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SUBMITTED VIA HARD COPY TO:

Docket Management Facility (M-30)
U.S. Department of Transportation
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590-0001

RE: Comments on the Interstate 5 Columbia River Crossing General Bridge Permit Application, Docket No. USCG-2013-0286, and Compliance with the National Environmental Policy Act

To Mr. Gary Greene, CRC Project Officer:

The Northwest Environmental Defense Center (“NEDC”) submits the following comments on the Interstate 5 Columbia River Crossing (“Project”) application for a Coast Guard Bridge Permit submitted by the Oregon Department of Transportation and Washington Department of Transportation (collectively, “CRC”) to the United States Coast Guard (“USCG”). NEDC has and continues to seek to ensure all federal and state environmental laws and regulations are complied with throughout the development and planning of this Project. Given NEDC’s mission to protect and conserve the environment and natural resources of the Pacific Northwest, we are particularly concerned about the adverse environmental impacts that are likely to result from the construction of the Project.

Bridges over major interstate waterways serve two essential functions. First, they provide a means for land-based vehicles to cross that waterway. Second, and of equal importance, such bridges must allow for water-based vessels and commerce to continue to use the waterway that is being crossed. For this Project the CRC has focused almost exclusively on the first purpose, spending tens of millions of dollars analyzing and justifying their proposal to build a replacement bridge that provides essentially twice the capacity for land-based vehicles to cross the Columbia River. The second purpose of the bridge, in contrast, has been treated by the CRC like an afterthought, with almost no consideration given to how high the bridge needed to be in order to not unreasonably restrict navigation. Curiously, although the CRC insists that land-based commerce requires a much wider bridge, the CRC thinks that water-based commerce should be satisfied with a much lower bridge. The CRC has clearly assumed from the beginning that it could “role” the USCG just as they have “rolled” every other governmental entity or official that has expressed any skepticism about the \$4 billion bridge. The CRC believed the

USCG would simply agree to whatever it ultimately proposed, even if that proposal provided significantly less vertical clearance than the existing bridge, and thereby violated federal law.

Due to numerous failures on the part of the CRC, NEDC requests that the USCG prove the CRC wrong and deny the permit. First, there can be no meaningful public comment because the CRC's permit application is incomplete and the CRC's piecemeal approach to "refining" the bridge design has been less than transparent. Second, the proposed bridge is inconsistent with the General Bridge Act of 1946, 33 U.S.C. § 525 *et seq.*, and the USCG's own regulations because it will unreasonably obstruct navigation. Finally, the USCG should recognize that the CRC's latest iteration of the bridge design, in combination with new information from recent studies, is a new proposal that necessitates the preparation of a Supplemental Environmental Impact Statement ("SEIS") pursuant to the National Environmental Policy Act ("NEPA"). At the very least the USCG should require the CRC to submit the missing information to complete the permit application and provide for public comments on the application as a whole.

Through the framework of the bridge permit process, the USCG has the opportunity to correct the deficiencies in the CRC's environmental analysis and provide the public the chance to meaningfully scrutinize the proposed Project in its entirety, including the most recent design iteration and new information resulting from recent studies. We hope that the USCG recognizes the magnitude of this proposed Project and carefully reviews the adequacy of the CRC's environmental analysis.

Background

In 2011 the Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA") (collectively, "co-lead agencies") issued a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") that identified a replacement bridge for the Interstate 5 Bridge that would be 95 feet above zero Columbia River Datum¹ ("CRD") ("95 foot bridge"). The 2011 FEIS strongly suggested, incorrectly, that the USCG had agreed to a 95 foot clearance height for the "Locally Preferred Alternative." *See* FEIS at 3-74. When the USCG's December 7, 2011 concerns regarding the draft ROD for the Project became public, the CRC, again incorrectly, insisted that the USCG had not expressed concerns about the proposed 95 foot clearance height during the NEPA process. Of course the USCG had expressed such concerns, in writing, on multiple occasions before the CRC finalized its FEIS. *See, e.g.*, October 24, 2011 Letter from Randall Overton, USCG, to Heather Wills, CRC Environmental Manager (attached hereto as "Attachment 1"). Despite such clear evidence that the proposed 95 foot height could cause it future problems, the ROD was issued in December of 2011, approving a 95 foot replacement bridge.

Almost a year later, finally realizing that they had ignored a significant problem regarding the impacts of the 95 foot bridge on navigation, in November of 2012 the co-lead agencies published an internal re-evaluation to support a change in the bridge design that

¹ The Columbia River Datum is a fixed low water datum that was established by the Army Corps of Engineers in 1911 during a specific river flow period. National Oceanic and Atmospheric Administration ("NOAA"), Technical Memorandum NOS CS 22: VDatum for the Coastal Waters of North/Central California, Oregon and Western Washington: Tidal Datums and Sea Surface Topography (2010), page 33. The river datum zero was set below the average low water, but not as low as the lowest record for a long a period. *Id.*

increased the vertical clearance to 116 feet above zero CRD (“116 foot bridge”). *See* Columbia River Bridge Vertical Clearance NEPA Re-evaluation, December 2012 (“Re-evaluation”). At that time the CRC also published a Navigation Impact Report (“NIR”) “to inform decisions related to the height and navigational clearance” for the Project. *See* Columbia River Crossing Navigation Impact Report (Nov. 7, 2012), page 1.

On January 30, 2013, the CRC submitted an application for a bridge permit to the USCG. The USCG denied the application as incomplete on March 8, 2013, and requested additional information. *See* March 8, 2013 Letter from K. A. Taylor to Paula Hammond, Washington State Department of Transportation, and Matt Garrett, Oregon Department of Transportation (attached hereto as “Attachment 2”). Among other things, the USCG requested a new Biological Opinion (“BiOp”), a preliminary assessment of the new navigational channels required and a reduction in the size of the Upper Vancouver Turning Basin, more specific information on mitigation for the direct adverse impacts to current users of the waterway, and more information on the economic impact on current and future river users.

