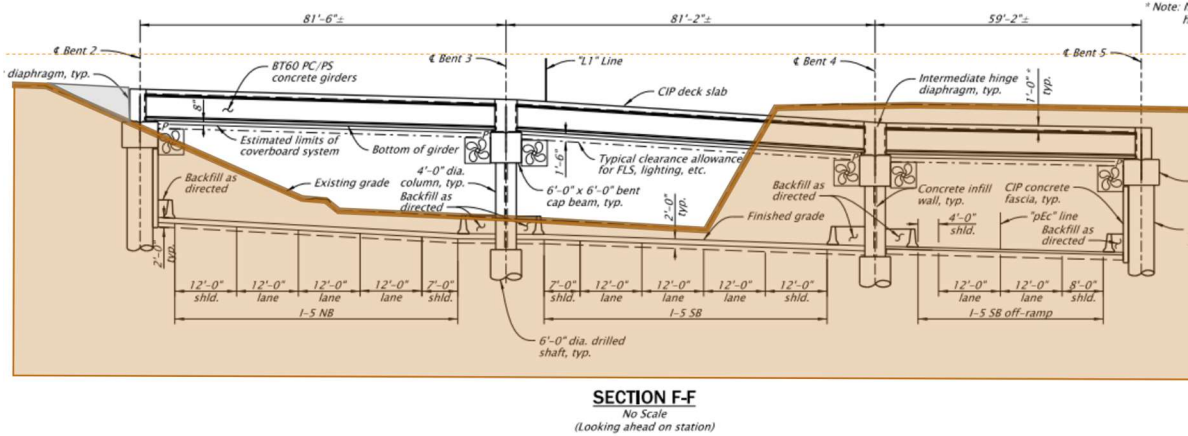
The Project is significant under 40 C.F.R. § 1508.27(b)(6) (2016) because the project may establish a precedent for future actions with significant effects. The agencies have included the roughly \$3 billion Columbia River Crossing Project (CRC - also known as the Interstate Bridge Replacement or IBR) within the alleged baseline.⁴ The Columbia River Crossing Project is a 12-lane-wide, five-mile-long freeway widening project located approximately three miles north of the Project. If the Project is approved as an RSEA and assumes the existence of the Columbia River Crossing Project, then the Columbia River Crossing (which only now is going through its own NEPA process under the name “Interstate Bridge Replacement”) may be argued to be insignificant under NEPA, when it certainly is not.

55.

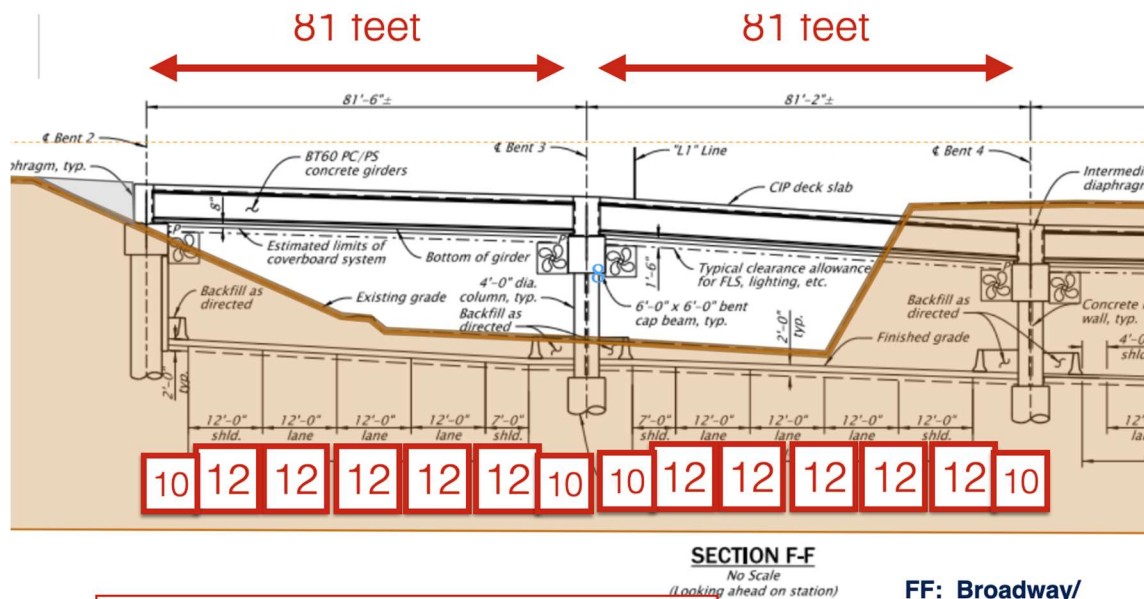
The Project will also create a roadway capable of accommodating additional lanes of traffic beyond what is proposed for the Project. It will do so by creating an expansion to the shoulder which, based on internal ODOT documents, could extend the road to up to between 160-250 feet wide. This more than doubles the width of I-5. It includes a “shoulder” that is far larger than even ODOT consultants believed was necessary for the safety purposes. This massive expansion would allow for additional lanes of traffic to be proposed or implemented in the future, most likely without any further environmental analysis. Here is what the current proposal in the RSEA looks like in terms of lane and

