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The Honorable Rosanna Malouf Peterson

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 CITIZENS FOR SENSIBLE
11 TRANSPORTATION PLANNING,

12 Plaintiff,

13 v.

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15 U.S. DEPARTMENT OF
16 TRANSPORTATION, FEDERAL
17 HIGHWAY ADMINISTRATION;
18 and RAY LaHOOD, SECRETARY
19 OF TRANSPORTATION,

Defendant.

NO. CV-10-00108-RMP

AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

20 I. PRELIMINARY STATEMENT

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22 1. This is an action for declaratory and injunctive relief challenging
23 the U.S. Department of Transportation, Federal Highway Administration's
24 ("FHWA") approval of a \$35,000,000.00 grant under the Transportation
25 Investment Generating Economic Recover ("TIGER") Discretionary Grant
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28 AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
(NO. CV-10-00108-RMP) - 1

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1 Program for construction of the U.S. 395 North Spokane Corridor – Francis
2 Ave. to Farwell Road Southbound lanes project. The grant was awarded to
3 the Washington State Department of Transportation on February 17, 2010.
4

5 2. This action arises under and alleges violations of: (1) the
6 National Environmental Policy Act, 42 U.S.C § 4321, et seq. (“NEPA”) and
7 (2) the Administrative Procedures Act, 5 U.S.C. § 501, et seq. (“APA”), and
8 the implementing regulations of these laws.
9

10 3. Plaintiff seeks a declaratory judgment finding that FHWA was
11 arbitrary and capricious and failed to comply with federal law by not
12 preparing a supplemental environmental impact statement (“SEIS”) as
13 required by NEPA analyzing the effect of mobile source air toxics (“MSAT”)
14 on the surrounding community and environment.
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17 4. Because the FHWA has not complied with the requirements of
18 federal law, plaintiff seeks temporary, preliminary and permanent injunctions
19 prohibiting commencement of the proposed construction.
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21 5. This relief is necessary to preserve the status quo, prevent illegal
22 agency action, and to forestall irreparable injury to the environment and
23 plaintiff’s interests.
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II. JURISDICTION AND VENUE

6. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question); § 2201 (declaratory relief); and § 2202 (injunctive relief). Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and § 1391(e).

III. PARTIES

7. Citizens for Sensible Transportation Planning (“CSTP”) is a Washington non-profit organization whose mission is to engage the citizens of Spokane County in a dialogue about transportation planning issues that can affect the livability and sustainability of our urban environment. On behalf of its members, CSTP works to provide an independent voice that can critically review and analyze the information generated by the project’s proponent and ensure that the full impacts, including health, environmental and economic impacts of projects are analyzed and discussed prior to implementation. CSTP works to educate the citizenry so they can make informed decisions regarding transportation projects within their communities. CSTP supports projects that make sense from both an economic and a societal standpoint. CSTP educates the public about transportation choices, and where appropriate, advocates on their behalf. CSTP is composed of volunteers and members

1 who draw on their individual strengths and passions, contributing as they are
2 able to CSTP's effort.

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4 8. CSTP's membership includes landowners and residents of the
5 neighborhoods that will be affected by the U.S. 395 North Spokane Corridor
6 project.

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8 9. Plaintiff and its members will suffer an injury in fact by the
9 federal defendants' actions. Construction and operation of the U.S. 395 North
10 Spokane Corridor project will result in significant impacts from MSAT on the
11 surrounding neighborhoods and residents, including plaintiff and its members.
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13 10. The injury suffered by plaintiff and its members is fairly
14 traceable to the federal defendants' approval of discretionary grant money
15 allowing the construction of the U.S. 395 North Spokane Corridor.
16

17 11. Plaintiff seeks a declaratory judgment that the actions of the
18 federal defendants, including specifically the failure to prepare an SEIS to
19 analyze MSAT, violate NEPA. Because the defendants' decision could have
20 been influenced by a legally sufficient review and process, plaintiff seeks
21 declaratory and injunctive relief confirming that the decision awarding
22 discretionary grant money for the U.S. 395 North Spokane Corridor – Francis
23 Ave. to Farwell Road Southbound lanes project is null and void and that
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1 construction may not proceed. Plaintiff's injury will be redressed by a
2 favorable decision.

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4 12. Plaintiff's interests are within the zone of interests protected by
5 NEPA. NEPA requires that federal agencies take a "hard look" at the
6 environmental impacts of their actions through preparation of an EIS before
7 making decisions. These review requirements ensure more informed
8 decisionmaking in order to protect the interests of citizens like plaintiff and its
9 members.
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12 13. Plaintiff has also suffered a procedural injury because the
13 FHWA's failure to properly follow NEPA procedures has impaired its distinct
14 and concrete interest in full public environmental review and comment on the
15 proposed project. The requirements of NEPA were expressly enacted to
16 protect citizens and organizations like plaintiff and its members by ensuring
17 thorough environmental review of a proposed project.
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20 14. Plaintiff has been actively involved in the public processes
21 associated with review and comment on the proposed facility and the federal
22 agencies' review of the proposal. Plaintiff and its members participated fully
23 and substantially in the USDOT's public review process by submitting public
24 comments.
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1 15. The plaintiff has exhausted its administrative remedies.