The CRC responded by submitting additional new information to the USCG. *See* April 5, 2013 Transmittal from Heather Wills, CRC, to Randall Overton, USCG Bridge Administrator, *available at* http://www.columbiarivercrossing.org/FileLibrary/TechnicalReports/April_5_2013_USCG_submittal_Bridge_Permit_Application_Guide_Responses.pdf; April 18, 2013 Letter from Matthew Garrett and Lynn Peterson to Rear Admiral Keith A. Taylor, USCG (attached hereto as “Attachment 3”). This new information included reports on economics, necessary changes to the turning basin and navigational channels, marine facilities likely to be impacted by the Project, and cultural assessments. The CRC also requested to reinstate formal consultation with the National Marine Fisheries Service (“NOAA Fisheries”) pursuant to Section 7(a)(2) of the Endangered Species Act (“ESA”) in a letter dated April 4, 2013. *See* April 4, 2013 Letter from John McAvoy and R.F. Krochalis to Kim Kratz, NOAA Fisheries (attached hereto as “Attachment 4”). NOAA Fisheries has begun preparing the BiOp, which will describe impacts to listed species and designated critical habitat in the region of the Project. *See* May 13, 2013 Letter from Michael P. Tehan, NOAA Fisheries, to John McAvoy, FHA, and R.F. Krochlis, FTA (attached hereto as “Attachment 5”).

Discussion

The CRC must receive USCG approval for a bridge permit. 33 C.F.R. § 115.50(b) (explaining that “. . . a bridge cannot lawfully be constructed across any navigable waterway of the United States until the location and plans have been approved by the Coast Guard.”). The USCG bases its determination of whether to authorize a bridge permit on the sufficiency of the application, and ultimately on whether the proposed bridge will unreasonably obstruct navigation. In this case the USCG should deny the CRC’s application for a bridge permit as incomplete. If the USCG determines the application is complete, it should still deny the permit because the bridge, as proposed, would be inconsistent with the USCG’s duty to prevent undue restrictions to navigation on our nation’s waterways. Finally, the USCG has an independent obligation to ensure the Project complies with NEPA. Because the CRC has failed to comply with NEPA by making substantial changes to the Project and developing significant new information relevant to environmental concerns after issuing the ROD and FEIS, the USCG should deny the CRC’s application and require the FHWA and FTA to prepare an SEIS.

I. The USCG should deny the CRC's application because it is still incomplete.

Upon receiving an application for a bridge permit, the USCG District Commander must review the application to ensure it “complies with relevant environmental laws, regulations, and orders.” 33 C.F.R. § 115.60(a) (“sufficiency review”). If the District Commander determines that the application is sufficient, or, if found deficient but the applicant seeks consideration by the Commandant, the District Commander notifies the public it has been received. *Id.* Here, the CRC's application lacks information essential for the USCG to determine whether the proposed Project complies with relevant environmental laws, regulations and orders. Specifically, the application omits the forthcoming BiOp and ship simulation. Plus, the proposal is based on an ever-changing bridge design. Without this information and a clear description of the proposed bridge, the USCG cannot comply with its own regulations requiring a sufficiency determination and thus the USCG should deny the CRC's application as incomplete.

The CRC's application lacks essential information, including various forthcoming studies. First and foremost, the CRC's application is premature and omits the BiOp that is currently being drafted by NOAA Fisheries. Pursuant to the required sufficiency review, 33 C.F.R. § 115.60(a), the USCG's March 8 letter responding to the CRC's initial application stated that the CRC needed a new BiOp from NOAA Fisheries before the USCG would proceed with processing the bridge permit application. *See* Attachment 2, page 3 (“CRC must address the following items before the Coast Guard can issue a public notice for comment,” noting “[t]he application must include a Biological Opinion for” Eulachon and Lower Columbia River Coho Salmon designated habitat). The CRC then waited until April 4, 2013 to ask NOAA to reinstate ESA consultations. *See* Attachment 4. NOAA Fisheries then explained to the CRC that the BiOp may not be completed until August 16, 2013. *See* Attachment 5, page 2.

In fact, the CRC in fact has been on notice of the need to reinstate ESA consultations and to thereby obtain an updated BiOp since at least April 2012 when the FHWA and FTA were served by NEDC and others with a 60-day notice of intent to sue under the ESA because of their failure to consult regarding Eulachon and Lower Columbia River Coho Salmon designated critical habitat (and because the existing BiOp had many other legal flaws). The CRC ignored that notice. The FHWA and FTA were sued by NEDC and other plaintiffs in July of 2012 for failing to reinstate ESA consultations (and for many other NEPA and ESA violations). But the CRC still waited and did not actually request to reinstate consultation under the ESA until April 4, 2013, almost a year after NEDC demanded such action and almost a month after the USCG did the same. Thus it is entirely the CRC's fault that their application lacks an up to date BiOp. And unless and until the new BiOp is complete, the public cannot determine and comment on whether the CRC's application complies with the ESA. Moreover, issuing the permit requires the USCG itself to comply with the ESA. As the USCG's March 8, 2013 letter acknowledges, such compliance cannot occur until the CRC has a new, up-to-date BiOp. Reviewing this application without the assurance that it is compliant with federal environmental laws, and the ESA in particular, would run contrary to the USCG's own regulations and would violate the ESA.

The information in the BiOp is especially important because it will address adverse impacts that were not previously considered. In its April 4, 2013 letter the CRC cites two factors

as triggering the re-initiation of formal consultation under Section 7(a)(2) of the ESA: (1) modifications to the original action that are likely to affect listed species in a manner not previously considered and (2) new designation of critical habitat. *See* Attachment 4.

The BiOp is also likely to inform this permit. Of particular concern is the increased amount of in-water work during extended in-water work windows. The CRC's request to reinitiate consultation states that "[r]ather than a concentrated in-water construction effort spanning approximately *five* years as proposed in the 2010 [biological assessment ("BA")], sequencing will require approximately *nine* years of in-water work, with impact pile driving occurring in *seven* of those years." *See* Columbia River Crossing, Endangered Species Act Reinitiation (April 2013), page 2-3 (emphasis added). Thus the CRC admits that there will be significantly more in-water work than previously planned. This necessarily relates to the question of whether the bridge will unreasonably obstruct navigation, because the in-water work will prevent navigation. Because the information in the BiOp is likely to inform this permit application, and the BiOp is currently being drafted by NOAA Fisheries, the USCG should deny the CRC's permit application as incomplete and wait to notice the bridge permit until that document is complete.