⁴ RSEA Appendix C, *Reasonably Foreseeable Future Actions Comparison*, 2.2, p.3.

1 shoulder sizing with only one additional auxiliary lane:



8 Here is what that sized roadway could be re-striped to look like:



10 lanes with 45 feet for shoulders/structures.

FF: Broadway/
Weidler

20 That sort of "re-striping" without further environmental analysis would be consistent
21 with both prior projects and guidance issued by the Defendants. The direct and indirect
22 effects of that additional lane expansion have not been, and most likely given
23 Defendants prior conduct and guidance would never be, analyzed or disclosed. That

1 includes the impacts from traffic, noise, and pollution of the many thousands of vehicles
2 that those additional lanes would allow on the highway.

3 57.

4 The Project is significant under 40 C.F.R. § 1508.27(b)(7) (2016) because the
5 agencies have misconstrued the project's cumulative impacts. The Columbia River
6 Crossing is a reasonably foreseeable project utilized in determining a baseline, but the
7 agencies failed to prepare a cumulative impacts analysis for the Columbia River
8 Crossing. Congestion pricing (also known as value pricing or tolling) is also reasonably
9 foreseeable, as that has been planned for implementation along I-5 and Interstate 205
10 (I-205) by ODOT and/or the Oregon legislature. Nonetheless, Defendants failed to
11 prepare a cumulative impacts analysis for congestion pricing or to include that in the
12 cumulative impact analysis that was conducted.

13 58.

14 The Project is significant under 40 C.F.R. § 1508.27(b)(8) (2016) because the action
15 may adversely affect highways and culturally historic areas. As to highways, the effect
16 of the project will be to increase capacity of the highway, creating induced demand that
17 will then cause the new larger highway to also be filled to capacity, something
18 commonly known as the "fundamental law of road congestion." The agencies also
19 erroneously relied upon assumptions related to vehicle fleet composition and turnover,
20 amongst others assumptions, to predict artificially reduced emissions. Actual emission
21 will be greater. The effect of the project will also adversely affect a number of notable
22
23
24

1 pillars of Portland’s Black community, including the Bill Webb Elks Lodge, the Urban
2 League of Portland, the Harriet Tubman Middle School, and Lillis-Albina Park.⁵

3 59.

4 The Project is also significant under 40 C.F.R. § 1508.27(b)(10) (2016). The project
5 threatens to violate Federal, State, and local law, including Section 4(f) of the
6 Transportation Act, the Federal Highways Act, Executive Order 12898, Governor
7 Brown’s Executive Order No. 20-04, as well as local land use laws and plans.

8 60.

9 Defendants’ actions as described are arbitrary, capricious, not in accordance with
10 law, and without observance of procedures required by law, within the meaning of the
11 APA, 5 U.S.C. § 706.

12 61.

13 Plaintiffs are entitled to its reasonable fees, costs, and expenses associated with this
14 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

15 **Count II**

16 **Failure to Take a Hard Look at the Project’s Direct, Indirect, and Cumulative**
17 **Impacts**

18 62.

19 Plaintiffs incorporate by reference ¶¶ 1-43 and 60-61.

20 ///

21 _____
22 ⁵ See e.g., *attached*, Exhibit #1, Letter from America Walks to U.S. Department of
23 Transportation (July 24, 2024) (advocating against funding the highway expansion in
24 this project as it would “disconnect communities and repeat the harms of 20th century
highway building that the [Reconnecting Communities and Neighborhood Grant]
program seeks to repair.”)

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63.

Pursuant to 42 U.S.C. § 4332(2)(C)(i)-(ii); 40 C.F.R. §§ 1508.7-8 (2016), NEPA requires federal agencies to analyze the foreseeable environmental impacts, including direct, indirect, and cumulative impacts (including past, present, and reasonably foreseeable actions) of major federal actions, as well as actions by state and local authorities.