2 16. Plaintiff's individual members would have standing to bring this
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4 action, the organization's purpose relates to the interests sought to be
5 vindicated in this action, and the claims asserted do not require the
6 participation of individual members. Plaintiff has standing to bring this
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8 action.

9 17. Defendants U.S. Department of Transportation, Federal Highway
10 Administration and Secretary Ray LaHood, in his official capacity as
11 Secretary of Transportation are the agency and agency official that approved
12 the discretionary TIGER grant award for construction of the U.S. 395 North
13 Spokane Corridor – Francis Ave. to Farwell Road Southbound lanes project
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15 without completing environmental review as required by NEPA.
16

17 IV. FACTS

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19 18. The North Spokane Corridor Project creates approximately 10
20 miles of new major intermodal freeway, up to eight lanes wide, with up to
21 seven interchanges within an existing urban environment, tripling the freeway
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23 traffic lanes in Spokane's East Central Neighborhood.
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1 19. The FHWA prepared a Final Environmental Impact Statement
2 (“FEIS”) for the project on April 3, 1997. The FEIS was followed by a
3
4 Record of Decision on November 20, 1997.

5 20. FHWA prepared a Supplemental FEIS on September 18, 2000
6 followed by another Record of Decision on November 21, 2000.
7

8 21. Neither the FEIS nor SFEIS analyzed the impact of Mobile
9 Source Air Toxics (MSAT) on the residential communities adjacent to the
10 NSC project.
11

12 22. On January 30, 2006 CSTP petitioned the FHWA to prepare a
13 new Supplemental FEIS to address MSAT. The FHWA declined CSTP’s
14 petition on January 12, 2007.
15

16 23. Controlling air toxic emissions became a national priority with
17 the passage of the Clean Air Act Amendments of 1990, whereby Congress
18 mandated that the U.S. Environmental Protection Agency (“EPA”) regulate
19 188 air toxics, also known as hazardous air pollutants.
20

21 24. The EPA assessed the expansive list and issued its Control of
22 Hazardous Air Pollutants from Mobile Sources by rule on February 26, 2007.
23 The EPA rule identified a group of 93 compounds emitted from mobile
24 sources that are listed in its Integrated Risk Information System (“IRIS”).
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1 25. In addition, the EPA identified seven compounds with significant
2 contributions from mobile sources that are among the national and regional-
3 scale cancer risk drivers from its 1999 National Air Toxics Assessment.
4 These are acrolein, benzene, 1,3-butadiene, diesel particulate matter plus
5 diesel exhaust organic gases (diesel PM), formaldehyde, naphthalene, and
6 polycyclic organic matter.
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9 26. On June 17, 2009 the FHWA issued a Notice of Funding
10 Availability for Discretionary Grants for Capital Investments in Surface
11 Transportation Infrastructure under the American Recovery and Reinvestment
12 Act.
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15 27. On September 2, 2009, the Washington Department of
16 Transportation (“WSDOT”) applied to the FHWA for a \$35,000,000 grant for
17 construction of the U.S. 395 North Spokane Corridor – Francis Ave. to
18 Farwell Road Southbound lanes project.
19

20 28. On September 30, 2009 the FHWA issued its Interim Guidance
21 Update on Mobile Source Air Toxic Analysis in NEPA Documents.
22 (“Interim MSAT Guidance”).
23

1 29. The purpose of the Interim MSAT Guidance document is to
2 update FHWA Division offices on when and how to analyze MSAT under
3 NEPA for highway projects.
4

5 30. The Interim MSAT Guidance document develops a “tiered”
6 approach for analyzing MSAT in NEPA documents depending on the specific
7 project circumstances.
8

9 31. Tier 3 projects include those that have the potential for
10 meaningful differences in MSAT emissions among project alternatives. In
11 order to fall into the tier 3 category a project must: (1) Create or significantly
12 alter a major intermodal freight facility that has the potential to concentrate
13 high levels of diesel particulate matter in a single location or create new or
14 add significant capacity to urban highways such as interstates, urban arterials,
15 or urban collectors-distributor routes with traffic volumes where the AADT is
16 projected to be in the range of 140,000 to 150,000 or greater; and (2) be
17 located in proximity to populated areas.
18