Second, the CRC's application lacks the results of the ship simulation, which will inform the USCG and the public as to the impact of bridge construction on the navigation channel. The USCG's Federal Register notice states that "[a] ship simulation will be conducted by the [United States Army Corps of Engineers] in early fall 2013." 78 Fed. Reg. 26,380 (May 6, 2013) (Notice of availability and request for comments; notice of public meetings). The study will "determine the impact [of the Project] on the navigation channel during and after construction." *Id.* This information is directly relevant to the determinations the USCG must make before it issues a bridge permit.

What's more, the CRC's "refinements" to the Project have in fact converted the proposed bridge into a much different Project. The Project analyzed in the FEIS is significantly different from the Project described in the January 2013 application, and that Project is also different from the one described in the most recent April 2013 submissions from the CRC. As outlined in the background section, the CRC has been continuously changing the bridge design and presenting new information. What's more, since the CRC submitted its application for a bridge permit in January of 2013, the CRC has completed numerous studies and made design changes that substantially alter the nature of the proposed Project. The changes create a moving target and make it impossible to define the actual proposed Project. In combination with the lack of essential information, the changes subvert the purpose of public notice and preclude meaningful public comment.

The USCG should deny the permit application as incomplete, or at least require the CRC to correct the deficiencies in the application and provide a second public comment period to address the information contained in these studies as it relates to the Project. The USCG retains the authority to give an applicant the opportunity to correct any objectionable features of a plan. 33 C.F.R. § 115.60(c)(3). Here, the USCG should require the CRC to correct the deficiencies in its application. The stated purpose in President Obama's Executive Order 13604, which applies to this Project listed on the Federal Infrastructure Projects Dashboard, is "to significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure

projects by the Federal Government, while improving environmental and community outcomes.” 77 Fed. Reg. 18887 (March 28, 2012). This purpose establishes a balance between streamlining permit procedures and ensuring sound environmental and community outcomes.

President Obama’s Order does not, however, instruct the government to rubber stamp major infrastructure projects. Rather, the Executive Order recognizes that projects may “be delayed due to many factors beyond the control of the Federal Government, such as poor project design, incomplete applications, uncertain funding, or multiple reviews and approvals by State, local, tribal, or other jurisdictions.” *Id.* Further, the Order states that federal permitting and review processes “must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.” The massive scope, overwhelming complexity and ongoing controversy surrounding the CRC, in combination with recent modifications to the proposed project and new information, support the need for greater public scrutiny at all stages of the authorization process.

II. The USCG’s statutes and regulations require the denial of the CRC’s application because the bridge will unreasonably obstruct navigation.

When making permit decisions, the USCG’s primary concern must be navigation. *See* 33 C.F.R. § 114.10 (“The decision as to whether a bridge permit . . . will be issued . . . must rest primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment.”). Pursuant to 33 U.S.C. § 512, “[n]o bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.” The USCG’s own regulations explain that “[t]he several bridge laws . . . [including, e.g., the General Bridge Act of 1946, 33 U.S.C. § 525 *et seq.*, and the Rivers and Harbors Act] are intended to prevent any interference with navigable waters of the United States whether by bridges, dams, dikes, or other obstructions to navigation except by express permission of the United States.” 33 C.F.R. § 114.10. To obtain a general bridge permit from the USCG, the CRC may not unreasonably obstruct or interfere with navigation along the Columbia River.

The USCG’s regulations expressly state that a bridge permit should be denied “[i]f the application contains any defects that would prevent issuance of a permit (as for example, if the proposed bridge provided insufficient clearance).” 33 C.F.R. § 115.60(a). A bridge may create an unreasonable obstruction “either due to insufficient height or width of the navigation span, or because of difficulty passing through the draw opening.” *Id.* § 116.01(c). Not only does the USCG have the authority and responsibility to ensure protection and preservation of navigable waters, but its own regulations state that “[i]t is the policy of the Coast Guard to secure compliance with these provisions of law short of legal proceedings.” 33 C.F.R. § 114.40. Denying the CRC’s application would therefore be consistent with the USCG’s policy set forth by regulation. Because the 116-foot bridge will unreasonably impede navigation due to the low vertical clearance, reduce navigational safety by permanently reducing the upper turning basin, and further restrict navigation during construction for up to nine years, the USCG should deny the general bridge permit.

The CRC’s proposed bridge will unreasonably obstruct free navigation along the Columbia River. The CRC’s application identifies direct economic impacts to three industrial

fabricators as a result of the lower vertical bridge clearance: Thomas Metal Fab, Greenberry Industrial, and Oregon Iron Works, each of which is located in the Columbia Business Center (“CBC”). *See* Columbia River Crossing, USCG General Bridge Permit Economics Report: Additional Information (April 17, 2013) (“Economics Report”), page 1-1. It will also have direct adverse impacts on a marine contractor vessel in its current configuration, JT Marine *DB Taylor*. The CRC attempts to downplay the impacts to these burdened users by focusing on the percentage of gross revenue that will be impacted by the reduced vertical bridge clearance. Yet that type of analysis ignores the bottom line: each of these burdened users will be permanently, directly impacted by a lower vertical bridge clearance. The specific production activities that will be forced to cease due to a lower vertical clearance may, in isolation, appear to be a small percentage of the entire production for these fabricators. The economic stability and health of each company, however, should be viewed as a whole. Removing one source of revenue may have a cascading effect on the remainder of the fabricator’s economic health. The CRC’s economic analysis splits hairs to diminish the relative impact on these burdened users.