64.

Inadequate Analysis of the No-Build Alternative and the Environmental Baseline.

Defendants failed to take a “hard look” at the no-build alternative and the environmental baseline. The agencies misconstrued the levels of traffic in the no-build alternative by improperly inflating traffic levels and producing higher estimates of congestion than would actually occur. The agencies misconstrued and misapplied models and modeling data. The agencies relied on traffic modeling prepared for the 2014 Metro Regional Transportation Plan, and have failed to account for or explain new modeling prepared for the 2018 and 2023 Metro RTP. The agencies failed to fully disclose and document the Project’s traffic projections. The agencies misconstrued the no-build alternative by including non-existing traffic from the as-of-yet unbuilt Columbia River Crossing, which adds tens of thousands of imaginary vehicles and their fictitious emissions (and other impacts).

65.

The agencies misconstrued the traffic data used for the Project. The Project assumes that the Columbia River Crossing, a 12-lane-wide, five-mile-long freeway project was built in 2015, but the agencies failed to substantiate or disclose their

1 assumptions for modeling and estimates of traffic levels generated by the Columbia
2 River Crossing, which is hardly a finished project which should be part of a no-action
3 baseline given that it is only going through its own NEPA analysis now.

4 66.

5 The agencies failed to include average daily traffic for the build and no-build
6 scenarios, one of the most commonly used metrics of traffic volume.

7 67.

8 *Direct and indirect impacts.* Defendants failed to take a hard look at the direct and
9 indirect impacts of the project.

10 68.

11 The agencies misconstrued the traffic estimates for the build alternative by
12 understating their traffic levels. The agencies relied upon conclusory assumptions and
13 discredited theories for carbon emissions, which understate carbon emissions.

14 69.

15 The agencies failed to adequately consider the impacts to pedestrian and bicycle
16 transportation. The Project's Clackamas Pedestrian and Bicycle Bridge will still increase
17 grade and create unsafe conditions with its inadequate design. Furthermore, by
18 widening the intersections around the Project area, the Project will put increased levels
19 of stress on local pedestrians and cyclists.

20 70.

21 Contrary to the scientific literature and documented impacts of widening freeways,
22 including I-5, the agencies failed to adequately consider the impact of induced and
23 latent demand, the phenomenon by which increases in highway capacity in urban areas
24

1 generate additional travel that leads to a recurrence of congestion at even higher levels
2 of traffic. Increased congestion will lead to increased pollution and greenhouse gases.
3 Not only will the project create greater emissions from increased congestion but the
4 widening will also reduce the distance between the highway and the Harriet Tubman
5 Middle School and its outdoor play area. Moreover, the agencies erroneously relied
6 upon assumptions related to vehicle fleet composition and turnover, amongst others
7 assumptions, to artificially reduce emissions.

8 71.

9 The agencies' analysis improperly assumes that build and no-build alternative will
10 have no impact on the pattern and intensity of traffic over the coming decades, even
11 though its own analysis showed a 5-14% increase in traffic demand in the Project Area.⁶

12 72.

13 The Project may create new urban land within the City of Portland through the use of
14 freeway lids with the possibility of supporting structures and other uses. The agencies,
15 however, failed to address or analyze the environmental impacts of creating new urban
16 land and uses within the Project Area.

17 73.

18 The Project will create a roadway capable of accommodating additional lanes of
19 traffic beyond what is proposed for the Project. The EA obfuscates the actual width of
20 the road, but estimates and agency documents indicate a roadway as wide as 160-250
21 feet, more than doubling the existing width of 82-feet. The agencies failed to analyze the
22

23 _____
24 ⁶ RSEA, 3.13.2.4, p.112.

1 direct and indirect effects of such a significant widening of the roadway and an increase
2 in roadway capacity, including the impacts from traffic, noise, and pollution.

3 74.

4 The agencies failed to take a hard look at the environmental and economic impacts of
5 diverting money from other projects in the Portland-Vancouver metropolitan area, and,
6 instead, proposed to use approximately \$1.9 billion for the Project.

7 75.

8 *Cumulative impacts.* Defendants failed to take a hard look at, adequately analyze, or
9 accurately represent the cumulative effect of past, present, and foreseeable projects.

10 76.