19 32. The U.S. 395 North Spokane Corridor – Francis Ave. to Farwell
20 Road Southbound lanes project meets the definition of a tier 3 project under
21 the Interim MSAT Guidance.
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1 33. According to the Interim MSAT Guidance, projects falling
2 within the third tier should be more rigorously assessed for impacts. Analysis
3 should include a quantitative analysis to forecast local-specific emission
4 trends of the priority MSAT for each alternative, to use as a basis of
5 comparison. If the analysis includes meaningful differences in levels of
6 MSAT emissions, the NEPA analysis is to identify and consider mitigation
7 options.
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10 34. CSTP filed comments with the FWHA regarding WSDOT's
11 TIGER grant application on December 9, 2009. CSTP's comments again
12 requested NEPA analysis of MSAT.
13

14 35. FHWA awarded a \$35,000,000.00 discretionary TIGER grant to
15 WSDOT on February 17, 2010, for the US-395 North Spokane Corridor –
16 Francis Ave., to Farwell Rd. Southbound lanes project on February 17, 2010.
17

18 36. FHWA did not analyze MSAT emissions in a NEPA
19 supplemental FEIS prior to approving the discretionary grant.
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22 V. FIRST CAUSE OF ACTION: VIOLATION OF NEPA

23 37. The allegations in ¶¶ 1-36 are reasserted as if fully stated herein.
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25 38. NEPA forms the basic national charter for protection of the
26 environment and specifically establishes “action-forcing” procedures to
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1 ensure that the “broad national commitment to protecting and promoting
2 environmental quality” is “infused” into the actions of the federal
3 government. By focusing an agency’s attention on the environmental
4 consequences of a proposed project, NEPA ensures that important effects will
5 not be “overlooked or underestimated only to be discovered after resources
6 have been committed or the die otherwise cast.” In order to fulfill NEPA’s
7 objectives, adequate environmental evaluation must occur sufficiently early in
8 the planning process in order to be meaningful.
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12 39. NEPA requires that federal agencies prepare an EIS for all
13 “major Federal actions significantly affecting the quality of the human
14 environment.” If the action will significantly affect the environment, an EIS
15 must be prepared, while if the project will have only an insignificant effect,
16 the agency issues a FONSI.
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19 40. The award of discretionary grant money, loans, loan guarantees
20 or other funding requires the USDOT to comply with NEPA.
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22 41. FHWA’s NEPA regulations require that FHWA prepare a
23 written evaluation of a project’s FEIS or SFEIS prior to subsequent project
24 approvals where the original project FEIS or SFEIS are more than three years
25 old.
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1 42. The most recent SFEIS for the North Spokane Corridor project
2 was completed in 2000 – far more than three years prior to FHWA’s 2010
3 approval of the \$35,000,000.00 discretionary TIGER grant.

4
5 43. FHWA’s NEPA regulations require additional documented
6 consultation between an applicant for grant money and the FHWA prior to the
7 award of grant money to determine whether the original FEIS or SFEIS for a
8 project remains valid.
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10 44. FHWA’s NEPA regulations mandate that the FHWA prepare a
11 supplemental FEIS whenever the agency determines that there is new
12 information or circumstances relevant to environmental concerns and
13 bearings on the proposed action or its impacts would result in significant
14 environmental impacts not evaluated in the original EIS or supplemental EIS.
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17 45. The EPA rule concerning assessment and control of Hazardous
18 Air Pollutants from Mobile Sources was issued on February 26, 2007 –
19 subsequent to the 2000 FSEIS for the North Spokane Corridor projects - and
20 constitutes new information or circumstances bearing on the project and its
21 MSAT impacts. This information was not evaluated in the original project
22 FEIS or SFEIS. Furthermore, as the FHWA itself has issued new Interim
23 MSAT Guidance regarding when and how to analyze the emerging threat of
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1 mobile source air toxics in the NEPA process for highways, this new
2 guidance qualifies as “relevant to environmental concerns” and needs to be
3 adequately addressed through the NEPA process.
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5 VIII. REQUEST FOR RELIEF

6 WHEREFORE, plaintiff respectfully requests that this court:
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8 1. Declare that the FHWA violated NEPA by not preparing a
9 Supplemental FEIS to evaluate the MSAT emission impacts on the
10 environment, including alternatives and mitigation.
11

12 2. Issue a temporary restraining order, preliminary injunction,
13 and/or permanent injunction halting project construction activities that depend
14 on the \$35,000,000.00 discretionary TIGER grant;
15

16 3. Award plaintiff its costs of litigation, including reasonable
17 attorneys’ fees and expert witness fees incurred in bringing this action,
18 pursuant to 28 U.S.C. § 2412, et seq., and any other applicable statute or
19 equitable purpose; and,
20

21 4. Grant any further relief as the Court deems just and proper.
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23 Dated this 13th day of April, 2010.
24

25 /s David S. Mann

26 David S. Mann, WSBA No. 21068
27 Attorney for the Plaintiff

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