A reduced vertical clearance will also have permanent, direct adverse impacts on the CBC and the scope of its future lease opportunities. The CRC states that the Project “will have a modest impact on the ability of the property owners of the CBC to continue to use the site for heavy industrial and marine-dependent uses.” Economics Report at 2-7. The CRC’s analysis, however, confuses alternatives for future development with existing opportunities for future development. At present, CBC’s potential industrial lessees include large fabricators. Construction of a bridge with a lower vertical clearance would eliminate that potential for future economic growth. *See* January 9, 2013 Letter from George H. Killian and Lance E. Killian, Killian Pacific, to J.A. Servidio, USCG (attached hereto as “Attachment 6”). The CRC states “other factors may suggest a future conversion to other uses.” Economics Report at 2-7. While true, the CRC is simply pointing to alternatives rather than accepting and disclosing the fact that the Project, as currently designed, will have a direct adverse impact on the CBC.

The CRC’s proposed mitigation to offset these direct adverse impacts rests largely on compensation. *See* Columbia River Crossing, Fabricator Mitigation Update (April 18, 2013), page 1-2. The CRC dismisses the idea of providing relocation, again focusing on the percentage of the revenue that will be affected by the reduced vertical clearance. This piecemeal economic approach is insufficient to offset the losses that these businesses will face, much less account for lost future opportunities. The CRC approaches mitigation for the likely obstructions to navigation with blinders on, focusing only on the most obvious economic impacts that can be demonstrated by past revenues. Simply offering cash settlements, however, ignores the bottom line. A lower bridge will unreasonably obstruct navigation on the Columbia River, both in its current and future form. Plus, because the impacts are likely to be much greater than is conceded in the CRC’s Economics Report, the CRC’s proposed mitigation is insufficient.

In addition, Representatives Jaime Herrera Beutler, Cathy McMorris Rodgers, Doc Hastings and Raul Labrador have also expressed concern with the probable negative impacts of the CRC on navigation and commerce upstream from the project site. *See* January 30, 2013 Letter from Jaime Herrera Beutler, et al, to Rear Admiral Keith A. Taylor, USCG (attached hereto as “Attachment 7”). Among their concerns, the Representatives noted that even with the new bridge height of 116 feet, the CRC will have direct negative impacts on upstream businesses that need a higher vertical clearance for commercial shipping routes.

The Representatives expressed concern about the direct immediate impacts to property owners if current businesses relocate; likely future reduced demand for those property owners due to the navigational restrictions; the total cost of the recent change in bridge design, including mitigation costs for businesses; how the co-lead agencies intend to mitigate for lost jobs; and the cascade of indirect impacts on the local economy, should these upstream businesses relocate or close down as a result of the navigational restriction. The Representatives also noted that the NIR is insufficient, and instead requested a full study of the economic impacts of the proposed bridge height. Representative Jaime Herrera Beutler again expressed concern about the low vertical clearance, citing the likely “chilling impact to future business development due to the permanent, impassable nature of the design for larger vessels and cargoes.” *See* June 12, 2013 Letter from Jaime Herrera Beutler to Rear Admiral Keith A. Taylor, USCG (attached hereto as “Attachment 8”).

As Representative Jamie Herrera Beutler and other commentators have noted, when the Glenn Jackson Bridge, just a few miles upstream from the CRC Project, was permitted several decades ago, the analysis then determined that 144 feet of vertical clearance was necessary. The CRC’s analysis and application simply ignore this inconvenient fact and make no attempt to explain why 144 feet of clearance was considered necessary then but 116 feet is supposedly sufficient now. At a minimum, this apparent change in what is necessary to avoid unreasonably obstructing navigation must be addressed and explained. Any permit issued for a 116-foot bridge that is not supported by such analysis and explanation would be arbitrary and capricious.

Finally, in addition to the direct impacts on burdened users due to a reduced vertical height, the proposed Project will also unreasonably obstruct navigation by permanently reducing the upper turning basin and temporarily restricting navigation along the Columbia River for up to nine years. The CRC has explained that the bridge design will permanently reduce the upper turning basin by 18 percent. This reduced turning basin will reduce navigational safety, placing an additional burden on recreational and commercial river users. The additional restriction on recreational and commercial use of the river during construction may seem modest because it will be temporary. The current plans, however, forecast construction for up to nine years. Such “temporary” restrictions become unreasonable when imposed for such a long period of time. At bottom, based on the direct adverse impacts to existing users, permanent adverse impacts to the upper turning basin, and medium-term adverse impacts to navigation, the proposed Project will unreasonably obstruct navigation.

Thus the insufficient clearance of a 116-foot bridge is the basis on which the USCG should deny the bridge permit application, consistent with the agency’s own regulations. Issuing the permit in the face of direct, permanent restrictions on navigation as well as likely future restrictions on navigational growth would run directly contrary to the USCG’s own regulations.

III. The USCG must comply with NEPA.

As part of its general permit authorization, the USCG must determine whether NEPA has been satisfied. 33 C.F.R. § 115.60(a). The FHWA and FTA claim the Re-evaluation is sufficient to meet the agencies’ duties under NEPA to analyze the environmental impacts of the CRC. The USCG, however, has an independent obligation to ensure compliance with NEPA and

as explained below, the CRC's current NEPA analysis is insufficient to fulfill the USCG's independent duty. First, the Re-evaluation and NIR are not themselves NEPA documents. Second, the CRC has produced thousands of pages of additional analysis since the FEIS was issued, but none of that additional analysis is set forth in a draft NEPA document that was offered to the public for comment. The public should be provided the opportunity to review the entirety of the CRC's re-evaluation in an actual, comprehensive NEPA document that is subject to comment. To maintain compliance with NEPA, we request that the USCG demand the preparation of an SEIS that does exactly that.

A. The USCG has an independent obligation to require the preparation of an SEIS.

As part of its general bridge permit authorization, the USCG must determine whether NEPA has been satisfied. 33 C.F.R. § 115.60(a). This obligation is also an opportunity to correct the co-lead agencies' failure to prepare an SEIS, and thereby afford the public and other comment agencies a meaningful opportunity to scrutinize the recent changes and new information.