11 In the RSEA, the Columbia River Crossing is supposedly a reasonably foreseeable
12 project that adds many lanes across the Columbia River, but the agencies did not
13 prepare a cumulative impacts analysis that included that crossing in evaluating future
14 impacts, including traffic demand and the environmental impacts from such changes.
15 The agencies' position is clearly that other major traffic projects are vital and integral to
16 solving the congestion problem. Therefore, the scope of this environmental analysis is
17 inadequate and should be extended to include the analysis for at least the Columbia
18 River Crossing, and most likely the other projects that are part of the regionwide Urban
19 Mobility Strategy.

20 77.

21 Meanwhile, congestion pricing (or value pricing) is authorized and mandated by the
22 Oregon legislature, the City of Portland, the Metro Regional Government, and included
23 in Metro's 2023 Regional Transportation Plan as an anticipated project, a list that also
24 includes the Columbia River Crossing. However, the agencies failed and/or refused to

1 prepare a cumulative impacts analysis that included congestion pricing – claiming that it
2 was “not reasonably foreseeable,” even after funding a study showing that value pricing
3 was necessary to reach the project’s goals of reducing traffic congestion to adequate
4 levels.

5 78.

6 *Reliance on erroneous factual assumptions.* In its environmental analysis, the
7 agencies rely on the ‘fact’ that, at the time of issuing the RSEA and FONSI, the project’s
8 anticipated cost would be \$1.3 billion.

9 79.

10 Contrary to this ‘fact,’ the agencies regularly represent the actual cost of the entire
11 Project at between \$1.5-1.9 billion, generally giving a \$1.7 billion figure as a reasonable
12 stand-in for the actual range.⁷ The agencies therefore knew of this higher figure in the
13 year leading up to the issuance of the FONSI and RSEA, and still relied on the lower
14 \$1.3 billion figure in clear violation of their NEPA requirements.

15 **Count III**

16 **Failure to Analyze All Reasonable Alternatives and an Adequate Range of**
17 **Alternatives**

18 80.

19 Plaintiffs incorporate by reference paragraphs ¶¶ 1-43 and 60-61.

20 ///

21 ///

23 ⁷ See ODOT, *Neighborhood Access and Equity (NAE) Program Grant Application*, p.16,
24 Table-4, (September 28, 2023) (“Total Project Cost Estimate: \$1,700,000,000”).

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81.

In both an EA and an EIS, NEPA - 42 U.S.C. § 102(2)(E) - requires the agency to study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

82.

Further, pursuant to 40 C.F.R. § 1502.14(a) (2019) agencies shall rigorously explore and objectively evaluate all reasonable alternatives in order to accomplish the project's goals, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

83.

For the Project, the agencies only considered two alternatives: The Revised Build option and a No-Build option.

84.

The agencies failed to consider, in detail, an alternative that would not require billions dollars in public financing and still satisfy the clearly delineated purpose and need of the Project.⁸ Fiscally-conservative alternatives raised by Plaintiffs during the Notice & Comment process, but not considered in detail, include congestion pricing, lane closures, transit alternatives, a reduced or narrowed right-of-way, and alternatives that do not include increasing the capacity of the freeway and the expenditure of billions of dollars.

⁸ RSEA 1.4, p.5 (“[T]he purpose of the project is to improve the safety and operations on I- between I-405 at the Broadway/Weidler interchange, and on adjacent surface streets in the vicinity of [that] interchange.”)

1 85.

2 Congestion pricing uses the power of the market to reduce the waste associated
3 with traffic congestion. Premium charges during periods of peak demand would
4 encourage road users to eliminate lower-valued trips, take them at a different time, or
5 choose alternative routes or modes of transportation. As part of the same legislation
6 that provided funding for the Project, the Oregon legislature also directed ODOT to
7 pursue tolling within the corridor. According to the FHWA, there is a consensus among
8 economists that congestion pricing represents the single most viable and sustainable
9 approach to reducing traffic congestion. The City of Portland Central City Plan also
10 directs ODOT to implement congestion pricing. Oregon Metro's 2023 Regional
11 Transportation Plan further includes I-5 congestion pricing within its list of Constrained
12 Projects (Project 12304). Aside from avoiding a costly expansion, congestion pricing
13 can also generate revenue.

14 86.

15 The agencies also failed to consider, in detail, a fiscally conservative alternative to
16 implement ramp closures at certain times throughout the day to allow traffic to flow
17 without interruption from incoming motorists. The agencies acknowledge that close
18 interchanges are a root cause of the issues the Project purports to address.