The purpose of an EIS is to insure fully informed and well-considered decisions. 42 U.S.C. § 4332. NEPA requires an agency set forth in an EIS sufficient information for the general public to make an informed evaluation and for the decision maker to consider fully the environmental factors involved and make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from proposed action. 42 U.S.C. § 4332. Although not expressly mandated by the statutory language, the Supreme Court has recognized that pursuant to NEPA's goal to "prevent or eliminate damage to the environment and biosphere" through analysis of the impacts of a proposed agency action, 42 U.S.C. § 4321, "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The regulations promulgated under NEPA by the Council for Environmental Quality ("CEQ") require an agency to supplement a draft or final EIS if the "agency makes substantial changes in the proposed action that are relevant to environmental concerns" or if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). A change is substantial if it presents a "seriously different picture of the environmental impact," as determined by the possible environmental consequences that were not previously considered. *South Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663 (3d Cir. 1999); *see also Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990); *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987); *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005). New information will trigger the need for an SEIS if it demonstrates that the proposed action will affect the environment in a significant manner not already considered. *See, e.g., Marsh*, 490 U.S. at 374.

Regardless of the co-lead agencies' determinations, the USCG has an independent responsibility to determine whether the change in bridge height, the new information provided in the NIR, and the additional information requested by the USCG to complete the bridge permit

application, demonstrate that the proposed action will result in “significant” environmental effects that were not considered in the FEIS.

Pursuant to USCG regulations, the District Commander must review the application for a permit to construct a bridge over navigable waters and ensure that the application complies with relevant environmental laws, regulations and orders. 33 C.F.R. § 115.60(a). This includes ensuring the permit application complies with NEPA. If the permit application is insufficient, the USCG notifies the applicant. *Id.* The USCG has the authority to deny a permit application and suggest modifications that would justify reconsideration. *Id.* § 115.60(d).

The only NEPA document in this case, the FEIS, is insufficient to satisfy the USCG’s responsibilities under NEPA. The FEIS lacks an accurate or adequate discussion of the environmental effects of the 116 foot bridge. Even before the bridge design had been changed, the USCG made clear that it was considering exercising its veto power based on an inadequate FEIS for the 95 foot bridge. In a memo dated December 7, 2011, from USCG vice commandant Sally Brice-O’Hara to United States Department of Transportation deputy secretary John Porcari (“2011 USCG Memo”), the USCG stated that “the Coast Guard will not be able to accept a bridge permit application based on the information provided in the FEIS” due to defects in the FEIS’s treatment of the clearance issue, and noted that the FEIS might need supplementation. The USCG explained that it “cannot determine if the preferred 95 foot bridge clearance will meet reasonable navigational requirements based on the information provided for review.”

The Re-evaluation and NIR fail to cure the defects of the FEIS. The Re-evaluation and NIR are not NEPA documents and cannot be relied on to satisfy the USCG’s duties under NEPA. A re-evaluation may not be used to present information and analysis that was required but not included in the original EIS. *See Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562 (9th Cir. 2000). The analysis by the co-lead agencies in the Re-evaluation and NIR belongs in an SEIS. Moreover, the Re-evaluation does not include or even consider the additional information submitted by the CRC to the USCG in 2013. Most significantly, the Re-evaluation does not consider the new information that required the CRC to reinitiate consultation under the ESA. Indeed, the new information about the significantly increased length of time that will be required for in-water work and the additional impacts of the greatly increased in-water work is by itself significant enough to justify an SEIS. For these reasons, and the information provided in Part II below, the USCG should require that the FHWA and FTA prepare an SEIS to address the changes in the bridge design and new information, including the NIR. The USCG retains both the authority and the obligation to mandate these changes.

B. Recent changes to the CRC project, as well as new information in the NIR and additional information requested by the USCG to complete the general bridge application, demonstrate that the CRC will have significant environmental effects that were not considered in the FEIS and thus necessitate the preparation of an SEIS.

The changes to the bridge design and new studies, information and mitigation measures all demonstrate that the proposed CRC will have significant environmental effects that were not considered in the FEIS. CEQ’s regulations define “significantly” as encompassing both context and intensity. 40 C.F.R. § 1508.27. Intensity refers to the severity of the impact, which

includes, *inter alia*, beneficial and adverse impacts, the degree to which the proposed action affects public health or safety, the unique characteristics of the geographic areas, the potential for controversy, uncertainty of the impacts, and adverse effects on listed species or critical habitat. *Id.* Based on these considerations, the change in the CRC bridge design presents a significantly different picture of the environmental impact of the proposed Project from what was previously envisioned.

Direct Impacts on Navigation

As noted in Part I above, the CRC will have immediate and direct adverse impacts on navigation due to the lower clearance level. At least one business claims it will go out of business because the proposed height of 116 feet is too low. The CRC bridge permit application identifies direct economic impacts to three industrial fabricators as a result of the lower vertical bridge clearance. CEQ's regulations define "effects" to include economic effects. 40 C.F.R. § 1508.8(b). The direct and immediate economic impact to businesses upstream from the proposed CRC is a significant effect that the co-lead agencies failed to consider in the FEIS. The NIR attempts to supplement this information, but fails to cure the need for an SEIS, as explained above. Even assuming, *arguendo*, that the NIR is legally sufficient to supplant the need for an SEIS, the analysis provided in the NIR regarding direct economic impacts to river users upstream from the proposed CRC is inadequate. *See* Attachment 2, Page 3 (noting that the general bridge permit application "does not provide the underlying data or analysis that supports" the projected economic impact to three industrial fabricators).

In addition, the CRC lacks specific information regarding how the co-lead agencies anticipate mitigating the direct impacts to navigation that will result from a lower bridge height. For example, the co-lead agencies should provide the specific types of mitigation being considered for each user, key milestones for achieving mitigation agreements and completing the mitigation itself, an analysis of the feasibility of the proposed mitigation, and an assurance that the mitigation process is timely proceeding.

Vertical and Horizontal Clearances

To start, the top of the bridge deck will be higher. The top of the bridge deck for the 116-foot bridge will be 160 feet CRD, whereas the height of the bridge deck considered in the FEIS was 140 feet CRD. The vertical clearance is increased from 95 feet to 116 feet CRD. The higher vertical clearance will require modifications to the proposed interchanges. For example, the height of I-5 North to Vancouver City Center exit to C Street ramp is increased from 90 feet to 100 feet at the point closest to the Vancouver National Historic Reserve, and the height of the SR 14 West to I-5 South ramp is increased from 68 feet to 72 feet.

The higher vertical clearance also means there will be a steeper grade along the bridge. In Oregon, the mainline grade of I-5 is increased from 2.8 to 3.7 percent. In Washington, the mainline grade of I-5 is increased from 3.4 to 4.0 percent. Steeper grades result in poor site distances, which increases risks to public safety and runs contrary to the stated purpose and need to, *inter alia*, improve travel safety and traffic operations. Steeper grades may also pose a greater risk of harm from stormwater runoff. The NIR and Re-evaluation fail to address whether

the steeper slopes will require changes to the stormwater management plan for the bridge and its interchanges.

The new bridge height will result in a different horizontal clearance. Greater horizontal clearance likely will result in an adverse impact on motor vehicle operation, light rail infrastructure, and pedestrian or bicycle transit due to a steeper profile grade and greater distance to cover. The Re-evaluation states that approaches to the bridge will be lengthened “by varying lengths, which requires more bridge structure.” Re-evaluation, page 4-1. The agencies fail to quantify how much longer the approaches will be or indicate where those changes will be made in the design plans.

The Re-evaluation does state that the transit grade approaching the BNSF railway in Washington would be at 6 percent for 465 feet for the 95 foot bridge, and 6 percent for 595 feet for the 116 foot bridge. Because the light rail transit has a maximum grade of 6 percent, the 116 foot bridge would lengthen the bridge distance from 500 to 1,200 feet in Washington, impacting maintenance and operations. In addition, it is likely that one or more light rail stations would need to be re-evaluated and redesigned. The 5th Street in Vancouver would be closed and Columbia Park and Ride reduced to a single access from Columbia Street, causing operational issues. The increased elevation from 30 to 40 feet in downtown Vancouver would cause additional impacts to downtown, such as closing 6th Street access to southbound I-5.

Impacts to Bicycle and Pedestrian Transportation

The FEIS does not address the impact of steeper grades and longer paths for bikes and pedestrians on both sides of the river that will result from a higher bridge clearance design. The Re-evaluation highlights that the 95 foot bridge would have improved bike and pedestrian facilities, in part by reducing grades. Re-evaluation worksheet, page 7. It also states that for the 116 foot bridge design, the bike and pedestrian route “is lengthened by 700 feet” and “[g]rades in some locations are increased, but are still within Americans with Disabilities Act standards.” Re-evaluation, page 4-1. The change in bridge design has a significant environmental effect – specifically, longer and steeper routes – that was not considered in the FEIS. Even if the Re-evaluation could be considered as part of the NEPA analysis, the agencies again failed to analyze the significance of the steeper grade and longer distance for bikers and pedestrians. This lack of analysis is especially surprising given the strong public interest that any new bridge include improvements for bike and pedestrian transportation.

Different Footprint

Due to the increased height and corresponding increased horizontal clearance, it is likely that the new bridge design will have a different footprint. Although the Re-evaluation states the bridge and its approaches will be longer, it fails to explain how longer distances will not result in an increased footprint. Re-evaluation pages 4-1 - 4-2. In *The Piedmont Environmental Council v. U.S. Dept. of Transportation*, the district court determined that the FHWA should have prepared an SEIS for the modification of termini for a proposed highway bypass project where the agency’s review of the environmental consequences in an Environmental Assessment prepared after modifications were proposed provided insufficient detail to ensure the environmental consequences of terminus shift were fairly evaluated. 159 F.Supp.2d 260 (W.D.

Va. 2001). Here, too, the FHWA and FTA have failed to provide sufficient detail to ensure the environmental consequences of the design change were fairly evaluated. A longer bridge and longer approaches will necessarily result in a larger footprint, which is likely to have significant environmental impacts. Because these environmental impacts were not considered in the FEIS, an SEIS is necessary.

General Fiscal Considerations

The discussion of costs and funding in the FEIS is inadequate. The analysis lacks sufficient detail to promote public participation and evaluation of the economic impacts of the project. Without an adequate analysis of the funding available for the CRC, it has been impossible for the concerned public to evaluate the economic effect of the project in the Portland and Vancouver area.

The brevity of the analysis in the FEIS is compounded by the recent changes to the bridge design. The Re-evaluation states that the increased horizontal clearance for the higher bridge and for approaches to the bridge “increases cost.” Re-evaluation, page 4-1. The co-lead agencies have explained that bridge heights above 110 feet would require modifications to sustain the additional weight and seismic load on the bridge structure, which are likely to be costly. *See* CRC Work Plan for Finalizing Bridge Height and Submitting Bridge Permit Application, addressed to the USCG and dated August 16, 2012 (hereafter “Work Plan”), page 8. Without quantifying the increased lengths or explaining the changes in the configuration, the co-lead agencies summarily determined the increased lengths do “not have a noteworthy change in environmental impacts.” Re-evaluation, page 4-1. As was just stated, this summary conclusion is insufficient to ensure the environmental impacts of the change in design were considered.

Even so, the increased cost alone is relevant to environmental concerns because as the agencies themselves have stated, greater costs are likely to trigger a phased construction plan, which means the impacts on the environment will be drawn out. In addition, the analysis of the effects of the proposed action on the human environment includes economic effects. 40 C.F.R. § 1508.8. Because the change in bridge height will have economic effects that were not analyzed in the FEIS, the FHWA and FTA must prepare an SEIS.

Indirect Economic Effects

The FEIS lacks critical analysis of the indirect economic effects of a lower bridge clearance. NEPA requires agencies to consider indirect effects. 40 C.F.R. § 1508.8. The FEIS fails to analyze the induced restriction on growth along the Columbia River north of the CRC site that will result from a lower bridge clearance than what currently exists. The 116 foot bridge, as compared to the existing bridge with a 178 foot clearance in the raised position, makes the upriver portions of the Columbia River less accessible. The USCG expressly identified this as a deficiency in the 2011 USCG Memo, noting that “[t]he FEIS does not address current and future impacts to navigation/waterway users as a result of the proposed decreased vertical clearance.”