19 **SECOND CLAIM FOR RELIEF**

20 **Violation of Transportation Act and the APA**

21 **Failure to Satisfy the 4(f) criteria**

22 87.

23 Plaintiffs incorporate by reference ¶¶ 1-43 and 60-61.

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88.

Section 4(f) of the Transportation Act, 49 U.S.C. § 303 identifies the policy of the U.S. Government that special effort should be made to preserve the natural beauty of public parks, recreation lands, and historic sites.

89.

Pursuant to 49 U.S.C. § 303(c), a transportation project requiring the use of publicly owned land of a public park, recreation area, or historic site of national, State, or local significance is permitted only if there is no prudent and feasible alternative to using that land and the project includes all possible planning to minimize harm to the park, recreation area, or historic site resulting from the use. No prudent and feasible alternatives exist if the project will have *de minimis* impact on public park, recreation area, and historic sites, pursuant to 49 U.S.C. § 303(d).

90.

Use of a section 4(f) resource, according to 23 F.R. § 774.17, occurs when land is permanently incorporated into a transportation facility, or when there is temporary occupancy of land that is adverse in terms of the statute’s preservation purpose, pursuant to 23 C.F.R. § 774.13(d). Use of a section 4(f) resource also occurs when there is a “constructive use” of a section 4(f) property which, pursuant to 23 C.F.R. § 774.15(a), occurs when the “projects proximity impacts are so severe that the protected activities, features, or attributes that qualify that property for protection are substantially impaired.”

91.

Use of a 4(f) property may not be authorized unless a determination is made that

1 there are no feasible and prudent avoidance alternatives to the use of the land and the
2 action includes all possible planning to minimize harm to the property resulting from
3 such use; or a determination is made that use of the property would have a would have
4 a *de minimis* impact on the property, as defined by 23 C.F.R. § 774.17. A *de minimis*
5 impact determination must include public notice and opportunity for public review and
6 comment, as well as written concurrence received from the officials with jurisdiction over
7 the property that the project will not adversely affect the activities, features, or attributes
8 that make the property eligible for section 4(f) protection.

9 92.

10 The Project will result in construction of a noise wall, to be constructed either on or
11 immediately adjacent to Lillis-Albina Park. This will block parts of multiple official
12 viewpoints, resulting in either the actual occupation and use of the Park, or constructive
13 use of the Park.

14 93.

15 Defendants did not obtain the necessary concurrence from officials with jurisdiction
16 over the property that the adverse effects will be *de minimis*.

17 **THIRD CLAIM FOR RELIEF**

18 **Violation the Federal Highways Act and Implementing Regulations**

19 **Inadequate funding availability to approve a FONSI**

20 94.

21 Plaintiffs incorporate by reference ¶¶ 1-43 and 60-61.

22 95.

1 As laid out in a series of policy memos in 2011⁹ and 2017,¹⁰ FHWA interprets its
2 statutory and regulatory authority as mandating that it can only issue a final NEPA
3 document (such as a FONSI) once a set of requirements have been met.

4 96.

5 One key requirement is that, before signing a FONSI for a project in a Metropolitan
6 Planning Area - such as the Portland Metro Area - FHWA must ensure that the project
7 is complies with the requirements for “fiscal constraint.” Fiscal constraint is found when
8 “there is sufficient financial information for demonstration that a project can be
9 implemented using committed, available, or reasonably available revenue resources.”¹¹

10 97.

11 The presence of fiscal constraint and reasonably available funding is generally
12 demonstrated by including funding for a subsequent phase of a metropolitan project,
13 such as this Project, in a Metropolitan Transportation Improvement Plan (MTIP) or a
14 Regional Transportation Plan (RTP) for a metropolitan area, as well as including the
15 estimated *full project cost* in the MTIP or RTP.¹² Here, the agencies claimed that this
16 rule is satisfied with full project cost inclusion on Oregon Metro’s RTP.¹³ Therefore, in

18 ⁹ FHWA, SUPPLEMENT TO JANUARY 28, 2008 ‘TRANSPORTATION PLANNING REQUIREMENTS
19 AND THEIR RELATIONSHIP TO NEPA APPROVALS’ (February 9, 2011),
20 https://www.fhwa.dot.gov/planning/tpr_and_nepa/tprandnepasupplement.cfm#ftn1
21 (“2011 FHWA Supp”).

21 ¹⁰ FHWA, MEMO: CLARIFYING FISCAL CONSTRAINT GUIDANCE (May 15, 2017),
22 https://www.fhwa.dot.gov/planning/clarify_fiscal_constraint.cfm (“2017 FHWA
23 Clarification”).

22 ¹¹ 2011 FHWA Supp, p.2, Table 1.

23 ¹² 2017 FHWA Clarification; *RSEA, Appendix G*, p 61. (emphasis added)

24 ¹³ *Id.* at p. 60; The project’s full cost is not included on the Metro MTIP at all, and
therefore this requirement is not satisfied through that route either, and the agencies
have not indicated to the contrary.

1 order to reasonably sign off on the FONSI, FHWA must ensure that the estimated *full*
2 *project cost* be present in the RTP’s financially constrained list.

3 98.

4 If an EA has a project cost significantly different than the fiscally constrained
5 estimate, FHWA’s interpretations further mandate that a “plan and/or STIP/TIP
6 amendment is necessary prior to the final NEPA decision.”¹⁴

7 99.

8 The Financially Constrained Projects list in Metro’s 2018 RTP describes the
9 Project’s estimated full cost at \$375 million.

10 100.

11 The Financially Constrained Projects list in Metro’s 2023 RTP describes the
12 Project’s estimated full cost at \$1.3 billion. This is the highest cost estimate represented
13 in the RSEA and FONSI.¹⁵

14 101.

15 However, the cost of the Project had already risen considerably. The full Project cost
16 was represented by the agencies in multiple grant applications *before the FONSI and*
17 *RSEA were issued* as between \$1.5 and \$1.9 billion, an approximately 40% increase in
18 full project costs as compared to the 2023 Metro RTP estimate.¹⁶

20 ¹⁴ 2011 FHWA Supp, p.8, Question 18.

21 ¹⁵ See RSEA, Appendix G, P. 61 (“estimated full Project cost of \$1.3 billion. . .”).

22 ¹⁶ See ODOT, *Neighborhood Access and Equity (NAE) Program Grant Application*,
23 p.16, Table-4, (September 28, 2023) (Total Project Cost Estimate: \$1,700,000,000);
24 See ODOT, *Infrastructure for Rebuilding America (INFRA) Grant Application*, p. 1 (May
6, 2024) (“as of June 2023, the total project cost estimate is **\$1.5 to \$1.9 billion**. For the
purposes of this INFRA Large project grant application, the total project cost is shown at
\$1.9 billion to reflect the high end of this range”) (emphasis added).

102.

Given that the agencies knew of the exorbitant cost of funding the Project had risen to as much as \$1.9 billion, their conclusions concerning the availability of reasonably available funding and fiscal constraint were factual errors and legally unlawful. The agencies knew that, by relying on either the 2018 Metro RTP which lists the project at \$375 million, or the 2023 Metro RTP which lists the project at \$1.3 billion, fiscal constraint could not be established for the Project at the time that FHWA issued the FONSI. Instead, the agencies attempted to satisfy a statutory and regulatory requirement that the project be fiscally constrained by relying on a promise in a Metro RTP that showed reasonably available funding approximately 30% below the most up-to-date estimated cost of the project.

103.

The anticipated funding in the 2023 Metro RTP is further unavailable because it has since been spent on an alternate ODOT project. ORS 367.095(2), the source of a significant amount of funding predictions, was amended in 2021 by House Bill 3055. That amendment altered the text of the statute, such that funding which previously was exclusively available for use on the Interstate 5 Rose Quarter Project is now *also* available to fund, amongst others, a \$500 million project to build Abernethy Bridge. Some of these funds, again originally anticipated to exclusively fund this Project, have already been spent on this alternative Abernethy Bridge project, making those funds unavailable for highway expansion.

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Therefore, the agencies relied on inadequate funding assurances which the agencies knew would fail to fund the entire Project.

PLAINTIFF’S PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in favor of Plaintiff and issue the following relief:

- Declare that one or more of the Defendant’s violated NEPA;
- Declare that one or more of the Defendants violated the APA;
- Declare that one or more of the Defendants violated the Transportation Act;
- Declare or direct that Defendants must prepare an Environmental Impact Statement due to the Project’s potential significant effects;
- Vacate and remand the FONSI and RSEA;
- Enjoin Defendants from implementing the Project until Defendants have complied with NEPA, the APA, and the Transportation Act;
- Award Plaintiffs their reasonable attorney fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and
- Grant Plaintiffs such additional and further relief as the Court deems just and equitable.

1 Respectfully submitted this 9th day of August, 2024,

2
3 */s/ Karl G. Anuta*

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