Given the USCG’s obligation to meet the reasonable needs of navigation, 33 U.S.C. § 401 and § 502, the USCG should pay particularly close attention to the lack of analysis in the FEIS to address future impacts to interstate commerce. The USCG authorizes bridges “only as

long as they serve the needs of land transportation while allowing for the reasonable needs of navigation.” 33 U.S.C. § 116.01(a). Under the USCG’s Bridge Guide Clearances, bridges over the Columbia River from the mouth of the river to the BNRR Bridge at Vancouver with a vertical clearance of at least 180 feet and bridges upriver from that point to The Dalles with a vertical clearance of at least 135 feet will ordinarily receive favorable consideration in the bridge permitting process. *See* United States Coast Guard, Bridge Guide Clearances, *available at* <http://www.uscg.mil/hq/cg5/cg551/Bridge.asp>. The 116 foot bridge is well under the guidance of 180 feet. The FEIS failed to analyze the environmental effects of a 116 foot bridge, in terms of induced restrictions on growth upriver due to a lower bridge clearance, and thus must prepare an SEIS.

Impacts to Aircraft

The NIR does not evaluate the specific impacts to aircraft posed by a bridge height of 116 feet, but instead simply states that “alternatives that lower the bridge height reduce potential impacts to aircraft but increase the number of potentially impacted river users.” NIR, page 4-1. The NIR does state that a 178 foot bridge would impact aviation safety associated with Pearson Airpark approaches and departures. NIR, page 7-34. The Re-evaluation likewise does not evaluate specific impacts to aircraft posed by a 116 foot bridge. Yet the FEIS noted that the Federal Aviation Administration would not allow the bridge to be much higher than the preferred alternative at 95 feet, in view of flights in and out of two nearby airports. Plus, the bi-state task force eliminated the four high-level bridge components (greater than 130 feet) from consideration because of safety concerns with Pearson Airfield and 2004 findings that all known commercial and recreational vessels could be accommodated at 125 feet. The gap in this analysis regarding the potential impacts of a 116 foot bridge on aircraft in the region is a significant environmental impact that was not considered in the FEIS and should be considered in an SEIS.

Landside Impacts

The Re-evaluation concludes, without analysis or detail, that the “landside impacts are similar to the 110-foot bridge analyzed in the NIR,” except for a higher vertical curve of one and a half feet. A higher vertical curve means that vision for drivers would be reduced, thereby increasing risks to the safety of drivers. Just as with other aspects not considered in the FEIS but considered in the NIR, the Re-evaluation relies on analysis conducted in the NIR to compare 110 foot bridge and 115 foot bridges to the 116 foot bridge chosen. Yet the NIR was completed after the FEIS and provides new information relating to the environment and resulting from the bridge replacement project. This is precisely the type of new information that should be analyzed in an SEIS.

New Information: 2012 Navigation Impact Report

New information provided in the NIR is relevant to environmental concerns, has bearing on the proposed action and its impacts, and will result in significant environmental impacts that were not considered in the FEIS. The CRC’s Work Plan states that the FEIS contained “very preliminary” information on the 125 foot bridge clearance alternative, with the understanding that an updated vessel assessment, impact analysis, and engineering evaluation would be

necessary to explore a higher clearance. Work Plan, page 3. The NIR does more than merely update material already contained in the FEIS: it alters the overall picture of the environment. For this reason an SEIS must be prepared.

For example, the NIR includes a vessel survey conducted in 2012 provides more detailed information on river users in the project area. The survey updated the types and number of vessels affected by a 95 foot bridge and documented bridge lift trends for the existing bridge from 1987 to 2011. The NIR also provides more specific analysis of impacts and mitigation to specific vessels and users and analyzes whether there are critical infrastructure manufacturing assets jeopardized by the 95 foot bridge. The NIR evaluates impacts to future users and land use impacted with a 95 foot bridge as compared to bridges 125 feet above zero CRD, as well as other mid-level vertical clearance options. The NIR includes a study of river water levels at the I-5 Bridge based on 40 years of river water level data. Because this new information relates to the environment and the findings bear upon significant environmental impacts caused by the bridge replacement project, the FHWA and FTA should have prepared an SEIS to evaluate the new information presented in the NIR.

New Information: Provided to the USCG

The additional information requested by the USCG to complete the CRC's application for a general bridge permit is also new information that is relevant to environmental concerns, has bearing on the proposed action and its impacts, and will result in significant environmental impacts that were not considered in the FEIS before the co-lead agencies finalized the ROD. For example, the USCG requested, *inter alia*, additional information on mitigation for the anticipated adverse impacts to existing river users, underlying data or analysis to support the permit application's claim that the new bridge will impact three industrial fabricators, information regarding changes to the turning basin and federally authorized navigation channel necessary for the proposed CRC, a description of the anticipated wetlands impacts, and a revised Biological Opinion that includes consultation for critical habitat for Eulachon and Lower Columbia River Coho Salmon.

This information has been requested even after the co-lead agencies prepared the NIR and re-evaluation for the CRC. This information, when considered in combination with the change in bridge design, new studies in the NIR and additional analysis provided in the re-evaluation, constitute substantial changes in the proposed action and significant new information relevant to environmental concerns and bearing on the proposed action or its impacts that were not considered in the FEIS before issuance of the ROD. As such, the co-lead agencies must prepare an SEIS. Even if the USCG determines that the NIR and re-evaluation were sufficient to address the change in bridge design and new studies presented in the NIR, the additional information requested by the USCG alone is significant new information sufficient to necessitate the preparation of an SEIS.

New Information: Requested by the USCG but Still Outstanding

As noted in Part I, above, the CRC's bridge permit application lacks essential information that the USCG has already requested, including a new BiOp. The fact that the CRC has chosen to continue with its bridge permit application absent this essential information not only blatantly

disregards the USCG's specific requests for that information, but also magnifies the need for an SEIS. The new BiOp will contain new information relating to the environmental impacts of the Project, and therefore is precisely the type of new information that requires an SEIS with a full public review period.

C. The FHWA's and FTA's Re-evaluation and NIR fail to cure the co-lead agencies' failure to conduct the analysis required by NEPA in the FEIS.

The FHWA and FTA regulations mirror CEQ's regulations, stating that "[a]n EIS shall be supplemented whenever the Administration determines that . . . Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS," or "[n]ew information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a). The "Administration" refers to the FHWA or FTA, or a State if it has been delegated the authority to carry out such responsibilities. 23 C.F.R. § 771.107(d).

The determination of whether a change in the proposed action or information will result in "significant" environmental effects not analyzed in the EIS, such that preparation of a SEIS is necessary, is committed to the discretion of the responsible agencies. *Sierra Club v. US Army Corps of Engineers*, 701 F.2d 1011, 1035 (2d Cir. 1983). *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir 1980) (explaining that it is for the agency to "evaluate [new information] and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures"). In this case, the FHWA and FTA have the discretion to determine whether an SEIS was necessary. This discretion, however, is limited.

First, the FHWA's and FTA's regulations state that an EIS *shall* be supplemented when the agencies determine that either changes to the proposed action will result in significant environmental impacts that were not evaluated in the EIS, or new information relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.² In this case, the changes to the bridge design, new information in the NIR, and the additional information requested by the USCG will result in significant environmental impacts not evaluated in the FEIS. *See* Part III, above. In accordance with its own regulations, the FHWA and FTA should have prepared an SEIS.

Second, the purpose of a re-evaluation under NEPA is to determine whether an SEIS is necessary. 23 C.F.R. § 771.129 (explaining that the purpose of a re-evaluation "is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed"). A re-evaluation is not the proper document for presenting information and analysis that should have been included in an EIS. *Idaho Sporting Congress*, 222 F.3d 562. The Re-evaluation prepared by the FHWA and FTA improperly supplemented the original analysis required by NEPA in the FEIS, and constitutes an improper post hoc justification.

The Re-evaluation adds information not considered in the FEIS to evaluate the design change from the 95 foot bridge to the 116 foot bridge. The Re-evaluation relies on and

² An agency must follow its own regulations. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974).

summarizes new information contained in the NIR to support its conclusion that the change in design does not result in significant environmental impacts. Re-evaluation, page 3-1. In fact, the agencies have made the NIR part of the Re-evaluation. *See id.* at 3-1 (noting that the NIR “is considered part of this re-evaluation and is incorporated by reference herein and included as an appendix to this document”). The NIR itself constitutes new information related to the environment that will result from the bridge replacement project. This new information triggered the FHWA’s and FTA’s regulations that require an SEIS.

The Re-evaluation states that the draft and final EIS considered the following alternatives: “low with a movable span (around 65 feet above zero CRD vertical clearance), mid (95 to 110 feet above zero CRD vertical clearance), and high (around 130 feet above zero CRD vertical clearance).” Re-evaluation, page 2-11. It then concludes that “[t]he mid-level bridge was not clearly defined,” but that “[a] 116-foot bridge would fall within that range.” *Id.* As the first sentence makes clear, the FEIS considered mid-level bridges at a height of 95 to 110 feet. There is no reason to infer that the co-lead agencies also meant to include a height of 116 feet in that analysis. In fact, the Re-evaluation relies on new information contained in the NIR to analyze the environmental impacts of the new 116 foot bridge height. *See* Re-evaluation, page 3-1 (explaining that information in the NIR “was used to inform the design refinement to 116 feet of vertical clearance”). This supports that the environmental impacts of the 116 foot bridge were not sufficiently analyzed in the FEIS, and this is the type of new information that must be analyzed in an SEIS.

The co-lead agencies improperly decided to forgo the preparation of a SEIS that would have analyzed the environmental impact of the changes to the bridge design and the results of recent studies. An SEIS is also necessary to analyze the additional information requested by the USCG to complete the general bridge application. We are concerned that the co-lead agencies’ failure to complete an SEIS precluded the public from having a meaningful opportunity to scrutinize and comment on the changes to the CRC bridge design and new information. The new bridge design, studies, and additional information that came to light after the FHWA and FTA certified the FEIS and ROD will have direct and immediate significant environmental impacts that necessitate an SEIS. In fact the FEIS only examined in detail a replacement bridge with 95 feet of clearance. No NEPA document regarding the CRC project has ever offered and examined in detail the impacts of an alternative replacement bridge with 116 feet of clearance, or an alternative replacement bridge with 144 feet of clearance, the same amount as the nearby Glenn Jackson Bridge. The CRC’s NEPA analysis offers absolutely no basis for comparing and contrasting the environmental and navigational impacts of alternative replacement bridges with clearances higher than 95 feet. This complete absence of analysis and consideration of alternative replacement bridges higher than 95 feet violates one of NEPA’s most fundamental requirements—the need to compare and contrast a wide-range of reasonable alternatives. There is nothing unreasonable about a replacement bridge that would match the vertical clearance of the Glenn Jackson bridge, and omitting such alternatives from detailed consideration in any EIS for this Project violates 40 C.F.R. § 1502.14.

Conclusion

For the reasons set forth above the USCG should deny the CRC’s application for a bridge permit. NEDC urges the USCG to deny the CRC’s application for a general bridge permit based

on the unreasonable interference to navigation that will result from the CRC's reduced bridge height. Short of denying the permit, the USCG should provide a public meeting to consider the substantial negative effects that the lower bridge height is likely to have on navigation along the Columbia River.

NEDC also urges the USCG to address the aforementioned deficiencies in the CRC's environmental analysis under NEPA before addressing the CRC's general bridge permit application. An SEIS is required to give the public an adequate means of evaluating the alternatives and the environmental impacts of a proposed action. The change in bridge design, new information presented in the NIR, and additional information requested by the USCG to complete the general bridge permit application are precisely the type of significant new information that require additional discussion and public input. Because the FEIS, Re-evaluation and NIR do not meet the requirements under NEPA or CEQ's regulations, the USCG should deny the CRC's permit application and require the FHWA and FTA to prepare an SEIS.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla Nelson". The signature is fluid and cursive, with the first name "Marla" being more prominent than the last name "Nelson".

Marla Nelson
Legal Fellow